CORPORATE SANCTIONS: SCOPE FOR A NEW ECLECTICISM*

1. INTRODUCTION

To a greater extent than ever before, the means of production, distribution and exchange are controlled by corporations. There has been an explosion in their number, size and power. These entities not only include domestic, national and trans-national companies engaged in traditional forms of business, finance and commerce, but also universities, colleges, charitable or recreational organisations, and governmental and quasi-governmental authorities. Some international conglomerates have annual sales figures which exceed the gross national products of many countries of the world,[1] but, whether they be large or small, the dominance of corporations within the economic system is unquestionable. The concept of the corporation, as a means of organisation that enables individuals to assume a collective identity which shields them in dealing with others, and limits their financial liability, has great flexibility. It may be used to pursue any kind of objective; it can be tailored in size from small to large; it may extend beyond state and national boundaries; its shareholdings may be widely or closely held; and it permits of almost any form of internal structure, organisation and management. It provides a vehicle through which power can be accumulated and exercised, and can isolate those in power from any direct personal involvement or sense of responsibility. The potential for economically strong companies to engage in injurious acts as well as beneficial ones, and their record in doing so, is beginning to challenge the significance of crimes by individuals and has elevated the control and correction of corporate misconduct into a contemporary and urgent area of law reform.

Corporate crime is no less real than street crime, but its relative complexity, low visibility and often technical nature defuses much communal reaction. It rarely shows up in the usual crime statistics prepared by police, courts or correctional authorities and, despite its enormous economic and physical costs, no department of government is ever assigned responsibility for its control or even for the systematic collection and analysis of data on its dimensions. In part this is due to a failure to perceive the illegal conduct as "criminal" in a conventional sense, and in part because of the variety and specialised nature of the agencies established to regulate it.[2] Is it "criminal" if a shipping

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[1] Nader R. & Green M.J. (eds.), *Corporate Power in America,* New York, Grossman, 1973, 67-93.

[2] Note, "Increasing Community Control Over Corporate Crime: A Problem in the law of Sanctions", (1961) 71 Yale L.J. 280; Kadish S.H., "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations", (1962) 30 University of Chicago L.R. 423; Coffee J.C., "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment", (1981) 79 Michigan L.R. 386; Fisse W.B. "Criminal Law and Consumer Protection", in Duggan A.J. & Darvall L.W., *Consumer Protection: Law and Theory,* Sydney, Law Book Company, 1980, 182-199.

service or railway transports animals in cruel conditions, or a university commits currency violations in the course of purchasing equipment for its laboratories, or a chemical works pollutes the environment, or customs duties or statutory quality standards are deliberately evaded by importers or manufacturers? Not only will the level of moral obloquy of such conduct be subject to dispute, but also different policing agencies will be involved in each case. It is this peripheral nature of corporate illegality that does much to explain the relative immunity from prosecution and punishment that companies and their senior personnel enjoy, particularly in comparison to lower and working class offenders whose over-representation has always been an established feature of the criminal justice system.[3]

Though the incidence of corporate crime appears to be growing and public sensitivity to such criminality increasing, the legal system possesses in its armoury very few weapons effectively capable of preventing or remedying the socially harmful results caused by this form of group misbehaviour. The pre-eminence of the corporation as an influential organizational mode in society is simply not something for which the criminal law has allowed. Once the prosecution of animals for crime had been abandoned,[4] criminal lawyers assumed that culpability attached only to identifiable human beings. It is true that churches, municipalities, universities and other forms of corporate bodies were in existence as the criminal law took shape, but neither courts nor legislatures were pressed until recently to consider whether the criminal law, and the concepts of punishment upon which it was based, were equally appropriate to abstract legal persons. By and large, the law responded to the growth of corporations simply by transferring to the new entities the theories of justice and forms of punishment that were applied to individuals, albeit with certain necessary adjustments, such as dependence on the fine rather than imprisonment as a sanction, where these were obviously compelled by the non-human nature of the defendant.

The concept of corporate criminal liability is now recognised in all jurisdictions which have inherited the common law[5] and most

[3] Ermann M.D. & Lundman R.J. (eds.), *Corporate and Governmental Deviance — Problems of Organizational Behaviour in Contemporary Society,* New York, Oxford University Press, 1978; Braithwaite J. & Kinchington B.R., *Crime and the Abuse of Power — Offences and Offenders Beyond the Reach of the Law,* Australian Discussion Paper Topic 3, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Canberra, Australian Government Publishing Service, 1979. See also Wilson P.R. & Braithwaite J. (eds.), *Two Faces of Deviance: Crimes of the Powerless and the Powerful,* St. Lucia, Queensland University Press, 1978: Sutton A. & Wild R., "Corporate Crime and Social Structure", 177-198; Gross E., "Organizations as Criminal Actors", 199-213; Hopkins A., "The Anatomy of Corporate Crime", 214-231.

[4] Evans E.P., *The Criminal Prosecution and Capital Punishment of Animals,* London, Heinemann, 1906.

[5] For emergence of the concept of corporate identity in English law see Pollock F. & Maitland F.W., *The History of English Law* (2nd ed.), Cambridge University Press, 1923, vol. 1, 486-511. The position under civil law systems basically is that, with certain statutory exceptions (e.g. tax laws), corporations are incapable of committing or being punished for criminal offences — liability is personal: Mueller G.O.W., "Mens Rea and the Corporation", (1957) 19 University of Pittsburg L.R. 21, 28-35; Leigh L.H., "The Criminal Liability of Corporations and Other Groups", (1977) 9 Ottawa L.R. 247, 264-266. The problems this leads to are well illustrated by Japan's experience with the "Minimata disease" which led to the deaths by mercury poisoning of 150 persons and the injury of hundreds of others who had eaten fish contaminated

statutory offences are defined in terms which either presuppose or allow for a corporation as a principal offender,[6] but little thought appears to have been given to what sanctions should be available when corporate violators are detected. Texts on sentencing generally ignore the problem of corporations, and legislation normally makes no specific provision for sentencing such offenders other than providing for substantially increased maximum monetary penalties.

2. IS CORPORATE MISCONDUCT "CRIME"?

A critical factor in the neglect of sanctions for corporate crime is one already adverted to, namely, the failure to perceive corporate wrongdoing as truly criminal in nature. It is treated as one of the excesses of aggressive capitalism and more a virtue than a vice. It was not until the 1940's, when the American criminologist E.H. Sutherland coined the phrase "white collar crime" to draw attention to corporate deviance, that any sustained theoretical attention was given to this phenomenon,[7] yet even so Sutherland's work continues to be attacked on account of the alleged over-inclusiveness of his definition of corporate crime.[8] Leigh, in his book on corporate criminal liability,[9] attributes the failure to treat corporate misconduct as crime to the fact that the legislatures themselves, in drafting laws affecting companies, were not attempting to punish predatory corporations engaged in traditional forms of intentional corporate offending e.g. bribery, corruption and consumer fraud, but rather were simply trying to bring about more efficient managerial policing of businesses to ensure conformity to prescribed health, welfare, and fiscal standards. Breaches of such standards are ordinarily seen as morally neutral transgressions of an economic and technical nature or as "mere public welfare offences".[10] The standards are often only prescribed by

by mercury compounds discharged by the Minamata Nitrogen Company into Minamata Bay for over a decade. The Japanese Penal Code punishes the negligent causing of death or injury but, under the Code, business entities are not directly criminally responsible. The defendants in the prosecution for the pollution-caused deaths and injuries were the present and former directors of the company, but the personnel changed frequently over the years rendering it almost impossible to establish individual responsibility for the mercury poisoning which revealed its effects on victims only after many years of eating contaminated fish. As a consequence, in 1970, the Diet enacted the Law Establishing Penalties for Environmental Pollution Crimes Affecting Public Health which, by Article 4, specifically embraces the concept of criminal responsibility for business enterprises. However the Code position remains as before: Kusano H., "The Punishment of Corporations", (1952) 1 Jap. Ann. Law & Pol. 82; Hirano R., "Penal Law Protection of the Natural Environment in Japan", (1980) 13 Law in Japan: An Annual (in press).

