



**criminal
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for
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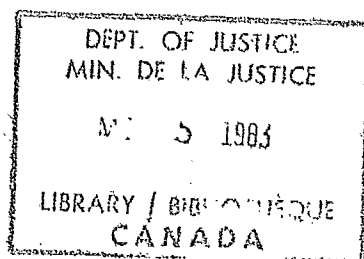
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Law Reform Commission of
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Criminal responsibility for
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Law Reform Commission of Canada

Working Paper 16

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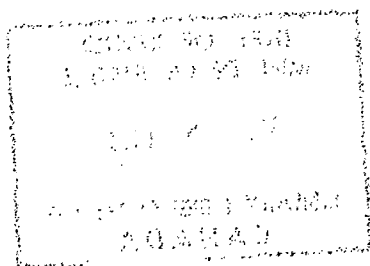
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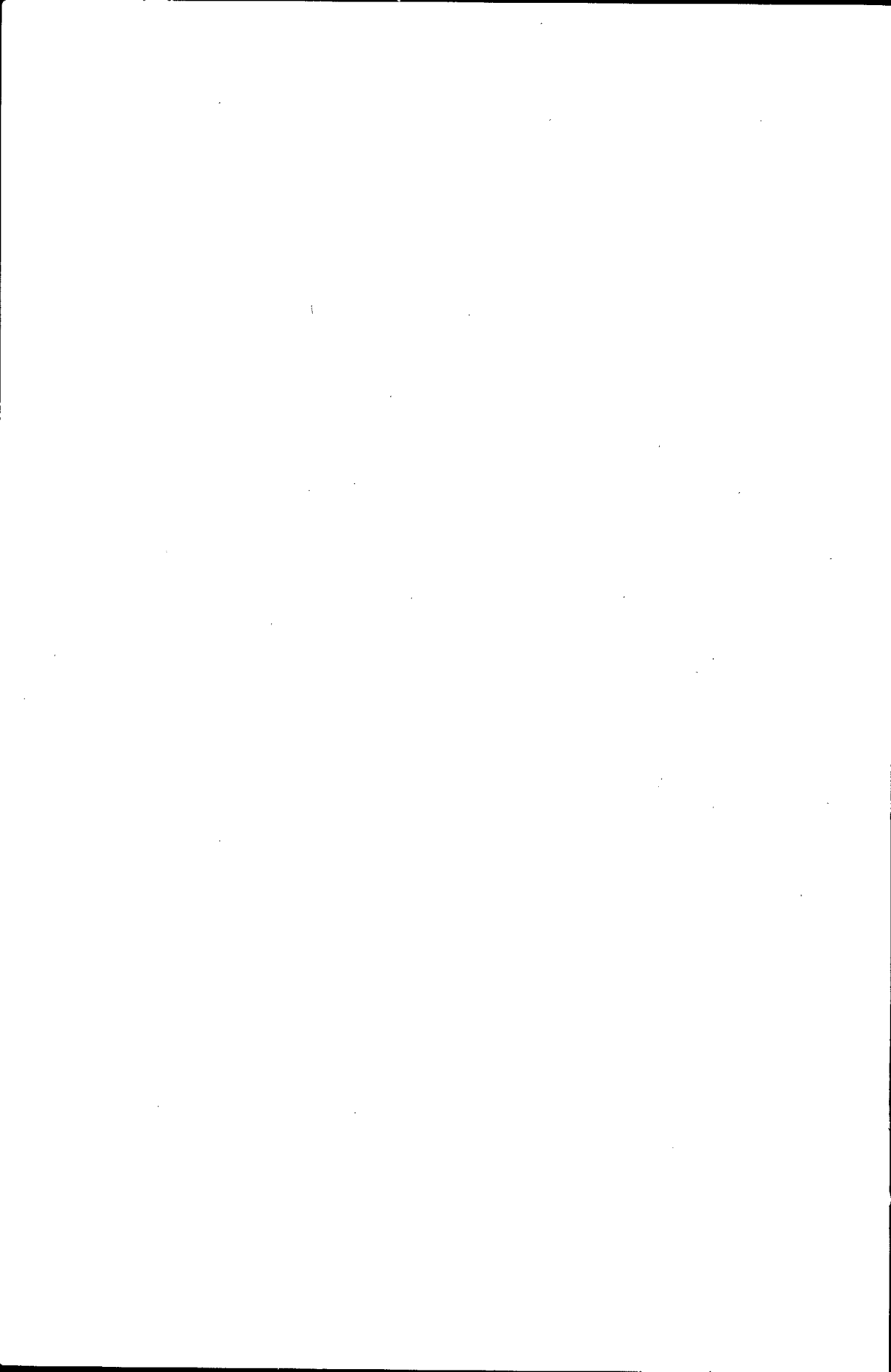


Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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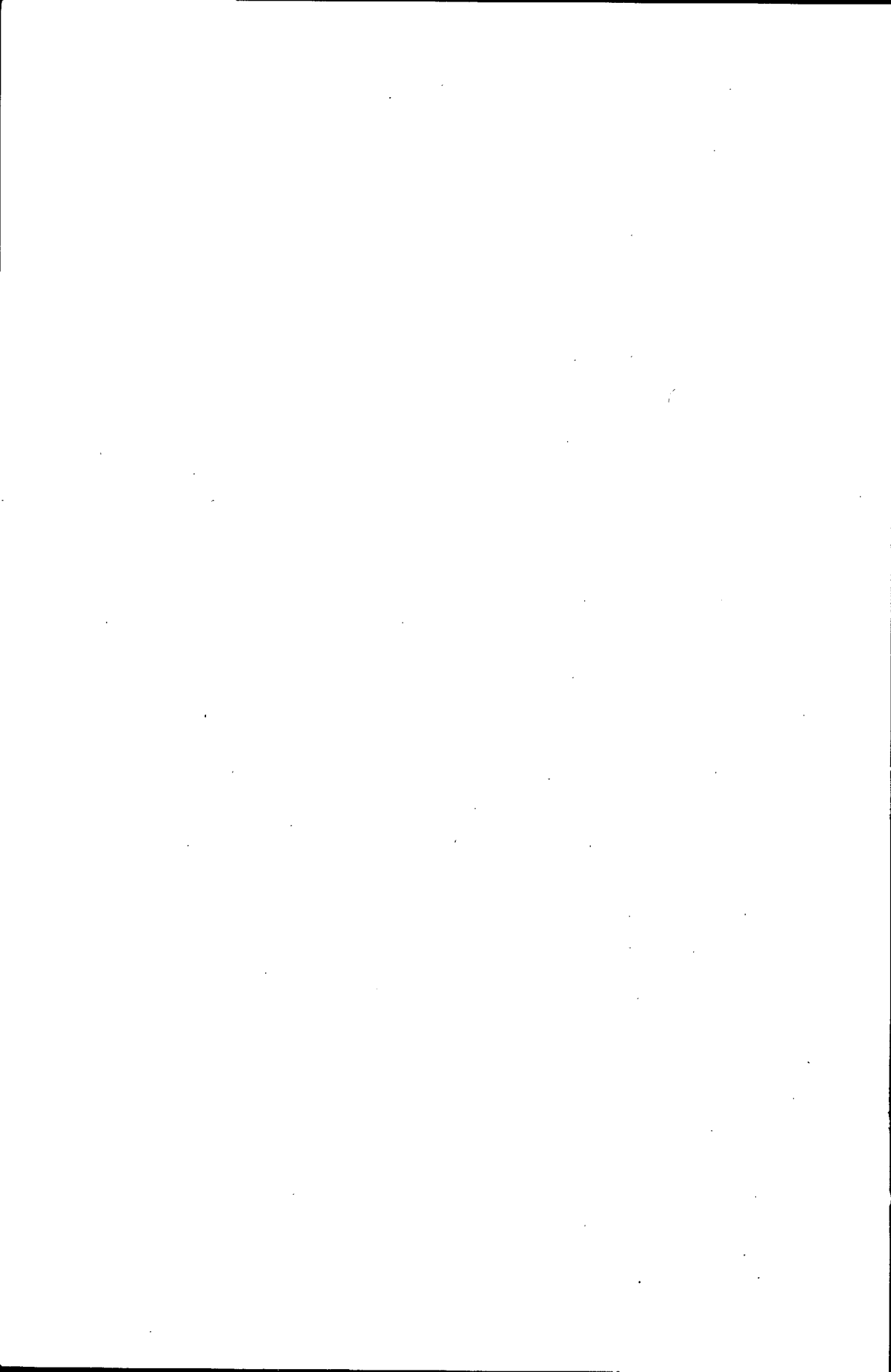


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Foreword

This is our third Working Paper on General Principles of Criminal Law. The first, *The Meaning of Guilt*, asked what state of mind should be required for criminal guilt. The second, *The Limits of Criminal Law*, asked what the scope of the criminal law should be. This Paper further explores these questions and moves into a new area, group conduct. It accepts as a premise what is recognized in much of contemporary literature in the fields of sociology, economics and political science, that there is a risk of conflict between the specialized interests of groups, the more general interests of the society they function in and the individual interests of people in that society. This Paper examines the place of criminal law, in the conflict of these interests, focussing on the responsibility of groups or what has traditionally been called the criminal liability of corporations.

Selecting the criminal law as a perspective from which to take a look at group conduct was to some extent an arbitrary decision. We might as easily, or more easily, have looked at the problem as one of administrative regulation or civil responsibility. As we point out in the Paper, the challenge of legal control over group process is one of melding a variety of approaches into a body of law that will encourage responsible decision-making. Our emphasis on restraint in the use of criminal law leads inevitably to the need for increased emphasis on non-criminal ways of accomplishing this goal.

We chose our perspective principally because it allowed us to probe further into the nature and scope of criminal law. *The*

Meaning of Guilt restricted itself to human offenders, expressly avoiding the reality that many of our strict liability laws are aimed more at corporations than at people. Our Working Papers on sentencing and dispositions concentrated on the use of criminal sanctions against people, despite the fact that the present criminal law authorizes sanctions to be imposed on corporations. So we felt obliged to examine the role criminal law should play in group control and what problems arise in using an instrument like criminal law in pursuit of this objective. We chose the corporation as the point of focus for the Paper, although the discussion is not restricted to the narrow issue of corporate responsibility.

The Paper adopts a largely theoretical approach. Once again we deplore the limited useful empirical data on corporate criminal activities. What insight we have that is empirically based is gained from consultations with government administrators, Crown prosecutors, police investigators, members of the Bar, and interest groups concerned with these questions. Two background papers were prepared for use in this project, "The Criminal Liability of Corporations and Other Groups", by Leonard H. Leigh, and "Vicarious Liability for Crime", by Brian Hogan. Valuable advice was also provided by Philip Anisman, Director of Corporate Research, Department of Consumer and Corporate Affairs.

We recognize that this Working Paper is only a starting point for what must become a continuing discussion about ways of dealing with corporations and other groups in society so that group decision-making is responsive to public interest considerations. We invite our readers to reflect upon the issues raised and to share their opinions, ideas and suggestions with the Commission.

Introduction

Over the past thirty years since the end of the Second World War, corporations have occupied an increasingly dominant position in our society. The level of achievement reached in production and marketing has been accomplished largely through corporations, which have come to be regarded as the core of the economic system. When we think about it, most of our day-to-day experience is affected in one way or another by the activities of corporations. We purchase our consumable articles from them; we live in houses built by them; we breathe air and drink water that has been contaminated by them; much of our entertainment is produced by them; and large numbers of our population either work for or hold shares in a corporation. Corporations, whether industrial concerns, merchandising organizations, banks or insurance companies, make decisions that influence growth in society, the products that will be available, the manner in which people will be employed, the accommodation they will reside in, the way wealth will be distributed and the quality of the environment.