[6] Even if the statute does not expressly contain differential penalties for corporate offenders, the implication that it applies to them will usually arise out of rules of construction which provide that the word "person" when used in legislation is intended to encompass bodies corporate (and other forms of group enterprise) as well as individuals e.g. Acts Interpretation Act 1901 (Cth.), s. 24. See also Financial Corporations Act 1974 (Cth.), s. 28.

[7] Sutherland E.H., "White Collar Criminality", (1940) 4 American Sociological Review 1; Sutherland E.H., "Crime and Business", (1941) 217 The Annals of the American Academy of Political and Social Science 112; Sutherland E.H., "Is 'White Collar Crime' Crime", (1945) 10 American Sociological Review 132.

[8] See below, footnote 17.

[9] Leigh L.H., *The Criminal Liability of Corporations in English Law,* London, Weidenfeld & Nicolson, 1969.

[10] For the alleged distinction between these and "real crimes", a distinction which smacks of the already discredited "mala in se" versus "mala prohibita" dichotomy see: Law Reform Commission of Canada, Working Paper 16:

subordinate legislation and though their consequences may be grave for the community, as the pollution cases attest, they are treated as giving rise only to "civil" or "quasi-criminal" or "regulatory" offences and, thus labelled, are ignored as being only of marginal relevance to the study of crime.

This is a dangerously short-sighted attitude; firstly, because it leads to an underestimation of the social costs of corporate wrongdoing which, particularly over the long term, may affect more people, involve greater losses, and do more harm than conventional crime and, secondly, because it encourages a shift from "criminal" to "civil" modes of enforcement and control. This latter shift is already taking place on a very wide front [11] and is not just confined to breaches of law by corporate entities. Though its alleged advantages are reduced stigmatization, less formal adjudications, and greater flexibility to negotiate remedial dispositions, it offers no guarantee that penalties imposed as the result of a civil hearing, particularly those that aim to deter, will be any less of an exaction than those which follow a criminal trial. Moreover the state's strategy in imposing sanctions by non-criminal processes is that it lightens the prosecutor's burden by reducing the procedural protections afforded the defendant. Though principles of natural justice will ensure certain minimum safeguards for a defendant in any form of judicial or administrative proceeding, the common law (or, where applicable, "due process" provisions in a statute or constitution) will always dictate that more stringent procedural safeguards are to be observed in determinations that are classified as "criminal" in character. These safeguards traditionally include rights such as trial by jury in indictable matters, an open hearing, confrontation by and cross-examination of witnesses, exclusion of hearsay, the benefit of any reasonable doubt in the prosecution's case, and prohibitions against double jeopardy. Re-definition of liability from criminal to civil withdraws from corporate wrongdoers any guarantee that they will enjoy this panoply of due process rights.

Persuasive reasons may be advanced for treating trial by jury as inappropriate for complex corporate matters [12] and for changing the burden of proof rules so as to oblige a company to show that its behaviour was not a product of deliberate corporate policy or recklessness or negligence on its part, but these and other protections should not be lightly set aside in a blanket move to civil proceedings in the mistaken belief that the conduct in question is only of minor significance or that the consequences for the defendant of an adverse finding are of no great moment. To assert that there are no differences in corrective effect, but marked differences in social stigma, between monetary penalties imposed by way of civil processes and those ordered by criminal courts is to venture into the realm of speculation. The

Criminal Responsibility for Group Action, Ottawa, Information Canada, 1976, 11-13. See also "The Distinction between Mala Prohibita and Mala in Se", (1930) 30 Columbia L.R. 74; Glasbeek H.J. & Roland S., "Are Injuring and Killing at Work Crimes?", (1979) 17 Osgoode Hall L.R. 506.

[11] Freiberg A., "Civil or Criminal? The Vanishing Dichotomy", Monash University Law Review (in press).

[12] Gowans G., "Some Experiences in Criminal Trials in Relation to Company Offences", (1966) 39 Australian Law Journal 328; Eggleston R., "The Duties and Responsibilities of Corporate Officers", in Sydney University Institute of Criminology, Proceedings No. 19: Corporate Crime, Sydney, Government Printer, 1975, 9, 28-29.

suspect validity even of the basic criminal/civil distinction and the interpretive, procedural and evidentiary difficulties to which it has led, particularly in the United States where it has been heavily relied upon in designing sanctioning systems for corporations,[13] suggests that a more rational approach is to acknowledge that all sanctions are inflictive, not just those associated with the sphere of the criminal law, and that they and procedural safeguards are inextricably bound together.

Whenever the state prescribes statutory standards of performance or conduct for any aspect of individual or corporate behaviour and provides for enforcement machinery and the imposition of sanctions to coerce compliance, two key questions are thrown up for attention. Firstly, what procedural safeguards attach to the system to ensure that the sanctions ordered are neither inappropriate nor misdirected? Secondly, how efficient are the sanctions in reducing the likelihood of a re-occurrence of the offending behaviour? When assessed on dimensions of communal abhorrence, perceived dangerousness, moral obloquy, fault etc., some forms of conduct and types of deprivation will fit more readily within the label "criminal" than others, but the fact that some do not does not mean that powerful state sanctions are not being applied and that rights are not being placed in jeopardy. In Australia a very good example of this is found in the Commonwealth *Trade Practices Act* 1974. This legislation aims to strengthen the competitiveness of private enterprise by outlawing certain restrictive trade practices under Part IV of the Act and, under Part V, to protect consumers by prohibiting certain misleading and deceptive practices. Contraventions of Part IV are declared to give rise only to civil liability while breaches of Part V are stated to be criminal in nature. However, the maximum monetary penalties for the civil offences are five times higher (A$250,000 corporations; A$50,000 individuals) than are applicable to those convicted of criminal breaches (A$50,000 corporations; A$10,000 individuals) and, notwithstanding this discrepancy, the quantum of proof required for the civil offences is the lower standard of proof "on the balance of probabilities" rather than the more stringent criminal requirement of proof "beyond reasonable doubt". Sanctioning schemes such as this illustrate that the necessity for procedural safeguards requires independent assessment irrespective of the labels attached by the legislature and should be related directly to the severity of the sanction threatened and inversely to its efficiency in effecting change. Sanctions are coercive techniques for achieving social conformity; to ignore them and the conduct which provokes their use merely because they happen not to be labelled criminal is a grave error.[14]

[13] Charney J.I., "The Need for Constitutional Protections for Defendants in Civil Penalty Cases", (1974) 59 Cornell L.R. 478; Clark J.M., "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis", (1976) 60 Minnesota L.R. 379; Note, "Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions", (1979) 92 Harvard L.R. 1229, 1300-1365. In the Australian context see: Cooper E.J., "The Quasi-Criminal Federal Jurisdiction", (1970) 44 Australian Law Journal 365; Freiberg A. & McCallum R.C., "The Enforcement of Federal Awards: Civil or Criminal Penalties", (1979) 7 Australian Business L.R. 246.

[14] See generally Arens R. & Laswell H.D., *In Defense of Public Order,* New York, Columbia University Press, 1961.

3. PAUCITY OF RESEARCH

Unhappily both the sanctions and the conduct have been ignored by empiricists. Though theories of group behaviour are emerging which will help develop a better understanding of the forces which produce corporate crime,[15] there is still a dearth of useful data on the dimensions and dynamics of corporate misconduct, or of the effectiveness of corporate sanctions. Research so far has largely concentrated on attempting to assess the extent of corporate crime, usually by tabulating recorded convictions. E.H. Sutherland was one of the first to explore this area. In 1948, in his paper "Crime of Corporations",[16] he presented a listing of the crimes of the 70 largest corporations in the United States. In his definition of crime he included regulatory offences as well as conventional forms of criminality and found 980 adverse decisions had been recorded against the 70 companies within their average life of 45 years. Each had been convicted at least once, but the overall average was 14 adverse decisions. Ninety percent had at least four. After observing that, in many jurisdictions, individuals with such records would be treated as habitual criminals, he concluded that the figures provided evidence of significant corporate criminality and sustained recidivism. This tabulation of corporate crime has been criticised because of the width of Sutherland's definition of criminal behaviour,[17] but this is less important than his crude anthropomorphizing of corporate behaviour and his failure to allow for the factor of opportunity. To draw direct parallels between habitual criminals and habitual corporate offenders assumes that the criminogenic processes are the same when, by all accounts, they are quite different. So far as opportunity is concerned, the corporations studied by Sutherland were large diversified operations employing thousands of staff and engaged in enterprises that were regulated by a maze of legislative prohibitions and directions. Complex organizations such as these have many more opportunities to breach the law (unintentionally as well as deliberately) than legal entities that consist of only one person. Consequently the statistical probability of running afoul of the law is correspondingly greater and should be allowed for in making comparisons.

Apart from work undertaken more recently by Clinard and his colleagues in the United States [18] involving an analysis of the administrative, civil and criminal actions taken against 624 of the largest U.S.A. industrial, wholesale, retail and service corporations and their subsidiaries during 1975 and 1976 which show similarly high levels of corporate violation, and work in Australia by Hopkins on the

[15] E.g. Kriesberg S.M., "Decision-making Models and the Control of Corporate Crime", (1976) 85 Yale L.J. 1091; Schrager L. & Short J., "Towards a Sociology of Organized Crime", (1978) 25 Social Problems 407; Ermann M.D. & Lundman R., "Deviant Acts by Complex Organizations", (1978) 19 Sociology Quarterly 55. For more general material see Galbraith J.K., *The New Industrial State,* Houghton Mifflin Co., Boston, 1967, ch. 6 — "The Technostructure".

[16] Cohen A., Lindesmith A., Schuessler K. (eds.), *The Sutherland Papers,* Bloomington, Indiana University Press, 1956, 78. See also references cited in note 7 above.

[17] Orland L., "Reflections on Corporate Crime: Law in Search of Theory and Scholarship", (1980) 17 American Criminal L.R. 501, 505-508.

[18] Clinard M.B., Yeager P.C., Brissette J., Petrashek D. & Harries E., *Illegal Corporate Behaviour,* Washington, LEAA, National Institute of Law Enforcement and Criminal Justice, 1979; Clinard M.B. & Yeager P.C., "Corporate Crime: Issues in Research" (1978) 16 Criminology 255, 264-271. See also Ross I., "How Lawless are Big Companies", Fortune, 1st December 1980, 57.

operation of the Federal Government's Trade Practices Act 1974,[19] the literature discloses no significant large scale empirical studies of corporate crime since Sutherland opened the field.

This relative lack of quantitative research is due to a number of factors. One, already discussed, is the failure to perceive civil and quasi-criminal forms of control as falling within the subject matter of criminal justice. Another is the lack of experience and appropriate training in potential researchers. Corporate wrongdoing, and the mechanisms used in attempts to control it, involve complex organisational, economic and political factors and require an understanding of group processes set on foundations of corporate and administrative law. Criminologists, whose orientation is largely towards traditional criminal law, do not readily possess these skills and when they do venture into this area it is, by and large, to study small scale consumer frauds and the operation of specific pieces of legislation.[20] Thirdly, the problem of underdeveloped research skills is compounded by the absence of systematic statistics which might provide researchers with a starting point for work on corporate crime. Those wishing to tackle the topic must themselves gather the initial data. There is no equivalent of crimes reported to the police; the various enforcement agencies rarely maintain or publish adequate statistical data on their investigations and prosecutions; and researchers face an almost impenetrable underbrush of corporate complexity and secrecy. In the absence of specially negotiated access, these limitations place investigators at an almost impossible disadvantage in reconstructing the dynamics of offences or the impact of sanctions. Adequate research funding and political support has not yet been forthcoming to allow for these design, staffing and access problems to be overcome and, unless greater awareness of the physical and economic costs of corporate illegality serves to change this picture, the introduction of new sanctions or the refinement of old ones can only take place as exercises in guesswork and uncontrolled trial and error.

4. Expanding the Choice of Sanctions

Reductivism underpins all state coerced sanctions,[21] Whether the state achieves it negatively through deterrent measures, or positively through rehabilitative or reformative ones, its principal aim is to reduce the frequency of behaviour which it has legally prohibited. While a particular sanction may also serve denunciatory, retributive or compensatory purposes and may be limited by humanitarian and moral considerations, the ultimate objective of the state is to obtain, with as much efficiency as possible, conformity to its prescribed standards. What techniques are likely to be most effective? The paucity of research and the lack of an empirical base from which to draw conclusions leads, as has been said, to guesswork and broad generalizations, but what is clear is that no single technique provides a

[19] Hopkins A., *The Impact of Prosecutions under the Trade Practices Act,* Canberra, Australian Institute of Criminology, 1978. See also Hopkins A., *A Working Paper on White Collar Crime in Australia,* Canberra, Australian Institute of Criminology, 1977.

[20] E.g. Carson W.G., "White-Collar Crime and the Enforcement of Factory Legislation", (1970) 10 British Journal of Criminology 383; Hadden T., "Strict Liability and the Enforcement of Regulatory Legislation", [1970] Criminal L.R. 496.

[21] Walker N., *Sentencing in a Rational Society,* London, Allan Lane, 1969, 3-4.

panacea. Just as the sentencing options available for individual offenders have expanded in number over recent years as the courts search for cost-effective corrective measures, so too a new eclecticism seems called for in relation to measures aimed at correcting corporate tendencies to breach the law.

The traditional means of compelling corporate compliance is by threat of fines. They have long been available to the courts when either specifically prescribed as a corporate penalty by the statute creating the particular offence, or allowed for generally as a discretionary penalty in lieu of imprisonment. Much dissatisfaction has been felt with the use of the fine as a corporate sanction. The levels are said to be too low and, lacking adequate legislative guidelines, fail to take into account differential degrees of corporate wealth. Its efficacy as a correctional measure is also criticised. Such complaints, when coupled with the burgeoning expansion of corporate power, provide stimulus for change. Two basic lines of approach can be discerned. The first stresses counter-personnel measures and calls for reduced reliance on entity responsibility in favour of the more vigorous location and punishment of those corporate officers within the group who can be identified as responsible for the corporate violation. This amounts to a revitalized return to the position which existed originally at common law. The second, the counter-organisational approach, depends on continued direct imposition of sanctions upon corporate entities. Though frequently offered as mutually exclusive approaches, there seems no reason why both should not be retained to enable courts to tailor their dispositive orders to the peculiar circumstances of each case.