In a sense, however, it is misleading to talk about corporations holding this kind of control. It is important to recognize that corporations involve people, and that, from a legal standpoint, the corporation is primarily relevant because it represents a mode of organization in which *people* can make decisions that have this impact on society. The legal personality that attaches to a corporation, for example, allows those who form it to deal with outsiders under a collective identity, and to exercise collectively many of the powers and capacities of a natural person—for

example, to own property, to enter into contracts and to sue and be sued. The limited civil liability we associate with corporations has allowed people to invest in them without risking unlimited financial responsibility for their failures. This has been important in providing corporations with broad bases of investment and thus in encouraging their growth.

As a mode of organization, the corporation has proven to be flexible. Its use extends to a wide range of objectives—to businesses, large and small, to charitable organizations, to recreational clubs, to financial institutions and many others. Corporations run the gamut from small corner store businesses, which may have been incorporated for tax reasons, to large multi-national firms, designed to take advantage of favourable labour, consumer, financial and tax situations in different countries. Quite naturally the organizational structure varies from corporation to corporation, depending on its purposes and on the extent and nature of its activities. Some corporations are “widely held”, signifying that ownership is spread and that shares in the corporation can be purchased by members of the public. Others are “closely held”, indicating that ownership is concentrated within a small number of investors and closed to members of the general public. Systems of management vary as well, some exhibiting much more centralization of authority than others.

While it is important to recognize the importance of the corporation as an organizational mode, it is in a different sense that we view corporations when we talk about the degree of influence they have in society. Our concern springs not so much from the fact that people use a particular legal form for advancing their goals as from the fact that corporations normally involve group processes, some simple and some highly complex. Not only are there shareholders, who in a legal view would be regarded as the corporation; there are those who provide direction to the corporation through the occupation of key positions, whether as directors or as management personnel. The corporation also encompasses its employees, whose technical abilities are used to implement its policies. Most corporations, therefore, function through the cumulative efforts of many individuals performing diverse roles.

Our interest in corporations, then, reflects a more general concern about the impact groups have on society, and how group processes provide a vehicle through which power can be exercised anonymously, often without feeling or responsibility. We are concerned about what happens to people in groups, and how group and sub-group pressures to conform to behavioural patterns may lower the sense of responsibility people feel for their contribution to socially harmful results caused by the group. We are concerned about the problems involved in determining how group decisions are reached and who contributes to them. Above all we are concerned that values and interests can be asserted through powerful groups to the detriment of values and interests held by less powerful groups and individuals.

While the goals of many of our corporations—profit and growth—spur important advances in the technologies of production and marketing benefiting the Canadian consumer, decisions made in the course of this development have detrimental influences as well. In some cases these are felt by society generally, for example resource depletion and environmental pollution; in others they are felt by individuals—for example, injuries caused by faulty production or marketing standards. The fact that many corporations come into contact with large numbers of people increases the risk of detriment flowing from corporate action. An automobile manufacturer who does not adopt specified safety standards can cause irreparable harm. So can an industrial factory on a major waterway.

As a society we face the difficult problem of coping with the detrimental effects of corporate activities. We face the problem of compensating people for injuries they suffer because of particular corporate activities; of stopping certain activities because to tolerate them may create a risk of injury to many people or may cause more general losses to society; and of creating a climate of respect within our corporations for the interests of those outside the corporate process.

There is, therefore, and this is a position that has become increasingly recognized over the years, a need for exerting controls over corporate processes and for developing policies that will keep the interests of corporations in line with public interest considera-

tions. This involves providing a legal framework within which policies can be implemented. We do not propose in this Working Paper to examine substantive policy questions that affect corporate control, for example the circumstances under which corporations should be restricted from merging and creating monopolies, or the extent to which they should be permitted to pollute in the course of production. We shall, however, attempt to analyse the role of a traditional legal control, the criminal law, in implementing substantive policy choices to cope with these questions. In doing so, we hope to achieve a broader purpose than merely to make recommendations for imposing criminal responsibility on corporations and the people who operate within them; we hope to give some insight into the difficulties of applying concepts of criminal responsibility to group situations generally, and into the limits of criminal law as a means of creating a high level of responsibility within corporations and other group processes.

We shall first look briefly at the present law affecting criminal responsibility for corporate action, after which we shall discuss some of the broad policy questions involved in using criminal law to deal with corporate behaviour.

Criminal Responsibility for Corporate Action—The Existing Law

Corporate activities have increasingly been drawn within the ambit of the criminal law. Because of a high level of regulation of the activities they carry on, corporations are affected by a maze of criminal offences that limit their freedom to operate. These include provisions restricting their ability to obtain capital, governing forms of production, controlling plant operations, ensuring the safety of their products, restricting their ability to advertise their products, and limiting their freedom to pool their resources and to combine operations.

While most of these provisions are found outside the Criminal Code, the traditional criminal law is also relevant to corporations. We have come to see how fraud and theft can be committed within the corporate framework and can affect consumers, governments and other corporations and bodies. Even offences usually associated with personal conduct, those dealing with violence, property interference, corruption and intimidation, can be relevant in the corporate context. Corruption, intimidation and violence reported to exist in certain sectors of the construction industry, for example, illustrate how traditional crime can occur in struggles between corporations and labour unions, leading to wasted resources, high costs, low construction standards and general social disruption. While the crimes that can be associated with corporations seem to be more limited in range than those that can be associated with natural persons, the Criminal Code does provide standards by which corporate conduct can be measured.

It is important, then, to see how the criminal law presently allocates responsibility for criminal activities occurring in the course of corporate operations. A brief overview will show that it provides a basis for dealing with individuals within the corporation, and with the corporation itself.

Individual Responsibility

Individuals are made responsible for corporate action through two related approaches. First, through doctrines that impose liability on those who commit criminal acts and on those who aid or abet, counsel or conspire to commit them. It is on the basis of these doctrines that traditional criminal charges involving fraud, theft, violence and intimidation can be brought against individuals participating in criminal conduct through corporations.

Individual responsibility is also imposed through statutory provisions that specify that corporate officers, directors and agents will be liable for offences committed by corporations. These provisions are often associated with statutory offences framed in terms that, in the context of the activities of a corporation, make them more applicable to the corporation than to an individual; for example, where statutory language uses terms such as "no *manufacturer* shall", "no *dealer* shall", or "no *importer* shall", suggesting the primary responsibility of the corporation rather than its agents and employees. These special provisions vary somewhat from statute to statute. Some clearly contemplate the need for proof of fault; some start from a position of presumed guilt, reversing the onus of proof by requiring the accused to prove he was not at fault or that he exercised due diligence; others can be construed to eliminate fault altogether in some situations. For the most part they depend upon proof of corporate criminality, although the actual conviction of the corporation is not usually necessary. Although most of these provisions are rarely used, they do express the potential responsibility of individuals participating in corporate criminal activities.

Corporate Responsibility

Historically, corporations were not regarded as suitable subjects for the criminal law. There were several reasons for this. Since corporations could not think or act for themselves, they were thought incapable of being held criminally responsible. Nor were the courts prepared simply to attribute responsibility to corporations, since criminal law theory did not look favourably upon imposing liability on someone for the acts of another. Another reason can be found in the view that a corporation would exceed its capacity to act in committing a crime. Difficulties were also perceived in the adaptation of criminal procedures to corporate defendants.

Over the last century and the early part of the present century, however, attitudes gradually changed. Courts first recognized that corporations should be held liable for crimes of omission where Parliament had imposed a duty on the corporation that was not performed. Other exceptions were created to impose criminal responsibility for nuisance, criminal negligence, criminal libel and contempt of court. Courts also began to accept that corporate employers, like human employers, should be held accountable for certain acts of their employees.

By 1941, it had become clear that a corporation could also be held criminally responsible as a "person" for crimes involving active wrongdoing. This development is not surprising, however, since Parliament had identified a corporation as a "person" for the purposes of the Criminal Code as early as 1906, without giving any indication that liability was to be restricted to a particular class of criminal offence.

There are, then, in the present law, two bases for holding corporations liable. One has its roots in the doctrine of vicarious responsibility—responsibility imposed on a corporation for the acts of its agents and employees. Parliament has enacted many provisions that express this kind of liability. Usually it is associated with "regulatory offences", "penal provisions", "public welfare offences" or "quasi-criminal offences", terms used interchangeably by lawyers, judges and administrators to set certain offences

apart from those that are viewed as more traditional crimes. And strict liability, the elimination of fault, is normally a companion of vicarious liability.

The other basis for holding corporations liable requires that the corporation itself be regarded as the offender even though the conduct of someone within the corporation must be imputed to it. This is the usual basis for imposing responsibility for Criminal Code offences as well as criminal offences outside the Code requiring proof of fault. Fault is attributed to the corporation through a person holding a position that gives him some control over corporate decision-making, allowing a court to identify the person with the corporation. A court will look for the traditional elements of fault in a corporate manager, for example, and attribute the mental processes of that individual to the corporation. Courts have become somewhat flexible in recognizing the capacity of different categories of management personnel to represent the corporation; one does not necessarily have to find culpability in the board of directors to convict a corporation. If control is left to the managing director, his culpability will normally be sufficient. If control is decentralized and is delegated to several management officials, it may be possible to impute the fault of one of them to the corporation.

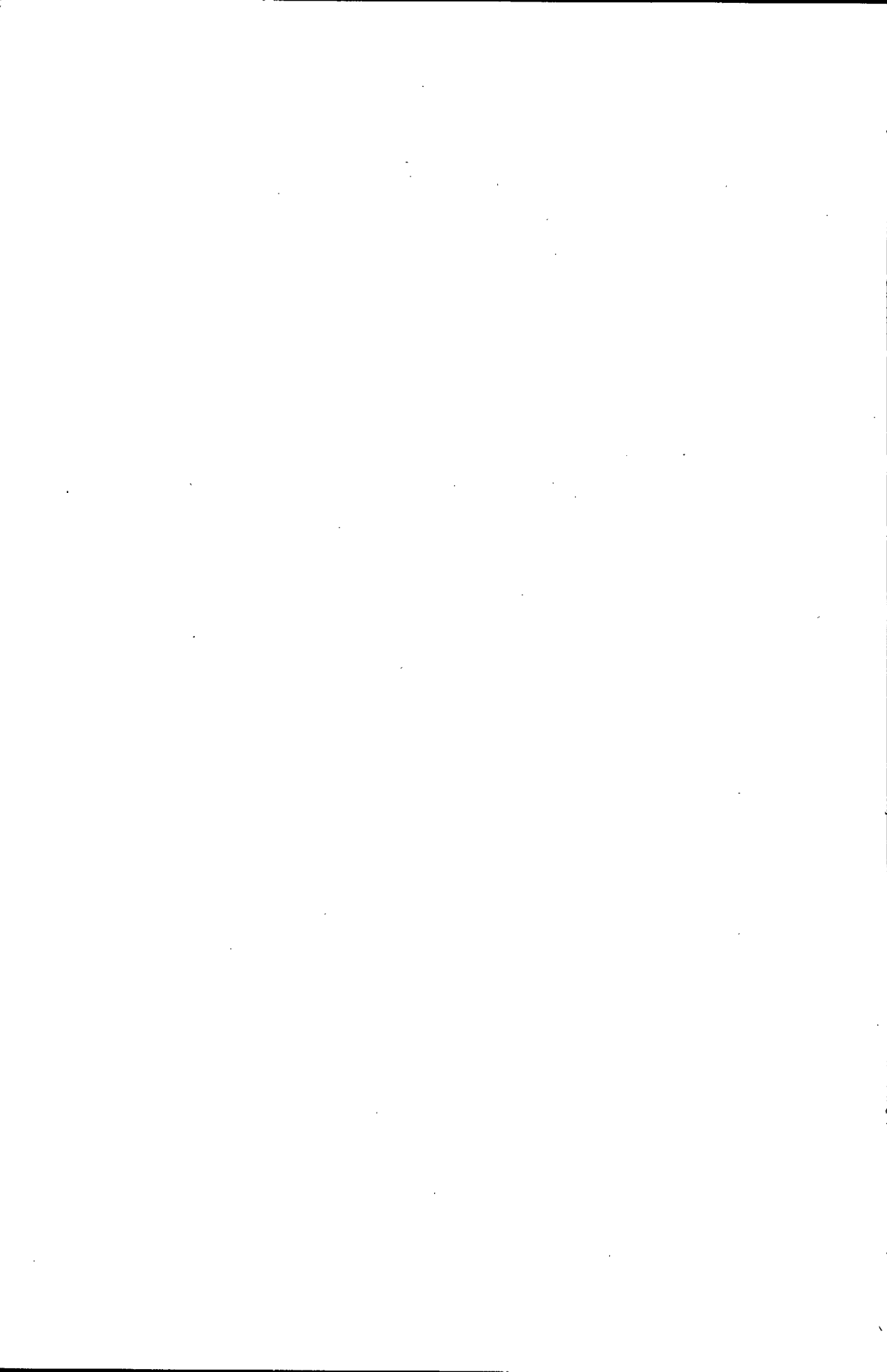
The Scope of the Inquiry

This brief overview of the law provides us, then, with a starting point for examining how criminal law can be used as a way of dealing with activities that fit into complex socio-economic patterns. In the course of this examination we shall raise a number of questions. On what basis is it legitimate to impose responsibility on people who contribute to criminal harm through participation in corporate activities? How valid is a concept of corporate criminal responsibility for conduct that can be traced to individuals participating in corporate activities? What is the significance of "fault" in evaluating the collective criminal responsibility of a group? Each is a question that must be addressed in developing a theoretical basis for criminal responsibility in a corporate context.

Attention must also be paid to the problems of sanctioning in the corporate context, especially where it involves imposing group sanctions on corporate offenders. What are the implications of sanctioning in terms of the behaviour of people operating within the corporate framework and in terms of the community within which the corporation functions?

Finally, what can really be achieved by using criminal law as a response to conduct within corporate structures, especially large corporations that are highly organized and have a significant influence on the kind of society we have? Is criminal law capable of approaching problems of these dimensions? Can it be enforced? Can a system that traditionally has focused on the isolated acts of individuals be expected to provide a suitable response to the systematized conduct frequently seen in large organizations, where the activities of many form a pattern of conduct that leads to harm we would like to avert?

These questions we discuss in the remaining pages of this Working Paper.



Real Crimes and Regulatory Offences

A discussion of criminal responsibility cannot ignore the broad goals of the criminal law, and from time to time in this Working Paper we shall advert to purposes we regard as important to the use of criminal law in our society. In a previous Working Paper, *The Meaning of Guilt*, we drew a distinction between "real" crimes and regulatory offences to focus on the purposes of criminal law, resulting in a proposal for classifying criminal offences in these terms. Indeed, in our discussion under the previous heading we referred to a working distinction in our present criminal law between crimes and regulatory offences.

This is a distinction to which we shall pay particular attention in this Working Paper as well. For it bears on the importance of "fault" to criminal responsibility, on questions of proof, on sentencing and dispositions and, generally, on whether group liability is an appropriate way to impose criminal responsibility for corporate action.

"Real" crimes, we have suggested, should be primarily concerned with fundamental values in our society. By emphasizing and reinforcing values considered to be at the basis of our social system, "real" criminal law promotes a society in which they are respected and are demonstrated in behaviour. It responds to social conduct that exhibits disrespect for values and is inextricably bound up with the notion of "fault". Intentional conduct that injures people, deprives them of their property, restricts their freedom or subjects them to offensive interferences are examples of conduct that violates values regarded as so important to our society as to

warrant the designation "criminal" and the stigmatization that is associated with the use of the criminal justice system.

The kind of criminal law we classify as "regulatory offences" involves a somewhat different objective. It is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.

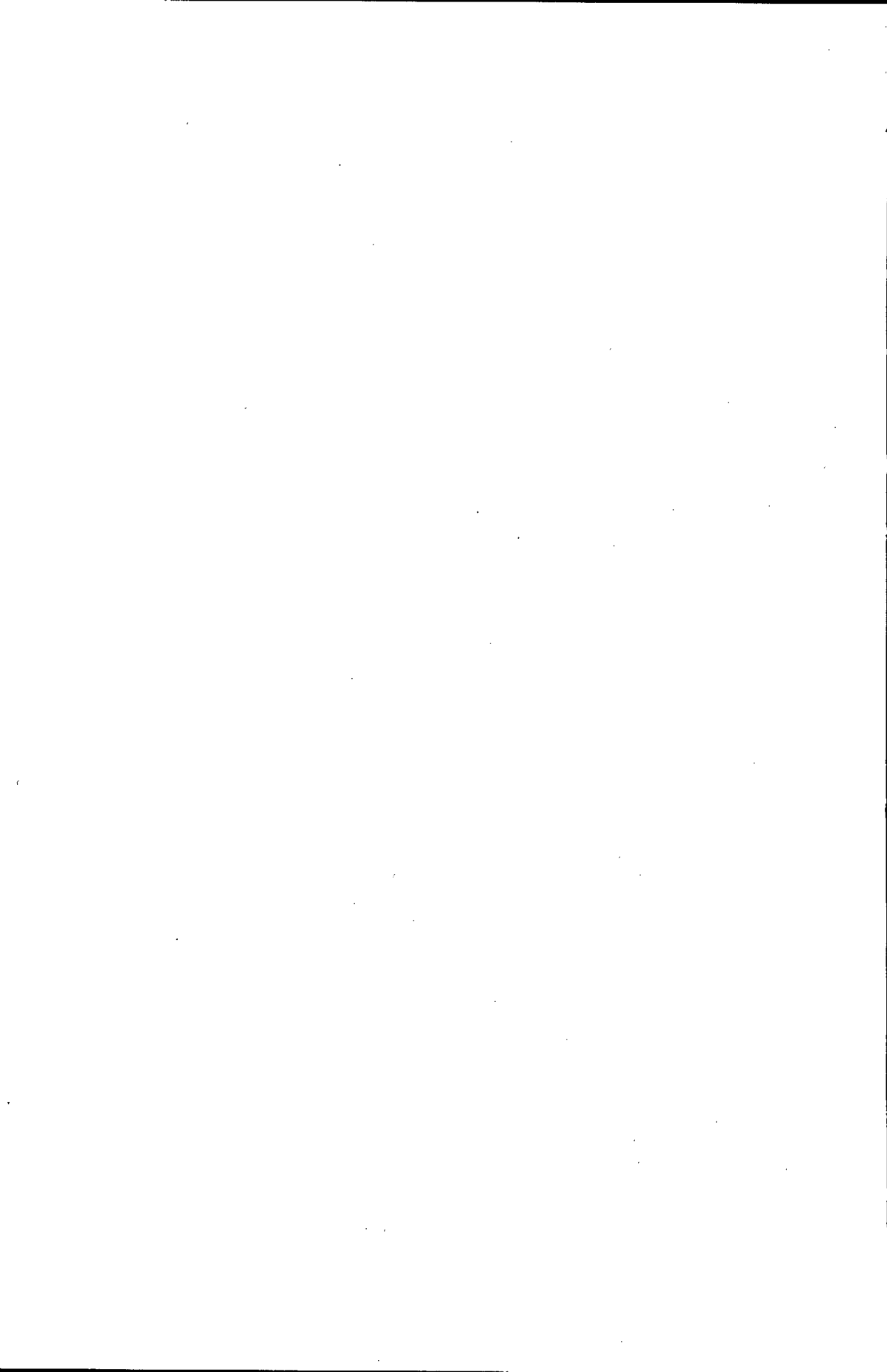
Because the primary concern in regulatory offences is not with reinforcing fundamental values, fault becomes less important. While in some cases it may be regarded as fair to impose responsibility only on those who intend to break a rule, it is generally regarded as acceptable to impose responsibility on people who have been negligent; i.e., on people who simply have failed to take reasonable care to ensure that a result or risk will not occur.

While it is for Parliament to decide which values are so fundamental as to warrant protection through the "real" criminal law, we have suggested that "real" crimes should be clearly identified by their inclusion in the Criminal Code. This may involve removing from the Code some of the offences that are presently within it and, conversely, of including within it certain offences that are presently found in other statutes. It may also involve establishing separate offences in the Code for intentional or reckless violation of regulatory offences, to satisfy a need to differentiate between negligent behaviour and behaviour exhibiting a more serious fault element. Selling bad meat might be an example of a regulatory offence that could also serve as the basis of a "real" criminal offence where evidence shows a higher degree of fault than negligence.

We realize that there is a difficulty in addressing ourselves in this paper to a nonexistent classification scheme, but we believe it is important to develop our analysis of criminal responsibility for group action within the framework we are suggesting for the Canadian Criminal Code of the future. In raising examples we shall attempt to use well-established crimes, such as theft and fraud, on

the assumption that these fall within the class of offences we call "real" crimes.

We must now examine how the two approaches, those of individual and corporate responsibility, apply to "real" crimes and regulatory offences committed through group action. We shall look first to developing a suitable basis for each approach, taking into account the traditional importance of the fault element in criminal law. From there we shall examine the interrelationship between the two approaches, with special emphasis on a question that is of paramount importance in this study—is there a role for corporate responsibility in our criminal law?



Individual and Corporate Criminal Responsibility—The Fault Element

Individual Responsibility

When we speak of individual responsibility we are referring to responsibility attaching to a person as a participant in group or corporate action. It is responsibility that takes into account a special relationship between the person and the corporation and applies to company presidents, directors, supervisors and employees who, in one way or another, have participated in conduct prohibited by a criminal provision. We have already pointed out that our present criminal law creates liability for people in these categories, although in our view it does not reflect either consistency in approach or the acceptance of fundamental underlying principles. It does not clearly answer the question—should fault always be an essential ingredient of responsibility?—or the question—what constitutes fault in these situations?

The view we took of the nature of criminal responsibility in *The Meaning of Guilt* is of considerable importance in approaching these questions. We have already accepted as a general principle that criminal responsibility should involve some degree of fault, whether intention or recklessness (which depends upon the offender's knowledge of the circumstances in which he is operating or of the risk his conduct raises) or negligence (his failure to conform to reasonable standards of conduct).

Since the subject of corporations was excluded from that study, however, we must now consider whether a special notion of "fault"

is needed to deal with individuals who participate in activities within a corporate or group framework. Should people functioning within corporations have higher standards of criminal responsibility than those functioning outside them? Should they have lower standards? In support of lower standards, one might argue the susceptibility of people to the influences of group pressures. People may be placed in difficult moral predicaments. Yet this is true of life generally, where family, community and economic pressures make it difficult at times to conform with social values. To create exemptions that would exculpate people from responsibility for moral choices would tend to undermine the importance of having broad standards by which to measure their conduct in relation to the fundamental values we seek to support through the criminal law.

Should they have a higher level of responsibility? Should there be liability through mere association with a group or through the mere occupation of a designated position within the corporation, such as director or president? Again we feel this goes too far. Suggestions of this sort can usually be traced to two considerations: first, the assumption that people in these positions control every aspect of the corporate operation, which often is untrue; and, second, the frustration of being unable to ascertain the exact significance of events leading to the harmful result, or, indeed, even to know what the events were. Yet to use mere association as the basis of criminal responsibility would ignore the fact that the conduct may not show the kind of disrespect for fundamental values that lies at the basis of our "real" criminal law; it would also ignore the fact that the simple imposition of criminal responsibility will not achieve regulatory aims where it does not reinforce realistic patterns of responsibility within the organizational structure of the corporation.

In our view, stipulating fault as a substantive requirement of criminal responsibility for individual participation in corporate action is an important condition of using criminal law to encourage responsible conduct within our corporations. While we accept that criminal responsibility should attach to individuals who actively participate in unlawful conduct in terms of doing the act, assisting in the act, authorizing the act to be done or establishing a policy that can only be effected by doing the act, it should only attach where

there is intention or recklessness or, in the case of regulatory offences, negligence.