4.1 *Counter-personnel measures*

The principal advocates for sanctions based on personal liability are Professor Glanville Williams and Dr. L. H. Leigh. Williams maintains that "the punishment of corporations is of small relevance to the purposes of the criminal law"[22] and supports individual liability on the grounds both of justice and efficiency. Considerations of justice lead him to object to the practice of imposing heavy fines on companies because the primary impact of such fines falls upon shareholders who, not being directly responsible for the crime or practically in a position to prevent it, are in a real sense innocent parties. Where the directors are the sole shareholders, and a fine levied on the corporation is sought to be justified as an indirect way of fining the directors for their own offences, Williams contends that this end can be attained with greater precision and efficiency by actually fining the directors personally. He rejects the theory that the shareholders whose holdings are diminished in value and whose dividends are reduced by a corporate fine will be moved collectively to dismiss the directors as unrealistic because shareholders in large public companies have no effective control over management:[23]

> In any event it is curious reasoning that an innocent person may properly be punished in order to compel him to do something that the law could, if it wished, do directly.

[22] Williams G., *Criminal Law: The General Part (2nd ed.),* London, Stevens, 1961, 865.

[23] *Ibid.,* 863. Professor Williams views were recently cited with approval by the Full Court of Victoria in *R. v. Wattle Gully Gold Mines* [1980] V.R. 622.

He draws particular attention to the problem of punishing national or government owned corporations since fines imposed on them amount to either a mere book entry in the country's revenue accounts, or are recouped by a charge upon the public at large or the particular sector of the public being serviced by the corporation or utility. In his view, the danger in the practice of penalizing corporations is that they offer too obvious and easy a target and to pursue the company rather than its responsible officers is to risk that the innocent will be punished and the guilty missed.

In agreeing with Glanville Williams, Leigh also contends that one of the principal weaknesses of imposing sanctions directly upon corporations is that, in truth, it is a form of indirect sanction.[24] The real objective is to shape the behaviour of those controlling the corporation, but this goal is pursued by striking at the corporation itself. Such a response is potentially capricious in its effects. Fining the corporation may have no impact whatsoever on the salaries and perquisites of those who manage it. Indeed not only may it harm innocent parties not in a position to exercise control over management, but it may impair the deterrent impact of laws designed to be used against the individuals actually responsible. The latter is especially true if the availability of a corporate scapegoat allows prosecutors and juries to absolve individuals of personal guilt, even though the wrongdoing resulted from their actions while acting in a corporate capacity.[25] If the principal justification for imposing sanctions on the corporation itself is the difficulty of determining who in any organization is responsible for any infraction, Leigh would sharpen the weapons used to identify corporate personnel for the purposes of prosecution. He asserts that, in the corporate crime context, personal liability can be made more effective by use of such devices as directors' liability provisions in statutes,[26] processes for criminal discovery,[27] and provisions requiring an accused acting in a corporate capacity to defend himself from a *prima facie* imputation of guilt.[28]

[24] Above, note 9, 140-143, 160-161.

[25] Strictly this need not occur because natural persons upon whose actions corporate guilt is founded obtain no immunity from liability by virtue of the conviction of the corporation: *R.* v. *Sorsley* (1944) 30 Cr. App. R. 84; U.S. v. *Wise* (1962) 370 U.S. 405.

[26] E.g. American Law Institute, Model Penal Code, Proposed Official Draft, 1962, s.2.07(6):

> (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.
>
> (b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.
>
> (c) When a person is convicted of an offence by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

[27] E.g. Companies Act 1961 (Vic.), ss. 168-180. These provisions allow for the appointment of inspectors to specially investigate a company's affairs. The inspector can compel officers of the company to produce the company's books, to assist in the investigation, and give evidence as may be required.

[28] E.g. Judicial Proceedings Reports Act 1958 (Vic.), s. 4(3):

> Where a corporation is guilty of an offence against this section any person being a member of the governing body or being a director manager or

Whether counter-personnel measures are to be resumed as the principal means of handling corporate based crime, or, as suggested, are to coexist with direct corporate sanctioning, certain difficulties must be confronted in applying sanctions to corporate staff.

(a) *Imprisonment*

The threat of imprisonment might well be expected to have a powerful *in terrorem* effect on first time, middle-class, white collar offenders, but these very characteristics will, in themselves, be taken by the courts to amount to mitigating considerations contra-indicating a custodial sentence. It is part of the class bias in the criminal justice system. To overcome this bias, mandatory minimum sentences of imprisonment may have to be prescribed. But inflexible measures of this sort pose their own dangers. In modern larger corporations the organizational division of responsibility is often so fragmented that there is a real risk that only one of a number of responsible individuals will be identified for punishment. The injustice of such singling out for mandatory imprisonment will be compounded if that person (as well as the others) had been acting in response to economic and peer group pressures to conform to the deeply entrenched values and practices of the company or industry in which he was employed. If imprisonment is to be used, it seems more appropriate to order it when the corporation itself is victimized by the crime, or has been manipulated for its offending employee's personal criminal purposes, than when the action complained of was taken for the advantage, benefit, and at the possible instigation of the company in question.

(b) *Fines*

The fining of corporate officers creates its own set of problems. Firstly, the scale of fines for individual offenders must be kept distinct from that applicable to corporate entities. The former will generally be less than the latter, but the assumption that all corporations are wealthier than their officers is not necessarily true and, unless fines are effectively linked to means, reliance on arbitrary scales will only work injustice. Secondly, the imposition of fines on individuals should not be used as a means of forcing the disgorgement of improperly obtained corporate profits, unless a means enquiry establishes that the profits have in fact passed from the corporation to the officer. Thirdly, the fine is unique among penalties in that the offender need not discharge it personally and ex post facto indemnification by a company of its officers frequently occurs and is very difficult to control. Though contracts of indemnification against future incurred criminal liability are generally unenforceable, courts do not inquire whether fines are actually being paid out of the offender's own pocket. That they are frequently paid by employers and others is well established. A prosecutor might, theoretically, be able to obtain an injunction prohibiting the company from meeting the fine itself, but this could easily be circumvented by a loan, an increase in salary, or a gift. Even when a court knows that the fine will almost certainly be paid out of corporate funds, it would be improper for it to fix the amount of an

secretary of the corporation shall severally be deemed to have committed the offence and shall be liable to the aforesaid penalty or imprisonment or both unless he proves that the offence by the corporation took place without his knowledge or consent.

officer's fine by reference to the assets of the company with whom he is associated.

(c) *Probation*

Probation (release under supervision on condition that the offender be of good behaviour and backed by threat of imprisonment for breach) may offer a more versatile means of controlling the conduct of an errant corporate officer, but it only acts upon him in his personal capacity. Though one of the conditions is that he should not further breach the law whilst on probation, and other obligations regarding his behaviour may be added, as probation is presently structured the courts would neither impose nor the probation service be able to supervise conditions regulating in detail the manner in which an offender was to discharge his corporate duties. Moreover since they are not empowered to compel the corporation to continue to employ the officer in any capacity whatsoever, any directions given to him regarding corporate functions can quickly be rendered futile by his demotion or dismissal.

(d) *Disqualification*

A final resort for those who press for personal sanctions as a response to corporate offending is some form of civil disability which limits the access to corporations of persons with demonstrated criminal propensities. This principally takes the form of disqualifying those with certain types of conviction from participating in the functioning of the corporation. This is a sanction which appears in section 188 of the Companies Act 1948 (U.K.), in Australian companies legislation,[29] and in certain U.S.A. legislation.[30] It operates in addition to any other penalty, and provides that where a person has been convicted of any Indictable offence in connection with the promotion, formation or management of a corporation, or of certain other crimes including offences involving fraud or dishonestly punishable by imprisonment for three months or more, he is barred for five years from the date of the conviction (or release from prison, whichever is the later) from being a director or promoter or having any other involvement in the management of any company unless a court expressly permits him to do so. This serves to allow the company to keep to the straight and narrow by eliminating baneful influences from its midst.

These counter-personnel measures seem most suited to wilful, self-serving wrong-doing in smaller closely held companies where the individual primarily responsible can be readily identified. But not all corporate wrong-doing is the result of management intentionally engaging in a course of acquisitive crime. Unlawful conduct may also be the product of negligence. This, according to Fisse,[31] is usually attributable to problems in three areas: communication breakdowns within the company, particularly failure to respond to warnings and complaints and the natural screening of bad news; the habit of sub-

[29] E.g. Companies Act 1961 (Vic.), s. 122. See also s. 374H for other disqualification powers and *Zuker* v. *Commissioner for Corporate Affairs* [1981] V.R. 72 for discussion of s. 122.

[30] Yoder S.A., "Criminal Sanctions for Corporate Illegality", (1978) 69 Journal of Criminal Law and Criminology 40, 56-57.

[31] Fisse W.B., "The Social Policy of Corporate Criminal Responsibility", (1977) 6 Adelaide **L.R.** 361, 374-376.

ordinates wrongly anticipating what their superiors require; and group pressure to comply with organizational standards which are themselves contrary to law. In a large company, where many people perform diverse tasks each of which may have contributed a little to the events which cause a breach, liability based in negligence may arise without it being possible to obtain sufficient evidence to effectively prosecute any one person for the collective act or omission. Indeed it may well be that, in a megalithic structure, no one has a sufficient comprehension of the nature of a transaction and its effects to fully appreciate all the possible consequences. Relying on personal liability alone cannot be a complete means of controlling group processes.

4.2 *Counter-organizational measures*

The arguments in favour of subjecting companies directly to sanctions are compelling. Firstly, there is the need to maintain public confidence that corporate activity is accountable to law. This impression is more difficult to maintain if only individuals are seen to be prosecuted. Secondly, it focuses on group processes which led to the result complained of. These may be particularly dominant in offences of omission or negligence:[32]

> The conduct may simply have more meaning as a group effort than as individual acts. The conduct of an individual may be significantly overshadowed by larger impropriety within the organization as a whole, especially where his decisions were made on behalf of and for the benefit of the corporation, reflected pressures and procedures engendered by the corporate process, and were made in ignorance of applicable laws.

Thirdly, it is a vehicle for coercing conformity where the relevant personnel and policy formulators are not amenable to the jurisdiction. This is especially true where corporate operations are conducted through subsidiaries across national or state boundaries, but also applies where offences have been committed over a long period of time by a company whose managerial staff has frequently changed.[33] Fourthly, it provides an opportunity to gain access to corporate assets for compensation purposes. Finally, it promotes enforcement efficiency through self policing:[34]

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

What entity sanctions are available; and how likely are they to effectively reshape the behaviour of the corporation?

(a) *Fines*

As has already been noted, the fine is the most commonly invoked corporate sanction. It still continues in use despite sentencing dis-

[32] Law Reform Commission of Canada, Working Paper 16: Criminal Responsibility for Group Action, above note 10, 31.

[33] As exemplified by the Minamata disaster discussed above note 5.

[34] Law Reform Commission of Canada, above note 10, 31.

parities which flow from the absence of legislative guidelines which would allow specific fines to be related to the level of the offending corporation's wealth. When legislation fails to provide for a realistic link between the quantum of a fine and the offender's means to pay it, exactions will usually amount simply to a licence fee for illegal conduct. A pointed example of this is the $437,500 fine imposed in the U.S.A. on the General Electric Company for its part in the well known 1961 electrical price fixing conspiracy. Though this fine was undoubtedly substantial in absolute terms, when it was related to the income of the company it turned out to be comparable to imposing a fine of $3 on someone earning $175,000 a year.[35] To avoid the penalty being trivialized in this fashion, the suggestion has been made that the power to fine corporations include formulas designed to equalize the correctional impact of the sanction on each offender. In an adaption of the Swedish day-fine system in use for individual offenders,[36] this would involve adjusting the quantum of the fine by reference to such factors as the offending corporation's turnover, profits and total assets, and its ability to deflect the impact of such monetary exactions.[37] Though there is always the risk that fines will be passed on to consumers in higher prices, competitive market conditions and the threat of government price control intervention can do much to inhibit this from occurring.

The fine is primarily designed as an economic sanction, punishing wrongdoers by placing them in a worse financial position than before their offence. If they have profited from their offence the sanction imposed should also compel the disgorging of their unjustly obtained bounty for otherwise, even after the fine, there will be a nett gain. However, to do so by way of a fine allows the state to divert to its own coffers funds which could more usefully be applied to restitution and victim compensation.[38] Fines of themselves do not make funds available for restitution or compensation, indeed they diminish the defendant's assets available for these purposes. Unless the prosecuting agency is clearly empowered to use and does, in fact, use revenue from fines for compensatory purposes to save victims from having to initiate a separate series of civil actions against the corporation, legislation should be passed which requires separate restitution and compensation orders to be considered by a court as part of its sanctioning power. Such legislation should contain a direction that the enforce-

[35] Geis G., "Criminal Penalties for Corporate Criminals", (1972) 8 Criminal Law Bulletin 377, 381.

[36] Thornstedt H., "The Day-Fine System in Sweden", [1975] Criminal Law Review 307.

[37] Law Reform Commission of Canada, above note 10, 38.

[38] The Law Reform Commission of Canada has suggested that the funds be either used to satisfy judgments for damages awarded in civil proceedings against the corporation, or allocated to suitable public interest organisations to encourage private representation of the interests of those victimized by the unlawful activities of corporations: *ibid.,* 47. The acceptance of the concept of representative or class actions will do much to facilitate this type of self-help. The Criminal Law and Penal Methods Reform Committee of South Australia would have unjust gains flowing from the commission of corporate offences recouped by specific unjust enrichment orders which would require the confiscation and repayment of illegally obtained profits: *Fourth Report: The Substantive Criminal Law,* Adelaide, South Australian Government Printer, 1977, 362-363. See also discussion of the United Kingdom experiment with use of bankruptcy procedures as a means of recovering funds for victim compensation: Fox R.G. & O'Hare C,. "Criminal Bankruptcy", (1978) 1 Monash University Law Review 181.

ment of these orders is to take precedence over the recovery of any fines also imposed at the same time. The orders need not be confined to compensating injuries of a private nature. Conduct damaging public interests, such as might constitute a public nuisance, should also attract judicial orders requiring the corporation to pay compensation to the relevant public authorities for loss of public amenities even though the damage is not exactly quantifiable.[39] But if victims wish directly to initiate private litigation to recover compensation for their loss or damage, their right to do so should be clearly recognized.[40]