In determining whether there was fault, the position of the individual within the corporation would be important. For example, the knowledge to which a person had access would clearly affect the issue whether he intended a particular result; while a company president negotiating a bid-rigging agreement would normally have the necessary knowledge and intention to ground criminal responsibility, subordinates assisting him in various capacities might not have a full appreciation of the nature of the activities and might not, accordingly, have the necessary intention. In the same way, the recklessness or negligence necessary to ground criminal responsibility would be highly dependent on the actual responsibilities the person had within the corporation and the extent of his control over the situation. For example, it may be that the criminal responsibility of the company president in Toronto would be viewed differently for corporate conduct occurring in a Vancouver branch than for similar conduct occurring in Toronto.

And while we also take the view that criminal responsibility should be imposed on individuals in certain cases where their participation is of a passive nature, again it is necessary to establish fault by testing the person's behaviour against his responsibilities within the corporation. To impose criminal responsibility for a "real" crime, we regard acquiescence as vital. It would be necessary to establish that the person knew of or was wilfully blind to the conduct in question and failed to take reasonable steps to exercise his authority to prevent it. Accordingly, the company president or director who overlooked criminal conduct by his fellow officials with knowledge of what was going on would be criminally responsible, if not for his intention then for his reckless disregard of the illegal activity.

To impose responsibility for passive participation in regulatory offences would require a person's failure to exercise his responsibilities in a reasonable way to prevent conduct contributing to the offence. Criminal responsibility for regulatory offences could therefore be imposed on a company president or director who simply did not exercise reasonable care to prevent harmful occurrences. Similarly, supervisors who failed to take reasonable steps to guard

against the commission of offences by employees under their supervision would show the necessary negligence to ground criminal responsibility for regulatory offences.

Proving fault, however, can sometimes present major problems, especially where fault involves knowledge and intention. It may be difficult ascertaining who within a corporation actually caused or contributed to the harm. Also, as we have already pointed out, it may be difficult establishing that those identified as participants had sufficient knowledge of the extent to which their efforts contributed to the criminal goal, or to the risk of harm, to prove intention or recklessness. These problems may be less true, of course, of smaller organizations than of larger ones where several agents and employees may have participated in criminal conduct without appreciating their role in its implementation.

With respect to policy makers, proof of criminal intent may in many cases have to be drawn by inference from a complex network of circumstances that may or may not be sufficient to establish guilt beyond a reasonable doubt. Where a case is built on the authorization of criminal acts by subordinates, there may be little direct evidence that the result was authorized. Where a case is built on acquiescence or inaction, it may be difficult to show knowledge of the activity.

A possible solution might be to shift the burden of proof to the accused in these cases. Where regulatory offences are concerned, little objection can be taken. As we pointed out in *The Meaning of Guilt*, many, if not most, regulatory offences presently involve guilt without proof of fault. We objected to this and recommended that an accused person be given the opportunity to establish his lack of negligence, his exercise of due diligence. This, of course, involves a shift in the burden of proof. Whether the fault element is intention or negligence, it is left to the accused to establish his lack of fault in respect of participation clearly attributable to him.

We do not accept this, however, as a way of handling "real" crimes related to corporate activities. Even though a reverse onus provision may be the most effective way of assuring that the court would have the necessary information to enable it to assess whether a person charged with effecting fraud or theft through corporate agencies was in fact at fault, we feel the price we would pay may be

too great. To require a person to rebut a charge that he committed a "real" crime flies in the face of a tradition in criminal law that espouses the right of the accused to maintain silence in court and conditions criminal liability on proof of guilt beyond a reasonable doubt.

We would also be faced with limiting the scope of the rule. To what classes of offender would it apply? To directors and officers, perhaps? And to what kinds of complicity? Authorization and acquiescence, or other forms of complicity? And, if restricted to certain kinds of complicity, what would be the effects on charging practices for corporate offences? We can foresee dangers in reversing the burden of proof for all forms of participation in crime associated with corporate activities; and we can foresee serious difficulties in trying to discriminate among the large number of potential situations in order to limit the application of the rule.

To the extent that information about personal activities within corporations is an obstacle to effective law enforcement, we would prefer to see solutions developed that stress more complete access to corporate information. Present restrictions on the right of search and seizure in the Criminal Code might be eased for corporations, to allow a more complete investigation of corporate affairs by investigators who suspect criminal conduct. Investigations are sometimes complicated by existing requirements that investigators know beforehand what they are searching for. While we would not endorse giving blanket authority to conduct investigations of corporate operations, we feel that greater freedom may be warranted upon evidence of reasonable suspicion of criminal activities. This may be regarded simply as a price people pay for the privilege of conducting their affairs as a corporation.

Corporate Responsibility

Corporate responsibility involves imposing criminal liability on a corporation for acts performed by individuals on its behalf. We are not, of course, interested in acts of individuals that are so remote from their duties with the corporation as to amount to the personal

conduct of those individuals. The salesman who assaults a customer during working hours would normally be regarded as acting in a personal capacity, not in his capacity of company employee. Yet many of his acts, for example overcharging a customer, may be related to his corporate duties, especially if the benefits flow into company coffers, not into his own pocket. At the same time, if a security guard employed by the same corporation assaults a customer while on duty the relationship between his conduct and his normal duties with the corporation may be a matter for careful consideration. The kind of offence committed is never a controlling factor.

The first step in imposing corporate responsibility, then, lies in attributing the "act" or conduct of the individual to the corporation. The incorporated group can only act through its members, agents or employees and in our opinion it is reasonable to take a broad view and to regard the conduct of any of these, in the course of their duties with the corporation and for the intended benefit of the corporation, to be conduct of the corporation.

But is this enough to justify imposing criminal responsibility on the corporation? Can we simply look to the conduct of the employees and impose responsibility on the corporation on that basis? What if the corporation responds that the employee's conduct was unauthorized, unknown to management officials and occurred despite efforts to prevent it? *It seems reasonable, in our view, that if criminal responsibility is to be placed on corporations, the harm resulting from the action or inaction on the part of people within the corporation should be related to the policies that are adopted by the corporation to achieve its objectives, the practices that may become accepted within the corporation, or the failure by corporate policy-makers to take steps to prevent its occurrence.* What this introduces, then, is the element of fault.

Fault, in criminal law, has many faces. Some crimes, for example, require only a general kind of intent, an intent to do the particular act described in a criminal provision. Other crimes require intent addressed to the purposes of one's conduct; others require special knowledge. There are also crimes that focus on reckless acts or omissions, which generally require advertance to the risks inherent in certain forms of behaviour. Finally, there are crimes

of negligence. How compatible is the notion of corporate fault with the varying fault elements found in our criminal provisions?

Our principal concern is with "real" crimes, where fault is expressed in concepts like knowledge and intention. Can group knowledge and group purpose be measured so as to satisfy the subjective levels of fault that underlie and find expression in so many criminal laws? Does it make any sense to be talking about corporate responsibility for offences that require subjective fault?

Inevitably, the fault element must be found in natural persons participating within the corporate system. Corporate responsibility must be regarded as a form of collective fault for which the corporation provides the symbolic focus. If this is so, corporate fault, at least on a theoretical level, seems to require that the people sharing policy-making functions share the desire to achieve a certain result, or share knowledge that a particular result is likely to flow from a course of action or from inaction.

Where a single person is responsible for establishing policy in an area, the task is relatively simple. We can look, as the present law does, to his knowledge and intention and conclude, reasonably, that these represent the "knowledge and intention" of the corporation. What we learn about the president of a corporation may, in many cases, tell us much about the corporation itself. But where several people have the responsibility to participate in policy-making it becomes more difficult to determine the precise knowledge of each, whether it was transmitted to others, and whether they agreed on the purposes reflected in the group decision. To talk of corporate responsibility for crimes of intention in these cases, then, often involves a fictional process. It may involve our presuming that the knowledge or intention of a single person is representative of all those involved in policy-making within the system. It may involve the corporation being held criminally responsible for knowledge and criminal intention held by one element of the decision-making process that does not represent criminal intention in other elements of the process.

If we are to have corporate responsibility for crimes involving knowledge and intention we see no alternative but to rely on fictions to give expression to the fault element. *Corporate responsibility would be imposed for acts and omissions of corporate agents and*

employees where it appeared that the acts or omissions were tied to policy choices made by someone to whom important decision-making functions had been delegated. Put in these terms, our view of corporate responsibility, at least for "real" crimes, would be broader than that accepted in the present law, which focuses more on the position of the offender within the corporation than on the relationship between his conduct and the goals of the corporate system.

Because of the difficulties involved in linking an employee's or agent's conduct to the knowledge and intention of those responsible for setting policy in various areas of a corporate operation, *we feel it may be necessary to reverse the burden of proof to place on the corporation the onus of satisfying the court that conduct alleged to constitute an offence was not supported by the knowledge or intention of appropriate corporate officials.* This would mean that if the court was satisfied beyond a reasonable doubt that the alleged acts took place, and the inference a reasonable person would draw is that the acts must have been known to management, the court could convict. It would fall to the corporation to raise the issue of actual knowledge, and to rebut the inference by calling witnesses to show that those responsible for policy in the area of activity in issue did not actually know what was going on and therefore did not intend the result.

While this would represent a departure from usual procedures in the criminal trial we do not regard it as unwarranted, given the fact that we are dealing with issues that involve information that may only be available to those within the organization. It merely attempts to achieve a workable compromise between principle and expediency in a difficult area. And while we were reluctant to make a similar suggestion earlier in the paper when considering the question of individual responsibility for "real" crimes, our reluctance was based on traditional views of individual liberty which, we feel, diminish somewhat when dealing with corporate defendants.

A procedural implication of a reverse onus provision would become apparent in joint trials of corporations and their officers and employees. The right of a corporation to select trial by jury would probably have to be curtailed so as not to prejudice the position of individual defendants who selected that mode of trial. This

would allow for the exclusion of the jury if individual defendants chose to testify solely on behalf of the corporation. Quite apart from this reason, it may be necessary to reconsider the desirability of jury trials for corporations. Juries are primarily important in safeguarding individual liberty. They have already been excluded from trials of corporations under the *Combines Investigation Act*, and the complexity of the corporate criminality issue may warrant shifting the question of guilt exclusively to the trial judge.

When we move away from offences that involve subjective elements like knowledge and intention, corporate fault becomes easier to formulate. In determining whether the policies and practices of a corporation involve negligence there is no need to inquire into the mental processes of corporate policy-makers; it is necessary simply to examine whether corporate conduct measures up to objective standards of care based on notions of reasonableness. To some extent, then, the idea of corporate responsibility is more comfortably associated with regulatory offences, which do not require the clear personal wrongdoing that is necessary if criminal responsibility is to be imposed for "real" crimes.

But should corporate criminal responsibility for regulatory offences involve the idea of fault at all? If so, are there special problems that must be faced in establishing corporate fault for these offences? These questions raise the difficult issue of strict liability, to which we turn next.

Corporate Fault and Due Diligence

In *The Meaning of Guilt* we recommended that regulatory offences need not contain the *mens rea* element we associate with "real" crime. At the same time, we affirmed the need for a minimum standard of culpability, negligence, and recommended that a person alleged to have committed a regulatory offence should always be given the opportunity to show that he exercised due diligence to prevent its commission.

We carefully refrained, however, from deciding whether the same standard of culpability should apply to corporations. We noted that values we were attempting to reinforce through the due

diligence defence—liberty and humanity—were perhaps less important in relation to corporations than natural persons. We left this question to be examined in a more complete discussion of corporations and the criminal law.

While we do not wish to reiterate the considerations we discussed in reaching our conclusions in *The Meaning of Guilt*, it may be useful to point out that we emphasized the competing interests of justice and expediency. On the one hand we felt it was unjust to convict defendants who were not at fault; on the other hand we could not ignore the interest of society in the efficient enforcement of criminal law.

When looking at the interests of justice the function of the regulatory offence must be stressed. It is used to create standards of care that will prevent certain harms and imposes penalties on those who do not comply with those standards. These penalties may be substantial, since many regulatory offences will involve the risk of serious injury and their breach is a matter of considerable importance.

What if, in the course of a corporation's business, a regulatory offence is breached despite the exercise of all reasonable care? To penalize the corporation despite the fact that it has met the objectives of the regulatory scheme can only be seen as unjust. It is no less unjust simply because the defendant is a corporation rather than a natural person. The adjudication continues to reflect upon conduct, albeit group conduct, and basic fairness requires that those who stand behind the corporation be allowed to explain why a finding of guilt ought not to be made.

In this regard, it is perhaps important to note that there is a distinction between regulating and the regulatory offence. There are many regulatory tools besides criminal offences, for example licensing, inspection and taxation. One might also impose as part of a regulatory scheme the obligation to bear the financial risk of certain kinds of injuries. A corporation might be made strictly liable to compensate people for injuries attributable to certain activities without violating the principles we have espoused in *The Meaning of Guilt*. What is important is that where the law adopts an offence framework requiring an admission or denial of guilt and attaches a penalty, basic fairness requires the right to establish

the absence of guilt. *As long as we attempt to deal with situations by prohibiting behaviour, the issue of culpability is one with which the law should deal.*

From the standpoint of justice, then, we do not favour a concept of corporate responsibility that has as its basis vicarious liability without fault, and we would be reluctant to see this continued in our criminal law. Apart from being unjust it could lead to incongruous results. Liability could be imposed on a corporation for an act of its employee without regard to the fact that the employee may have done all he could to prevent the offence and that the corporation may have set in motion a system to prevent the result that occurred. Accepting the recommendations we made in *The Meaning of Guilt* for individuals, it is clear that if the employee had been charged he would have had a defence. It appears to us to be incongruous that his employer should, nevertheless, be held responsible despite an absence of control over the result that occurred.

It is when we move away from justice and into the area of expediency that problems arise. First, does the fact that liability is not strict affect the capacity of the regulatory offence to be enforced? And is this more apparent in the case of group offenders, like corporations, than in the case of natural persons? There can be little doubt that the question of due diligence is more difficult when assessing conduct within an organization than when assessing the conduct of a single individual. With an individual we need simply to ask whether he took all reasonable care to avoid the result. With a corporation, however, we have a difficult preliminary question—who, of the many people operating within the corporate framework, had the responsibility for exercising reasonable care on behalf of the corporation? How does the exercise of due diligence, or the lack of it, manifest itself?

To some extent we face the same question here that arose earlier in our discussion of corporate fault for “real” crimes. The failure to exercise due diligence, like corporate fault, must be attributed to the corporation through those responsible for corporate policy.

The diffusion of responsibility within corporations having complex organizational structures makes it difficult to determine

whether due diligence has in fact been exercised, particularly where there is evidence of an unsuccessful effort to set standards to avoid harm. Was the preventive action taken by those whom a court would regard as having primary responsibility for exercising due diligence? Perhaps the matter should have been dealt with at a higher level of the management structure. Were the standards effectively transmitted to those whose conduct caused the actual breach? Perhaps the man on the assembly line had not been informed of the procedures. Were the standards conscientiously enforced within the corporation? Perhaps there was a tacit understanding that sanctions would not be imposed by the employer on employees who failed to follow the procedures laid down.

Consider, for example, the large corporation that owns and operates a chain of stores. Suppose it establishes training programs for its store managers, provides supervision and prescribes explicit procedures. Nevertheless, because a manager is negligent in supervising his subordinates the system fails to prevent an offence. Has the corporation exercised due diligence? At what level of management does negligence fail to ground corporate responsibility? Does the due diligence defence mean that the more centralized the authority within the corporation the less likelihood there will be of convicting a corporation for the negligence of seemingly responsible agents?

Extending the due diligence defence to corporations would inevitably raise questions of this nature. While many of the questions are suited to judicial decision-making and would simply require courts to look behind formal policies to determine the true measures adopted by the corporation to avoid the offence, other questions are of a more basic policy nature. For example, whether the due diligence defence should be excluded where a person to whom supervisory duties have been delegated has been negligent is a policy question that might better be spelled out by the legislation establishing the defence. For the purposes of the due diligence defence in regulatory offences, it may be necessary to take a broader view of who represents the corporation than we are willing to take for the purpose of imputing fault to the corporation for "real" crimes. A specially framed due diligence defence for corporations, therefore, may be necessary.

The due diligence defence would also have an impact on enforcement agencies. It would probably give rise to more contested cases and would require more resources to be devoted to enforcement. Not that investigators would have to search for fault where formerly they did not; the studies we made earlier of the enforcement of regulatory legislation showed that prosecutions are not usually brought unless investigation has disclosed evidence of fault. But even though the burden of raising the issue of fault would fall to the corporation owing to the shift in the onus of proof, there would be a need to meet the explanation offered by the corporation, most likely by documenting a pattern of behaviour to rebut the corporation's claim of due diligence. Not only would this require careful preparation by enforcement agencies, but its effective presentation would seem to depend on a relaxation of existing procedural rules requiring strict proof of alleged conduct. Perhaps departmental files could be introduced in court for this purpose.

Whether considerations like these focusing on the inexpediency of extending the due diligence defence to corporations warrant drawing a distinction between human and corporate defendants is not an easy question. While in *The Meaning of Guilt* we were prepared to sacrifice a measure of expediency for a measure of justice and recommended the half-way position represented in the due diligence defence, we face, with the corporate offender, an additional consideration. Does the fact that no person is singled out for condemnation, when a corporation is convicted, tip the scales away from justice towards expediency? Perhaps. But if, as we shall discuss in greater detail under the heading "Sanctioning the Corporate Offender", the effect of the sanction will be felt by people, and if part of our objection to strict liability is penalizing people without just cause, the interposition of the corporate format may not be a particularly relevant consideration. True, the issue of fault could be raised in the sentencing and dispositions part of the proceeding; but if fault can be put in issue at that stage, why not earlier, before the conviction is registered?

In principle, we think that corporations should be allowed to show that all reasonable care to prevent an offence was taken by officers and employees to whom supervisory responsibilities were delegated. And quite apart from the question of justice, we think

that this defence would serve a useful function by shifting into a public forum the adjudication of standards by which corporations are to be guided. Matters would be brought into the open that are now known only to administrative officials responsible for exercising discretion in the enforcement of these laws. Public enforcement would not only provide valuable information and insight into corporate activities but would also, we believe, promote a gradual raising of standards of care. Most corporations are interested in their public image, and there should be a reluctance to admit that they do not meet the standards exacted by regulatory legislation. The stigma of negligence is not conducive to good business.

In recommending the due diligence defence for corporations we do not mean to be insensitive to fears that are sometimes expressed by administrators responsible for enforcing legislation or to ignore what we have acknowledged to be problems. And we would prefer basing our recommendation on a body of experience that showed that the defence would not frustrate enforcement efforts. But while there are several statutes that presently allow for the defence without distinguishing between natural persons and corporations, there appears to be no useful experience in actively enforced fields, such as trade offences. While an amendment has recently been made to the *Combines Investigation Act* to allow due diligence to be used as a defence for misleading advertising and related offences, the defence is conditioned on immediate corrective advertising by the offender. This may tend to minimize its use and to limit its potential for supplying information for a follow-up study on actual experiences with the defence.

We believe the onus should be placed on those who seek to retain strict liability to make out the case for its retention. And the case should be based not on speculation but on actual experience, suggesting the need, at a very minimum, to enact the defence on a trial basis to obtain the experience upon which more precise recommendations can be based. It may be that experience will dictate the need to modify the defence in some cases if criminal offences are to be retained; or, more appropriately, it may reinforce the need for different kinds of controls for regulating activities primarily carried on by corporations.

Interrelationship Between Individual and Corporate Responsibility

A Case for Corporate Responsibility

An overriding issue remains: why have corporate responsibility at all? Is it not sufficient to rely on the capacity of the criminal law to deal with individuals comprising the corporate system? There are those who will argue that the corporate responsibility approach accomplishes little and that the effectiveness of criminal law in dealing with corporations lies in its use against those who make decisions.

While evidence to support this argument is not readily available, experience tells us that there is some truth in it, at least in terms of the impact criminal law can have on people within the system. There is evidence, for example, that the criminal conviction of business executives in the electrical equipment price-fixing conspiracy case in the United States in the early 1960s had a definite impact on those convicted; whether it had any major effect on the practices condemned in that decision, however, is less clear.

There are at least two observations that can be made in response to this kind of argument. First, the potential impact of convicting a corporation cannot really be measured at this stage of our legal development, since our law does not yet provide a satisfactory approach to sanctioning corporations. This is a matter we deal with later in this Working Paper under the heading "Sanctioning the Corporate Offender". Second, the argument may

not give full scope to the varied demands that arise out of situations involving criminal behaviour within corporations. Looking to corporate responsibility as an alternative, or additional, basis for imposing criminal responsibility in certain cases is, in our view, supported by several considerations.

An initial consideration is that corporate structuring may hinder efforts to deal with responsible individuals within the system. Corporate responsibility offers the possibility of using criminal law in situations where it may be impossible to establish the guilt of any one person. This could occur in complex organizations where sufficient evidence to support a conviction would sometimes be difficult to obtain. The problems of proof we discussed in relation to individual responsibility may well point to the usefulness of a corporate responsibility approach.

Imposing individual responsibility may be hampered as well by the fact that corporate operations can be conducted without regard to jurisdictional boundaries. Some corporations operating in Canada are wholly owned subsidiaries of foreign corporations. There are multi-national firms whose operations cut across state lines. Decisions affecting the Canadian operations of some corporations are, therefore, frequently controlled from outside Canada. Individuals upon whom we may wish to impose criminal responsibility will not always be amenable to our criminal process. In some cases, enforcement can be frustrated by the fact that the criminal activity of the individuals concerned occurred outside Canada and did not amount to an offence under Canadian law. Even where the activity can be characterized as a crime under Canadian law, our extradition treaties, which do not presently cover many categories of economic crime, may not be effective to prevent those outside Canada avoiding the application of Canadian criminal law. Our ability to deal with situations such as these in terms of the corporation may, therefore, prove advantageous, especially if the impact of the sanction can be transmitted indirectly through the corporation to people who cannot be dealt with directly.

A second consideration is that the individual responsibility approach does not really allow us to make a judgment about a process, only about the isolated act of an individual or the joint acts of several individuals operating within the corporate framework. If it

is the cumulative efforts of a group that have led to a particular result; and if it is the system within which these people function that has encouraged behaviour that is inimical to the value structure we support in our society, perhaps we should be able to evaluate the behaviour in group terms as well as, or perhaps instead of, individual terms. The conduct may simply have more meaning as a group effort than as individual acts. The conduct of an individual may be significantly over-shadowed 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.

And to the extent that our concern with corporate and group behaviour is with the impact of the process on our society, imposing corporate or group responsibility may be more representative of that concern than simply imposing responsibility on individuals. A corporate responsibility approach would not only shift the emphasis onto the social obligations of people acting collectively, but would also provide a higher level of visibility to the conduct in question, serving to protect the public from exposure to the risks of harm involved in the process. To prosecute a corporate retailer of bad meat may do more to put the public on notice than to prosecute the sales manager.

A third consideration relates to efficiency. In a society moving increasingly towards group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that harm does not materialize through the conduct of people within the organization. Rather than having the state monitor the activities of each person within the organization, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level. Clearly, enforcement measures and sanctioning flexibility play major roles in the success of this approach, and these are matters that will be dealt with in more detail under the heading "Sanctioning the Corporate Offender".