Every form of monetary exaction exploits corporate sensitivity to profit as a way of securing compliance with the law. By threatening the company with economic loss and compelling it to balance the likely gains of breaching the law against the likely losses, it is hoped that a rational and profit sensitive corporation will eschew wrong-doing as an economically bad bargain. While there has been debate about how overwhelming the profit motive is for corporations, it is doubtful whether the pursuit of profit is ever significantly subordinated to the realization of other goals such as the maintenance of prestige, quality production, or excellent industrial relations. And to this extent it makes a great deal of sense to use profit threats as the foundation of corporate control strategies. However two caveats must be lodged. Firstly, this strategy may not have the same impact on non-profit organizations such as universities, hospitals and government owned utilities. Secondly, it may be unsafe to carry too far the model of the modern corporation acting in an economically rational fashion. Fines imposed on a corporate entity may affect many different parties who include shareholders, executives, middle management, employees, creditors, and consumers. The extent and effect of the burden borne by each of the various constituencies is difficult to assess. To most persons within the corporation the money threats of the law are oblique and remote; it matters not to them that the secretary or treasurer may have to write a cheque at some future date to expiate a corporate fine. The potential efficacy of any sanction imposed upon a corporate entity becomes diluted as it is transmitted within the corporation to the individual members through whom the organization alone can act. The larger the corporation, the greater the dilution and, if the existence of the sanction is poorly communicated within the group, it is unlikely to have a significant impact upon the behaviour patterns of those in a position to make changes in its functioning. Thus although the fine is a simple and profitable sanction to administer, it represents somewhat of an haphazard attempt to influence decision making by attacking the corporate profit goals. Better results may be obtained by more structured approaches.

(b) *Dissolution or Disqualification*

The American Law Institutes' Model Penal Code has proposed, in section 6.04, that a prosecuting attorney be empowered to institute

[39] Law Reform Commission of Canada, above note 10, 47.

[40] E.g. Trade Practices Act 1974 (Cth.), s. 82 which confirms that a civil cause of action for damages arises in relation to both "civil" and "criminal" violations of the Act irrespective of any other sanction which may be imposed under the legislation. In the United States civil litigation is encouraged by provisions which permit courts to award treble damages n certain cases, see article cited in note 2 above.

civil proceedings[41] to forfeit the charter of the corporation and dissolve it on a finding that it had purposely engaged in a course of criminal conduct and that the public interest required protection from further violations. The Model Penal Code is not of binding legal consequence, but procedures similar to those suggested are available in the United States and Canada. They are, however, not widely used because of the potential economic dislocation involved in a complete dissolution of a company, and Leigh[42] reports that the order more commonly made is one ousting, for a certain period of time, the corporation's right to carry on the specified financial or business activities to which the offence relates. This is the equivalent of the various forms of licence revocation, suspension, and disqualification that beset ordinary offenders. When applied to a corporation, it represents a powerful economic deterrent and, as a more specific corrective measure, offers the community better protection from a recurrence of the harm than a fine alone. Even without formal withdrawal of licences and permits, similar governmental pressures can be brought to bear on errant corporations by withholding government business or subsidies. The difficulty in using this form of sanction as a means of control is that it may have harsh repercussions on third parties. Not merely will shareholders and corporate employees have to bear the costs, but also outsiders who have entered into contractual and other obligations with the company. The sanction may go far beyond punishing the offending corporation; it may give opposition companies such an enormous advantage that the entire shape of an industry is transformed from a competitive to a monopolistic position with far reaching economic consequences neither anticipated nor desired by the court making the order.

(c) *Publicity*

To improve the corrective effect of sanctions against corporations, it has been suggested that the powerful force of public opinion could be mobilized as an additional source of pressure. This is predicated on the belief that a corporation's prestige is as valued a commodity as its profit, and finds support in the work of Sutherland and others which shows that corporate crime is not the prerogative of small companies of unknown or dubious standing in the community, but is well represented in large, widely known corporations that have a substantial interest in maintaining their good name. Many sanctions are self publicizing in the sense that they are likely to attract their own media coverage without it being formally generated, but this works only in an informal and random manner. What has been proposed, particularly by Brent Fisse of the University of Adelaide, is the systematic use of publicity as a sanction in its own right, or as an adjunct to other forms of control, with courts formally requiring the placing of advertisements announcing the company's offences; the running of remedial notices and warnings; the compulsory notification of shareholders that their company has been punished for infractions;

[41] Known at common law as *Quo Warranto* — a prerogative writ by the Crown against one who claimed an office or franchise to enquire by what authority he supported his claim. It lay also in cases of misuse of authority and was used to prevent a corporation established by Royal Charter from abusing its franchise. It has been replaced in England, since 1948, by proceedings by way of injunction and in Victoria by the statutory Information of Quo Warranto, see *Supreme Court Rules* 1966, Order 53, rules 1 & 31-39.

[42] Leigh, above note 5, 296-297; Leigh, above note 9, 157-158.

and prohibitions on the company itself continuing to advertise in a manner that leads to infringements.[43] These concepts are not entirely novel. They have their precursors in the publicity provisions of early food, drug and health laws[44] and in the less well known common law power possessed by judges to order court personnel to publicize events which have transpired in open court.[45] In 1977 the Australian trade practices legislation was amended[46] to permit courts, for the first time, to order persons guilty of criminal contraventions of the Act to publish corrective advertisements in terms dictated by the court or to otherwise compulsorily disclose information to particularly affected segments of the public, provided that the expenditure involved in so doing does not exceed A$50,000 in aggregate.

Though the use of such adverse publicity is calculated to deter wrongdoing by diminishing the prestige, respect or reputation of the corporation within the community, it also threatens economic loss through resultant reduction in business and possible government intervention.[47] Additionally it aims at provoking lethargic shareholders into action against corporate officers. But the difficulty of toppling management and the uncertain impact of publicity makes the effect of the sanction somewhat difficult to predict and control. Unless the publicity is disseminated systematically and targetted appropriately so as to reach those most affected by the infringement, it may either go unnoticed or make but a transient impression. On the other hand, unexpectedly negative consumer reactions (perhaps fuelled by additional unplanned coverage in the news media) could punish the corporation beyond the damage actually done. Additional disadvantages are that the sanction is not one that generates funds for compensation, or even for its own costs, and also that it is potentially capable of being rendered nugatory by effective counter-publicity or changes of corporate identity or product name.

While these factors militate against the use of publicity as a sole means of control, they lose much of their force when the sanction is coupled with other options. Thus a publicity order together with a fine will guarantee at least a minimum degree of deprivation but, by also attacking prestige, will supplement the impact of the economic deprivation with effects that are not ordinarily associated with a fine alone.[48] This would also be true of other publicized penalties as well.

(d) *Injunctions*

Another sanction, albeit one usually used to supplement existing penalties when they prove to be ineffective, is the injunction.[49] At

43 Fisse B., "The Use of Publicity as a Criminal Sanction Against Business Corporations", (1971) 8 Melbourne University L.R. 107. See also Rourke F.E., "Law Enforcement Through Publicity", (1957) 24 University of Chicago L.R. 225.

44 For examples see Fisse, *ibid*., 110-117.

45 *Winters* v. *Cross* [1976] 1 N.S.W.L.R. 616.

46 See Trade Practices Act 1974 (Cth.), s. 80A.

47 Fisse, above note 43, 123-124.

48 Hopkins A., *The Impact of Prosecutions Under the Trade Practices Act,* Canberra, Australian Institute of Criminology, 1978, 22-23.