Considerations of efficiency also relate to the ability of courts to respond positively to criminal behaviour. The authority to deal with corporations in the sanctioning process may enable courts to respond more creatively to the needs of victims of criminal behaviour. Suppose a company president is charged with fraud, some of the benefits of which have accrued to the corporation. A corporate responsibility approach would extend authority to the court to make a restitution order requiring the corporation to restore losses. While, as a general proposition, we disapprove of using the criminal process to resolve disputes that can be handled adequately within the civil process, we also recognize that by restricting criminal responsibility to individuals we would in some cases be forcing victims into expensive civil proceedings to recover losses inflicted upon them by proven criminal acts perpetrated through, and benefiting, corporations.

While these considerations offer support for a flexible approach to criminal responsibility—allowing responsibility to be imposed on individuals, on the corporation or on both—there is a significant argument that can be made for excluding corporate responsibility for “real” crimes and for limiting its use to regulatory offences. If, as we have suggested, the primary purpose of “real” criminal law is to reinforce behavioural patterns supporting fundamental values, it is important to consider whether dealing with corporations in that law contributes to that purpose. The emphasis on fault in “real” crime suggests that its purpose can best be achieved by using the process against natural persons, and that convicting a corporation of a crime like fraud or theft may do little to promote values. After all, values really concern moral choices made by people, and whether an approach that de-emphasizes individual choice and looks at conduct from a group perspective is consistent with the theoretical position we have taken on “real” crimes causes us some difficulty.

On the other hand, the different perceptions that people have of “the corporation” make it hard to be doctrinaire about the role of corporate responsibility in the promotion of social values. There are those who regard the corporation as merely symbolic of a process of interaction among people, and who would see corporate responsibility as a way of making a definite moral statement about

the conduct of those people. Others would view the corporation as a personality separate from those involved in its processes; and, by these, a criminal law that convicts little people but not large corporations may be perceived not only as unfair but also as ambivalent towards the values our criminal law is used to support. For many people, then, corporate criminal responsibility may work towards the reinforcement of important social values reflected in our "real" criminal law.

We are reluctant, therefore, to make a recommendation that would exclude corporate criminal responsibility for "real" crimes, although the difficulties we have stressed in analysing the basis of corporate fault, and in attempting to reconcile corporate responsibility with the broad goals of criminal law, cause us to have reservations about its place in our law of "real" crimes.

Maintaining a Balance

It is sometimes objected that corporate responsibility shifts responsibility away from, and therefore insulates, people who function within corporations; that it simply provides a shield for irresponsibility in corporate decision-making. To the extent that this is a criticism of having in our criminal law an optional basis for dealing with corporations, we cannot agree. Certainly under our present law there is little evidence to support the criticism, at least as a broad proposition. True, there are areas of criminal law, for example, offences under the *Combines Investigation Act*, where charges have principally been laid against corporations. But Criminal Code offences are usually enforced against individuals, not corporations, despite the freedom under our law to proceed against corporations. Where corporations are charged with offences like fraud, normally it is in conjunction with proceedings against individuals operating within the corporation.

Present practices, it would seem, largely reflect the way in which offences are described, the historical relationship of the legislation to matters of criminal law, the prosecutor's view of the degree of culpability of individuals within the corporation, the

extent to which individuals derived direct benefit from the wrongdoing, and the multitude of tactical problems that necessarily bear upon the issues: problems of proving the elements of the case; of witnesses or potential defendants outside the jurisdiction; of key documentation outside the jurisdiction; and of evidentiary rules that would prevent key testimony being given by individuals if charged personally.

While it is impossible to predict the precise effect on charging practices that would follow the implementation of changes suggested in this Working Paper (for example, what the impact of imposing a reverse burden of proof on corporations charged with "real" crimes would be) we doubt that they would stimulate a major shift of emphasis from people to corporations. We feel the factors just outlined would continue to influence discretionary choices by prosecutors. If anything, it may be more reasonable to suppose that the importance we have attached to people within corporations would add support to what we sense is a growing emphasis, perhaps more so in the United States than in Canada, on the individual responsibility of people participating in corporate affairs.

Clearly our intention is not to support an approach to criminal responsibility that will permit corporations to serve as a shield for corporate wrongdoing. Corporate responsibility is not designed to provide a parallel, on the criminal side, to the notion of limited civil liability. We stress this point because we realize that it may be impractical to restrict corporate responsibility by legislation to specific categories of corporations, and that this necessarily creates a basis for imposing criminal responsibility on all kinds of corporations, whether large complex organizations or one-man operations, whether business corporations or charitable ones, whether legitimate on-going concerns or those used to further criminal objectives. Corporate responsibility must be kept within reasonable limits, particularly if employed in respect of "real" crimes. Normally, for example, corporate criminal responsibility should not replace individual responsibility where criminal acts are committed in the course of activities carried on by small organizations, where there is a clear association between the individuals and the corporate framework in which they operate. Nor would it normally be appropriate to deal, on a corporate responsibility basis, with "shell" cor-

porations that are formed or taken over to provide a vehicle for fraud. The corporation may have no substance and may exist on paper only. Here emphasis should be placed on the individuals who make use of the corporation, not the corporation itself.

What might prove to be of assistance in maintaining a proper relationship between individual and corporate responsibility are formal guidelines to assist those laying charges and prosecuting offences. Guidelines might reflect the kinds of considerations we have raised in supporting a corporate responsibility approach as well as in cautioning as to its use. Publication of such guidelines, a step we have advocated in our Working Paper *Criminal Procedure: Control of the Process*, would tend to minimize the risk of abuse and reduce the apprehension of those concerned about the possibility of undue emphasis on corporate responsibility.

It should also be pointed out that a decision to proceed against the corporation may simply defer the imposition of responsibility on individuals. The effectiveness of the criminal law against corporations depends on compliance by people within the corporation. Where a corporation refuses to pay a fine or to live up to its agreement to make restitution or to conduct its activities in a stipulated manner, the law must react. One possibility, of course, is to tie up corporate property, a traditional, but sometimes cumbersome, way of dealing with the problem. A second possibility is to proceed against individuals within the corporation who are in a position to see that the sanction imposed by the court is complied with. In our view, the latter is an appropriate measure and *a corporate sanction should include a designation of personal accountability at the time it is imposed*. This is sometimes done under our present law, but it should become standard practice. At least in terms of responsibility for future conduct, then, corporate responsibility does imply the responsibility of individuals within the system.



Sanctioning the Corporate Offender

While we have up to this point focused on issues of individual and corporate responsibility, our treatment of sanctions will be restricted to corporations. Our series of papers on *The Principles of Sentencing and Dispositions, Fines, Restitution and Compensation, Diversion, and Imprisonment and Release* consider in detail the disposition of criminal cases involving human offenders. We feel that the positions outlined in these papers are sufficiently comprehensive to provide a basis for sanctioning corporate officers, agents and employees who may be found criminally responsible for corporate crimes. Innovative responses, for example restricting the right of the individual to participate in business activities for a specified period, can clearly be accommodated within the broad range of disposition powers we have suggested a court should have.

We turn now to corporate sanctioning.

Observations on the Present System

Using criminal law against corporations requires a means of sanctioning them. Our present criminal law relies heavily on fines. Although the criminal law also provides for restitution orders, and while some legislation, for example the *Combines Investigation Act*, authorizes the use of prohibition orders restricting future activities of a corporation, the fine remains the principal sanction. For serious

Criminal Code matters, indictable offences, the amount of a fine is within the discretion of the court; for less serious matters, summary conviction offences, the maximum is \$1,000. Other statutes impose different maximums; a recent amendment to the *Combines Investigation Act*, for example, has established a maximum fine of one million dollars for certain offences. Others expand the maximum limit by treating continuing offences as separate violations each day the conduct is continued. The broad discretion given to courts applying these provisions necessarily produces variations from province to province, municipality to municipality, court to court and offence to offence.

It is often objected that fines simply don't work. Some people regard corporate fines as insignificant—too small. Others point to discrepancies in the fining practices of courts; in some cases there is little differentiation between corporations and human offenders, and in other cases little between large and small corporations. Total blame cannot be placed on the courts, however. Judges are asked to establish appropriate fines for corporate offenders without any particular expertise in corporate finance and without the benefit of legislative guidelines. To some extent our failure to recognize the degree of expertise necessary to evaluate the financial positions of corporate offenders and our failure to articulate sanctioning objectives precludes us from expecting more of our system of justice than we seem to get.

Discrepancies, of course, are always a problem, and we discussed this in *Working Paper No. 6* in relation to human offenders. There we advocated the day-fine, which would relate an offender's fine to his economic position. The rich person, on this principle, would be fined more than the poor person for the same crime. While the day-fine is designed to operate on fairly simple economic indicators, *the possibility exists of developing a formula for corporations to equalize the marginal deprivation imposed on each corporation by a fine in relation to such factors as profits, total assets, and ability to deflect the impact of the fine.*

This, however, is only one aspect of the problem. What also concerns us about the widespread use of the fine as a corporate sanction is the apparent lack of consistency in objectives. What do courts expect to achieve by fining corporations? In some cases

it is regarded as pure punishment, or as a denunciation of certain activities. More frequently courts seem to regard it as a device for modifying behaviour, stressing the need to deter corporations from their unlawful ways. In other cases, courts seem to be using the fine as a way of divesting the corporation of gains it has achieved through its illegal activities.

This leads us to our first observation: Fining the corporation is one thing; requiring it to surrender its illegal profits is another. To amalgamate what we would view as distinct sanctioning devices is to confuse our objectives. When we look to many of our traditional crimes, take theft for example, the offender is required to surrender the property he has taken from his victim. If a fine is imposed, it is a response that goes beyond our desire to deprive him of his illegal profits, and reflects the view we take of the particular crime he has committed. With many kinds of commercial crime, however, property is removed under circumstances that make identification difficult and entitlement a complex legal issue, with the result that judicial intervention is normally required in separate civil proceedings. Imposing a fine to reflect the value of the profits is done, we suspect, with the knowledge that in all likelihood the victim will be unwilling or unable to bring civil proceedings to deprive the offender of his gains.

Nevertheless, *when fining a corporation, or, indeed, any offender, a court should, in our view, only look at the illegal profits in order to assess the severity of the crime. If the court decides the corporation should, in addition to being fined, be stripped of its profits, and a restitution order has not been made, it should have the authority to treat this as a separate issue and to make an appropriate order.* The amount paid would be the property of the state but could be available to satisfy civil judgments, whether awarded to individual victims or to a class, arising out of the criminal act.

Our second observation is that we must attempt to develop and use innovative methods of sanctioning corporations. We share the concern of many that heavy reliance on fines is not the answer. This development can only take place, however, after clarifying the objectives of imposing criminal sanctions on corporations and after assessing how the group nature of corporate operations can affect the achievement of those objectives.

Sanctioning Objectives

Talking about the objectives of criminal sanctioning is complicated to some extent by the fact that we must deal with both "real" crimes and regulatory offences. Because the function of the criminal law differs with each class, sanctioning objectives are not entirely the same for each. "Real" crimes, we have already observed, deal with fundamental values. Sanctioning objectives are therefore related to reinforcing these values and supporting them in three ways: First, by expressing the serious disapproval with which society regards the conduct. Sanctions that seek to impose punishment, or to inflict financial deprivation, may serve this purpose.

Second, by fostering a society in which the value is actually observed. This may involve deterring the offender and the potential offender from future violations and removing people from positions from which they have the capacity to inflict social harm.

Third, by restoring the status quo to the extent possible, so that the victim, whether an individual or the public, is compensated for the injury that has resulted from the violation.

Sanctioning in the context of regulatory offences has narrower objectives, related primarily to achieving positive results mentioned in the second and third of these objectives.