49 Leigh, above note 9, 156-157; Rothery J.M., "Is the Law Adequate — Are Penal Sanctions Appropriate for Corporate Crime?", in Sydney University Institute of Criminology, *Proceedings No. 19: Corporate Crime,* Sydney, Government Printer, 1975, 78, 83.

common law the Attorney-General may seek, and the courts will usually grant,[50] an injunction aimed at preventing continued breaches of public rights.[51] The restraining of public nuisances was typical of the early use of this sanction but, in more recent times, injunctions have been awarded on the application of the Attorney-General when the ordinary threats of the criminal law, at least in relation to lesser offences, have proved incapable of deterring the offender, e.g. where the detendant has previously been fined the maximum allowed under statute, but still persists in breaking the law.[52] Disobedience to an injunction is punishable by a fine, the amount of which left to the discretion of the court, but which usually exceeds the statutory maximum prescribed for the offence enjoined, and, ultimately, by imprisonment of individuals for contempt.

The injunction, as supplementary sanction, is not confined in its operation to corporate offenders, but insofar as it may be utilized against group entities as a further coercive force, the suggestion has been made that it might be appropriate to grant key regulatory agencies responsible for monitoring corporate behaviour the right to apply for an injunction in circumstances similar to those which warrant the Attorney-General acting. This has transpired already under section 80 of the Trade Practices Act 1974 (Cth.) pursuant to which the Minister responsible for the legislation, the Trade Practices Commission, or any other person, may apply to the Federal Court of Australia for an injunction restraining not only civil or criminal contraventions, but also conduct that is alleged to amount to aiding, abetting, counselling, procuring or conspiring to commit such contraventions or "being in any way, directly or indirectly, knowingly concerned in or party to" such breaches.[53] This anticipatory function of injunctions, both at common law and under statute, has been criticised not only for the width and vagueness of its scope, but also for the manner in which the civil remedy can, in relation to criminal conduct, supplant the built-in protections of the criminal trial.[54] If the public interest cannot be adequately protected by other means such as allowing criminal proceedings to run their course, or by statutory increases in penalty for the offences in question, the injunction will provide a useful ancillary remedy, but it should be reserved for use sparingly in those cases in which there is imminent danger of significant and irrevocable damage if preventive action is not immediately taken.

(e) *Preventive Orders*

A proposal is current in Australia for a corporate sanction to be known as a preventive order.[55] This is based on an elaboration of the injunction; while an injunction attempts to bring the corporation

[50] *Attorney-General* v. *Harris* [1961] 1 Q.B. 74; *Attorney-General* v. *Huber* (1971) 2 S.A.S.R. 142.
[51] *Cooney* v. *Council of the Municipality of Kurringgai* (1963) 114 C.L.R. 582, 604-605.
[52] *Attorney-General* v. *Sharp* [1931] 1 Ch. 121; *Attorney-General* v. *Harris* [1961] 1 Q.B. 74.
[53] S.80(l)(d)-(i).
[54] *Attorney-General* v. *Huber* (1971) 2 S.A.S.R. 142, 165-166 *per* Bray C.J. On the House of Lord's view of the exceptional nature of the use of injunctions to enforce the criminal law, see *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435.
[55] Fisse W.B., "Responsibility, Prevention, and Corporate Crime", (1973) 5 New Zealand Universities L.R. 250, 266-279.

into line by the threat of additional punishment for contempt, the preventive order goes further and aims at compelling the implementation of changes within the corporation itself. The suggestion is that courts should be authorized to order corporations and their personnel to take specific measures to prevent the commission of offences or their repetition. A South Australian government committee has reported favourably on this proposal in outline,[56] but working details have yet to be developed or transformed into legislation, and it has not been implemented in that state or elsewhere.

The scheme assumes that there is a much greater scope for successful preventive intervention with corporate wrongdoers than criminologists and civil libertarians would allow in respect of human offenders. Rather than await a violation before intervening, and then imposing a fine or other unfocussed sanction on the corporation in the hope that it will, indirectly, operate to persuade those within the company to reform its conduct, a preventive order would be issued by a court on the application of a government agency or interested party in anticipation of an initial or continued corporate breach of the law. The order would call upon the organization in question to desist from the behaviour complained of and, if necessary, would require it to take affirmative action to avoid further offending. The order could also be addressed to particular corporate personnel whom the court regards as responsible for ensuring compliance:[57]

> Accordingly, the prospects of securing prevention are enhanced, partly because the corporation concerned is subject to a more specific threat than fines or other sanctions can provide, and also by reason of a clearer focus on individual responsibility within what can otherwise be an impenetrable maze of internal organizational accountability.

A preventive order is not intended itself to be a penal sanction, but is to serve as an authoritative direction to a corporation to take remedial action. Instead of proceeding directly against the corporation, reliance is placed, in the first instance, upon the preventive order to bring about compliance. But in the event of such compliance not forthcoming, the corporation and possibly the corporate officers named in the order will be visited with the usual penal consequences of fine, disqualification, etc. Additionally, the scheme envisages the use of progressively more detailed preventive orders if the first has been unsuccessful; the object always being to maintain the pressure on the corporation and its officers to implement the required corrective measures. In extreme cases this will lead to an extensive invasion of the corporate management structure in order to monitor and control the decision making processes that are believed to have led to the offending in question and this will require specialized staff, a considerable application of resources, and the possible establishment of entirely new agencies to implement the discretionary decisions of the courts in making and supervising such orders.

In the United States, C. D. Stone has been a persistent advocate for what he describes as "organization-adjustment measures" which are similar to but more extensive than the preventive orders outlined

[56] Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report: The Substantive Criminal Law, Adelaide, Government Printer, 1977, 359-361.

[57] *Ibid*., 359-360.

above.[58] He too points out that fines and other forms of punitive threat to corporations or their employees do not, of themselves, induce the most appropriate changes in the information systems, role definitions, authority structures and technical programmes which shape corporate behaviour. He would like to see greater judicial activism in the design of interventions tailored to the "rehabilitative" needs of the offending organization and gives as an example the 1973 decree settling charges of discrimination against women and minorities by the Bell Telephone Company which directed the corporation to establish compliance officers whose duties were to include the monitoring of the company's hiring, firing and advancement policies.[59] Stone also reports how, in the United States, courts and government agencies have at times taken a hand in the selection process by which key corporate positions are filled, and he describes how at least one federal judge has warned a recidivist corporate polluter that if it did not mend its ways, the court would send its own designate into the company to take over the pollution control activities of those corporate officers who appeared to be adversely affecting the company's willingness or ability to comply with the court's directives.[60]

Profit-making corporations would not be the only ones amenable to this type of judicial revamping. Other forms of organization, including school and university systems, mental hospitals and prison bureaucracies, are open to being brought into line by similar judicial directives. Problems may arise in drawing the boundaries between judicial and executive functions, but already in the United States such organizations have been placed under the control of federal and state judges who have appointed trustees or their equivalents to restructure them under judicial superintendance. Stone calls for the passing of a Model Corporate Rehabilitation Act under which companies convicted of criminal offences, or who have civil judgments awarded against them for an amount greater than $250,000, could be subjected to a hearing to determine whether the conduct giving rise to the conviction or adverse judgment arose from an uncorrected pattern of company policies, practices or procedures and whether the company might reasonably be required to make changes in them having regard to costs involved and the potential benefits to be gained.

Preventive schemes, such as those outlined above, possess a distinct advantage over other forms of sanction in that they readily lend themselves to negotiated settlements between the parties concerned: the enforcement agency, the corporate entity, and those victimized. This can effect significant savings in time and money in the prosecution process. No doubt some limits will have to be placed on the type of corporate offence that can be settled consensually, and some clarification of the nature of the courts' involvement in such arrangements will have to take place. The community may have a real interest in seeing that the more serious offences are brought to trial so that the corporation can be publicly condemned by a formal adjudication of guilt. Similarly, so as not to totally abandon the

[58] Stone C.D., *Where the Law Ends: The Social Control of Corporate Behaviour,* New York, Harper & Row, 1975; Stone C.D., "Controlling Corporate Misconduct", (1977) 48 The Public Interest 55, reprinted in (1979) 1 Criminology Review Year Book 553.
[59] *Ibid*., 561.
[60] *Ibid*., 562.

community's interest in corporate wrongdoing, all consensual settlements should require some form of judicial imprimatur. To be accepted by the court, a consent order should not only have to attend to such matters as compensation and restitution, but also would have to contain clear and enforceable undertakings regarding the future good behaviour of the company involved. It may also be that the rules should permit public interest organizations to participate in settlement proceedings on behalf of a wider constituency of potential victims. However, none of these considerations reduce the potential of the preventive order, or its permutations, to provide far more flexible and effective coercion for corporate change than other sanctions presently available.

(f) *Corporate Probation*

It is worth drawing attention to the fact that probation could, theoretically, also be utilized for purposes similar to the preventive order.[61] There are already a number of reported cases in the United States in which corporations have been placed on probation under federal or state law.[62] Most of the initial hesitancy to use probation arose out of uncertainty whether the particular probation statute could encompass corporate as well as individual offenders. But even when it can be read as extending to companies, it usually remains ineffectual in application. This is because the conditions the court may impose upon offenders as part of probation orders are inevitably couched in terms more appropriate to human than corporate rehabilitation. To use a probation order merely to direct a corporation to be of good behaviour or to compel it to undertake some form of restitution or to engage in some act of community service to expiate its wrongdoing is too narrow a conception of the potential of probation. Compensation, restitution and community service orders should be available as sanctions in their own right[63] and the general direction to be of good behaviour is too imprecise. What is required to maximize the use of probation is power in the courts to impose conditions which focus on the modification of those features of corporate organization that facilitate the commission of offences. Internal adjustments can then be demanded as a condition of probation. This would turn the sanction into a far more powerful remedial device for use against corporations than it is at the moment. For it to work however, a new specialization among probation officers will be called for. It is they who must determine whether the probation conditions are being adhered to. Since the normal training of probation officers will not equip them with the requisite skills, the simplest solution would be to appoint, as probation officers, the investigatory staff of the regulatory agencies who were responsible for instituting the proceedings in the first place.

(g) *Internal Discipline Orders*

Rather than struggle with the difficulties of gaining access to the decision-making process of a corporation, the identification of the individuals responsible for its offending, and the reasons for the offence,

61 Note, "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing", (1979) 89 Yale LJ. 353, 367-375.
62 *Ibid*., 368.
63 Criminal Law and Penal Methods Reform Committee, above, note 56, 364; Trade Practices Act 1974 (Cth.), s. 87; Crimes Act 1958 (Vic.), s. 546.

the South Australian Criminal Law and Penal Methods Reform Committee has come up with the radical idea of compulsory corporate self-policing. This takes the form of an internal discipline order[64] pursuant to which a court may order a corporation, or specified corporate personnel, to investigate any offence allegedly committed by the corporate entity. Those named must investigate, undertake appropriate disciplinary action and, ultimately, return a full and detailed compliance report to the court issuing the order. Non-compliance without reasonable excuse is to be punishable independently of any sanctions imposed for the original infraction.

The claimed advantage of this order is that it would require corporations "to undertake tasks of investigation and prosecution that are beyond the effective reach of any likely system of public law".[65] This is certainly true; indeed this alleged advantage represents one of the significant dangers of this new order which, if brought into law, would in effect require offenders or their accomplices to investigate their own offences, confess their wrongdoing and administer suitable punishment to themselves! Though it is said that the supervised operation of internal discipline proceedings would reduce the risk of scapegoating and unduly severe sanctions within the corporation, this seems to be a very minor trade-off for the considerable expansion of state power and violation of due process rights implicit in this scheme. It illustrates, very tellingly, the dangers discussed earlier in this paper of shifting a problem in sanctions from the criminal to the civil sphere. Even though advanced for genuinely remedial ends, the order's abandonment of established protections, such as the right against self incrimination, poses serious threats not only to those engaged in corporate business, but also to those involved with other group structures such as unincorporated associations. Law reformers are already turning their minds to the criminal responsibility of these groups,[66] and it should be expected that any sanctioning techniques perfected for use against one type of legal entity will be quickly put to good use against others.

5. CONCLUSIONS

The development of a sophisticated range of sanctions for corporate offenders has been a long time in coming. The delay has been the result, firstly, of an excessive reliance on the fine as the primary corporate sanction and, secondly, to a failure to appreciate the nature and breadth of corporate wrongdoing, a great deal of which is regarded as beyond the pale of the criminal law and merely "regulatory", "quasi-criminal", or "civil" in nature. Reappraisals of the fine as a corporate sanction has kindled interest in other measures by which public denunciation, victim compensation and structural changes within the corporation itself could be achieved.

The sanctions which have been variously discussed in this paper are either intended to be directed against individuals within the corporation who are thought to be responsible for its transgressions, or against the corporation itself. While strong advocacy is to be found for complete reliance on individual responsibility (since ultimately a

[64] *Ibid*., 361-362.
[66] *Ibid*., 362.
[66] Law Reform Commission of Canada, above note 10, 66.

corporation must act through the people who comprise it), there is also a demonstrable need for sanctions that aim at gaming access to group assets, affecting group reputations, and changing group processes. These require action to be taken against the corporation itself. Some of the proposals simply involve enhancing art existing sanction by buttressing its effect through publicity or a follow-up injunction, but others address themselves specifically to the measures needed to bring about changes in the internal management and policies of a corporation so as to reduce or prevent its further offending. It is not regarded as essential that these sanctions be available only through the criminal trial processes, but it is stressed that the more inflictive the sanction, the more important it is to include in its authorizing statute the types of protection normally accorded to those facing criminal punishment.

If all the suggested dispositive arrangements are enacted into law, there will exist a far greater flexibility in choice of sanction than ever before. In due course the various options will have to be integrated into some coherent body of law and practice, but what initially is most needed is a willingness to accept an eclectic approach to the problem of corporate deviance provided that the efficacy of each new corrective measure proposed is systematically tested.

Firstly, each sanctioning scheme must be allowed a proper trial, This not only means that it should run over a sufficiently long piloting period to allow it to be tried against a diversity of cases, but also that the agencies responsible for its administration should be appropriately staffed to permit its intended operation to be realized. Introduction of the preventive order or corporate probation will, for example, require supervisory staff with special expertise to monitor whether court directed changes in corporate functioning are actually occurring. If they are not implemented as designed, their trial has no volue. Secondly, a careful assessment must be undertaken of the extent to which sanctions attain their aims. Those who advocate new forms of response should be prepared to identify objectives and goals in a testable form and be willing to support research to learn the extent to which their corrective purposes have or have not been fulfilled. It might be thought that the state would always be responsive to a cost-benefit analysis of the viability of newly introduced and often expensive forms of control, but this is rarely the case in the criminal justice system or elsewhere. Sanctions are almost never tested for efficiency or regularly modified in the light of research findings, yet only with this type of feedback is it possible to learn from experience and to effect ongoing improvements. If the concept of the formal assessment of efficacy can be established as a working principle in relation to corporate sanctions, not only will it be possible to more competently respond to corporate misconduct, but a major advance in rational decision making by government in the whole area of sanctions will also have taken place.

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