Social scientists have spent considerable time and effort trying to determine how to deal with human offenders within the criminal process in order to achieve maximum success in relation to the objectives we have outlined. There is still an immense amount we do not know. What, for example, is the psychological impact of the use of criminal law in terms of value support? What is the deterrent effect of criminal sanctions on the offender and on the general public? Our Working Papers on sentencing and dispositions have attempted to deal with the problems of sanctioning individuals, emphasizing the importance of diverting offenders out of the process, encouraging restitutionary settlements and promoting a fining system that makes fines proportionate to economic security. When we approach the problem of sanctioning corporations, however, we are dealing with a different phenomenon; there are a number of features about corporations and corporate activities that

may have a direct bearing upon when they should be brought into the criminal process, and what can be done to them within that process in order to realize the objectives set out above.

Corporate sanctioning is a way of dealing with people collectively. Having chosen to approach a question of responsibility in corporate terms we must deal with people on the basis of their relationship to the corporation. We must sanction the group in the expectation that the effect will be transmitted to those responsible for the behaviour in question. An obvious ramification of corporate sanctioning is that the most prominent of the criminal sanctions, imprisonment, is not available as a way of dealing with offenders. You can't put a corporation in jail! And yet, the limited purposes of imprisonment we suggested in *Working Paper No. 11* are also relevant to corporate sanctioning. Denunciation of conduct may be as appropriate for corporations as for natural persons. This forces us to find different ways of denouncing conduct, possibly by using large fines or adverse publicity.

And where imprisonment satisfies the exceptional need to separate a human offender from the community for the protection of society, different sanctions must be developed to satisfy a parallel need with respect to the corporate offender. It may be necessary to place severe restrictions on the scope of corporate operations, prohibiting corporations from carrying on certain kinds of activities and possibly removing the corporation from the business community altogether, in extreme cases.

Where the major emphasis is on the need to encourage observation of rules by those who participate in corporate activities, we must consider sanctions that have an economic impact on the corporation, perhaps fines or business restrictions, sanctions that are likely to have an impact on those who assert control over corporate decisions. Where we wish to focus on the victim, we must use the resources of the corporation to make restitution for his losses.

Our approach in the remainder of this discussion of sanctions will not be, however, to examine the relative advantages and disadvantages of different ways of sanctioning corporations. While this kind of detailed consideration is essential, it can best take place

in the light of an understanding of more general considerations important to the development and application of corporate sanctions. It is on these that we propose to concentrate.

Implications of the Group Process

The corporation is simply a convenient frame of reference to deal, on a collective or group basis, with the activities of people. A corporation has no greater capacity to feel the impact of the criminal process than to experience a sense of participation in the activities it is alleged to have committed. This suggests two possibilities: First, that imposing group sanctions may raise the risk of treating group members unfairly. Second, that the intended effect of the proposed sanction may be frustrated by the manner in which the group is structured.

(a) *Considerations of Fairness*

Using the fine or some other means of economic attack to punish a corporation, with a view to reinforcing values or perhaps deterring future conduct within the corporation, means that the impact is not going to be felt by the mindless, lifeless symbol we call the corporation. It will be felt by people within the corporate operation who would otherwise have a claim on that amount (the impact may also be felt more broadly by creditors and consumers in addition to, or instead of, those within the corporation, a point we shall deal with later). It will hurt shareholders, who would otherwise be in a position to receive the benefits of this amount, and any employees who are in a position to share in corporate profits.

In our view, principles of fairness require that group sanctions be designed so that the impact will not be felt disproportionately by members of the group who have not contributed to the offence. In some cases, for example a closely-held corporation in which the principal shareholder is the effective decision-maker, there is nothing unfair about the shareholder bearing the brunt of the

corporate penalty. But in other cases this solution is complicated by the wide dispersion of shares. Control over a corporation may be effectively exercised by someone holding a small percentage of them. While punishment imposed upon a corporation and felt by the shareholders as a class will be felt by shareholders exercising control over decision-making, the brunt of the sanction will be felt by investors who have not contributed to the decision leading to the offence. While each investor may suffer only minimally, the result, nevertheless, is that the cumulative effect of the penalties is felt by people who would not, in the eyes of most people, be considered responsible for the conduct in question.

Economic sanctions used in a punitive sense, then, become risks that members of the group in an investment capacity are required to bear. The relevance of this is underlined when it is taken into account that we have distinguished a fine from a judicial order requiring a corporation to divest itself of illegally obtained profits. There the deprivation to investors would simply reflect the unwarranted aggrandizement of their investment interest and would not amount to a disproportionate absorption of the penalties occasioned by the offence.

At the same time, of course, we appreciate that the isolated act for which a corporation is convicted may well be only one of a series of acts that has benefited those same shareholders, substantially reducing any complaint they might have of unfair treatment. Nevertheless, it is arguable that the penalty should be related solely to the conduct established in the criminal proceeding, and that the fairness issue should be discussed exclusively within that context. On this basis, a sanction may be unfair.

We are not suggesting that the possibility of injuring innocent shareholders should be a strict bar to the use of economic sanctions against a corporation. Inevitably, innocent people are hurt by the imposition of any criminal sanction and it may be an unavoidable effect of a choice that achieves the maximum good. We are suggesting, however, that it is an important consideration for a court to take into account; consideration of this factor might point a court in a different direction, perhaps leaving the conviction itself to serve as the value reinforcement element and focusing on other objectives, perhaps restitution, in selecting an appropriate sanction.

(b) *Considerations of Effectiveness*

We are also concerned about the extent to which the group process may frustrate expectations of how sanctions can change the course of corporate behaviour. Take, for example, the question of deterrence. Group sanctions imposed with a view to deterring behaviour assume that the impact of the sanction, or the threat of such impact, will alter the behavioural pattern of individuals within the group. Normally, with a human offender, the shame or embarrassment of a criminal sanction will have an emotional impact and may have some effect on his behaviour. We seriously doubt, however, that sanctions serve this purpose in the group situation. Unless the individual identifies closely with the group image (which is perhaps less likely with respect to business corporations than other groups, for example religious or educational institutions) the impact would seem to be diffused in the course of being transmitted through the group to the individual member. He may simply not view the guilt of the corporation as reflecting on his own moral character.

In terms of influencing behaviour within the group, then, effectiveness is determined primarily by the impact on those in a position to make changes. We must look to the direct impact the sanction will have upon them, usually in an economic sense, or the pressure that can be brought from within the group. To a considerable extent, then, there is a correlation between what is an unfair sanction and what is an ineffective sanction. If a shareholder is punished unfairly, there may be little he can do about the situation.

Where a sanction is felt by shareholders, the structure of the corporation may well inhibit them from directly influencing its course of action. Effective control may be exercised by a few shareholders or by management. If the impact on those in control of the corporation, or the threat of such impact, is not sufficient to make them comply with the provisions in question, there is little likelihood of future compliance by the corporation.

We appreciate that the shareholder upon whom the sanction falls is not totally impotent. Under corporate legislation in Canada there are procedures a shareholder can use, for example calling for judicially appointed inspectors and bringing a derivative action in the courts. But these measures hardly justify criminal sanctioning

techniques that, on their own strength, are incapable of achieving the objectives of the criminal provision they are invoked to support.

In many cases, as well, the shareholder will not even be aware of the sanction, which at the very minimum should be rectified. Positive action might follow if a court were to require, in addition to imposing a fine or other economic sanction, that the corporation inform its shareholders of the nature of the offence, the sanction imposed and a proposal for correcting the situation leading to the offence. Informing the group is perhaps a first step towards internal realignment of objectives.

Another aspect of this question bears consideration, however. Even if, through corporate or individual sanctions, impact is felt by corporate managers, there will be cases where positive effects will be substantially diminished by sub-group and union pressures to resist changes in policy directed by management. While it is difficult to anticipate and to take into account these factors in individual cases, they do suggest further difficulties that may be encountered when the objective is to reshape corporate conduct by putting pressure on the corporate structure.

What these considerations seem to point to is that if criminal sanctions are to be used against corporate offenders for the general protection of society *it may be more effective to concentrate, where possible, on sanctions that directly remove the threat of injury by interfering with the corporate operation than to try to reshape corporate decision-making into a law-abiding model.* If it is felt that the public should be protected, for example, from a corporation that issues misleading advertising, it may be more feasible to require the corporation to conform with a specific court order than to attempt to influence corporate decision-making by sporadic attacks on the corporation's profit goals. Strict judicial or administrative monitoring, or outright banning, of advertising by the offending corporation may be the more effective route where its decision-makers do not seem to be vulnerable to more conventional sanctions. In an ultimate sense, if the corporation poses a real threat to public values, winding up the corporation or placing it under close court-sponsored supervision may be more effective than attempting to influence the behaviour of individual decision-makers

by imposing group economic sanctions. The consequences of this, however, could be so severe that it would have to be regarded as a final threat, to be used only where no other sanction was appropriate.

Corporations and Economic Power

Looking at the corporation as a group has allowed us to identify several considerations that should be taken into account in developing and using corporate sanctions. We now propose to look at the corporation in another aspect, in terms of its control of resources and its position in our economic system.

(a) *Redressing Injuries*

The orientation of corporations towards profit is particularly relevant to our third sanctioning objective, redressing injuries of victims of crime. In *Working Paper No. 5* we discussed restitution and compensation, stressing the importance of involving the offender in a process aimed at voluntary restitution to the victim. This may entail restoring the victim's property or paying him damages. Restitution allows the victim to regain his former position without undertaking costly civil proceedings and encourages the offender to accept responsibility for his conduct and to fulfil a social and private obligation.

While restitution is in many ways suited to economic crime, in which corporations are frequently involved, it is not without its problems. The large number of victims of economic crimes can cause difficulties in processing claims. It is also apparent that many of the injuries suffered by victims are of the *de minimus* variety; they are simply too small taken individually to process economically, even though to allow the corporation to profit would be a gross injustice. As well, corporate action will sometimes affect interests shared by the community as a whole, which may not be tied to rights that our law recognizes to exist in private individuals, and therefore may not support claims to restitution. Finally, estimating losses can place a tremendous burden on a court, especially

a criminal court, and even with specialized assistance the best estimate may only be a vague approximation based on limited factors.

While we acknowledge, then, some real difficulties, we stress the importance of focusing special attention on the need to redress injuries caused by corporate criminal behaviour. *First, we would promote restitution where it has been established that victims have suffered a sizeable loss or where restitution to victims, however small the loss, can be achieved without unreasonable effort.* The unlawful overcharging of customers' accounts, for example, could often be redressed by a relatively simple accounting measure.

Second, where restitution is not sought or a number of victims have suffered minimally, the court should be authorized to estimate the unlawful profits realized by the corporation and order the money to be paid to the state, subject, as we have already suggested, to being used to satisfy judgments awarded in civil proceedings against the corporation. Amounts paid might be placed in a fund from which grants could be administered to suitable public interest organizations to encourage private representation of the interests of those victimized by the unlawful activities of corporations. This would be particularly salutary in view of our recommendation to exclude property claims from the crime compensation scheme outlined in *Working Paper No. 5*, which would be funded through fines.

Third, corporate criminal conduct damaging general interests in resources shared by the community as a whole, like clean air and water, should in some cases attract a judicial order requiring a corporation to pay damages for public injury. Laws framed to safeguard public benefits such as these should authorize courts to impose sanctions that will at least partially compensate for public resources that must be devoted to their maintenance.

(b) *The Corporation in the Economic Matrix*

Imposing sanctions of an economic nature on corporations raises difficult questions because of the position the corporation occupies in a complex economic web. While we can talk about substantial fines, restitution and damages, the effects of the

sanction ramify outside the corporation. Not only must we be concerned about the effects of sanctions from an internal perspective (which we emphasized earlier in our discussion of fairness and effectiveness), we must also be concerned about the broader effects of corporate sanctioning.

Many corporations come into contact with thousands of people who purchase their products and services. Economic sanctions such as fines can be treated in the same way as taxes and business losses, simply as another item to be taken into account in the overall financial picture of the corporation. To the extent that the market will bear an increase in the cost of the products or services of the corporation the economic sanctions will be deflected into the general community. In many cases, then, the sanction is illusory; not only does it fail to provide any stimulus to behavioural change within the corporation, it becomes another of the many factors contributing to a general trend of rising prices.

Not all corporations can pass on fines, however. For some there will be a real impact, especially where the fine is imposed in addition to an order directing divestment of illegal profits. And while substantial fines may be regarded as strong deterrents to future behaviour where the corporation is truly affected, the community impact cannot be ignored. A severe jolt to the corporation's financial position may cause investor confidence in the corporation to falter. The corporation may have difficulty obtaining the necessary resources to expand its operation or even to continue on its existing level of activity. This may affect creditors, whose position may become threatened, employees who may be laid off, potential employees who might otherwise have been hired, service industries who respond to the demand placed on the community by the presence of the corporation, and the general community whose demand for the services of the corporation may be unfulfilled.

To some extent, this kind of impact occurs whether the criminal process is used or not. Civil remedies, especially damage awards, have a similar impact and some of the sanctions we have suggested here simply complement the civil process in returning to victims what is rightfully theirs. Many of these sanctions, however, go beyond this. Fines, damages, and certain restitution orders will require corporations to pay sums not directly reflected in

revenues related to the illegal activity. Other sanctions we have alluded to, such as adverse publicity, interferences with the right to do business and the ultimate sanction, winding up the corporation, may have even more serious impact on the related economy than pecuniary sanctions.

We do not mean to suggest that corporations should not be sanctioned where this would have adverse economic effects on the community; or that marginal operations are entitled to an immunity not shared by more prosperous concerns. We do think, however, that guidelines for sanctioning corporations should direct law makers, who might otherwise opt for a limited range of sanctions, or for mandatory sanctions, and judges, who might otherwise take an easier route to sentencing, to pay special attention to the character of the corporation as a component of our economic system.

Negotiated Sanctions

The considerations we have raised here do not exhaust the subject of corporate sanctioning. What we are presenting is simply a starting point for viewing the corporation as something more than "a person with money". Sanctions traditionally associated with the criminal law may not always work. Sanctioning objectives such as punishment and deterrence, for example, may have to become secondary to compensatory objectives in some cases, simply because a corporation may not be as responsive to sanctions that support the former objectives.

We have tried to describe a framework within which a difficult balancing process takes place, a framework that would necessitate a more sophisticated process than presently exists. Considerable information about the corporate operation would have to be provided to the court, and expertise would have to be made available to assist the court in evaluating the impact of the sanction on the corporation and the community in which it operates. These are problems for which we cannot offer detailed solutions at this time.

We do suggest, however, that some of these problems might be alleviated through a voluntary process of negotiation between

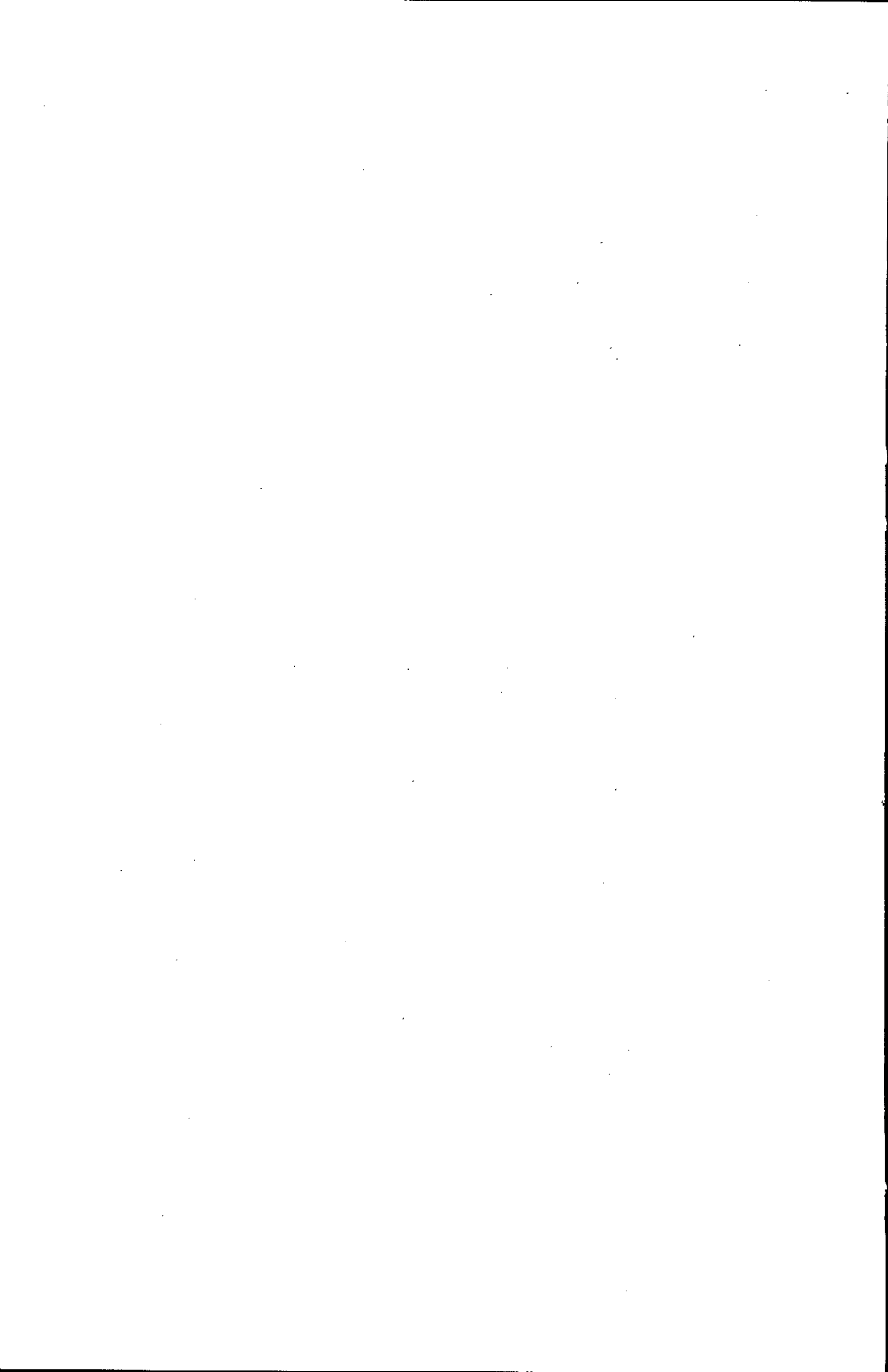
corporate offenders and victims, with a view to a consensual sanction that would not only provide restitution to victims but would see corporate managers accept procedures to eliminate future violations. Success of this approach would require a willingness by corporations to negotiate with sufficient openness to permit an assessment of what it could and could not reasonably do in the context of the larger economic picture. In many cases it would also require that public interest groups be permitted to participate in the negotiations to represent victims. The role of the court would be limited to one of final arbiter to settle disputes and to approve the final disposition of the matter. The court might also reserve the right to impose supervision over the fulfilment of the terms of the agreement.

The approach we have outlined might be taken at either of two stages in the criminal process. While we have been concentrating on ways of sanctioning a convicted corporation, *there is no need to restrict negotiation to the post-trial stage. It may well be that the matter can be handled effectively at the pre-trial stage.* We have repeatedly emphasized in our Working Papers the importance of restraint in using the criminal law, and in our Working Paper *Diversion* we encouraged several programs to remove from various stages of the criminal process cases that can be dealt with effectively in other ways. In particular, we stressed pre-trial settlement as an alternative to trial. A process of negotiation would bring the offender and victim together to work out a suitable agreement that might include, for example, restitution and an undertaking as to future conduct. Rather than having a formal adjudication of guilt, the ends of justice would be served by extracting an acceptance of responsibility from the offender and an agreement to comply with the terms of the settlement.

We think that many corporations charged with criminal offences would be prepared to participate in negotiations outside the criminal process rather than become involved in a criminal trial. Much, of course, depends on the offence, on the penalty likely to be imposed on conviction and on the projected cost to the corporation of complying with the proposed settlement. It is important to emphasize, however, that *we do not see negotiation simply as a matter of settlement between corporations and our law enforcement*

agencies, which we fear could deteriorate into a "judgment by consent" situation. The process might then simply become a matter of convenience, a way of dealing with problems with a minimum of effort for both sides, taking the path of least resistance to a solution that may simply amount to a licence fee for doing business. The role of the victim, then, is vital. And it is important that public interest organizations be given the opportunity to participate in diversionary settlement proceedings where it is shown that they have the capacity for, and a legitimate interest in, the representation of victims or, in appropriate cases, the public. Without representation of this sort, negotiations would be weighted heavily in favour of the corporations.

We do not wish to create the impression, however, that the corporate offender should automatically be diverted from the criminal process in consideration of its willingness to compensate its victims. Clearly there are cases where this would be an abuse of process. An offender should not simply be allowed to pay compensation for crime and ignore its other implications. Our diversionary proposal contemplates that the Crown prosecutor would be given discretion to decide whether any useful purpose would be served by proceeding to trial or whether justice would substantially be served by treating the matter as one for out of court settlement.



Group Criminal Responsibility in a Wider Context

While our focus has thus far been on corporations, we indicated in the introduction that we have a broader interest in group processes. We have emphasized corporations because of the wide range of their activities, because of their importance to the economy and because of potential conflicts between their interests and those of the public.

The corporation is only one mode in which groups carry on activities, however. People carry on business without incorporating, in sole proprietorships and partnerships, for example. Workers have sought an outlet for joint expression in labour unions. People group together in unincorporated structures such as clubs and associations. They act jointly in political forums such as town councils and Indian band councils, and in fulfilling the statutory functions of administrative bodies such as labour relations boards. And, indeed, people act collectively within the structures of "organized crime".

While there are diverse groups with differing organizational structures and purposes, the kind of analysis we have brought to bear on notions of individual and corporate responsibility and on sanctioning objectives and techniques may be of value in looking at questions of criminal responsibility in other group situations. If criminal law does have a role to play in regulating group behaviour and in preventing the risk of certain kinds of social injury, it would be arbitrary to restrict this role to corporations. Some groups are involved in the same activities as corporations. While corporations may dominate business activities, they do not totally monopolize them. Partnerships and sole proprietorships are involved in the same

activities, yet are not generally recognized as entities by our criminal law. Apparent as well is the competition between corporations and government where government, through its Crown corporations, has moved into traditionally private sectors of the economy such as housing and product merchandising. Is it not reasonable that group considerations that promote the role of corporate responsibility should promote a group responsibility approach in these cases as well? And shouldn't considerations that underlie our approach to individual responsibility for participation in corporate conduct have corresponding importance with respect to unincorporated groups and public corporations? We believe they should.

The scope of a general concept of group responsibility would, of course, be limited by the relationship between the activities of certain kinds of groups and the propensity of the state to prescribe regulatory controls. When we move outside business organizations we find that the potential for criminal responsibility for group activities changes, and the likelihood of involving voluntary associations or unincorporated clubs in the criminal process is perhaps more remote. But the potential is there; such organizations may become involved, for example, in illegal games and lotteries. Labour unions may engage in unlawful assemblies or illegally withdraw services. Even government agencies and departments may be involved in activities that violate criminal laws, those relating to environmental protection, for example.

Is it rational to draw the line at corporations, or should we apply the approaches we have outlined to other forms of organization? Let us examine for a moment three considerations that might be raised as possible bases for distinguishing corporations from other groups for purposes of criminal law.

First, the legal personality that attaches to corporations. While this may partly explain the development of corporate criminal responsibility, we do not regard it to be of major significance. In our view, the most important characteristic of incorporation, from a criminal law standpoint, is that it provides a way of defining a group and of identifying people and activities in relation to that group. But there are other devices besides incorporation that provide this definition. Labour unions can be defined by constitutive documents and frequently are given official recognition through

certification proceedings; partnerships are based in formal agreements and again have formal recognition through government registration. Clubs and associations are definable by constitutive documents and in some cases have recognition for official purposes.

Our focus on the importance of definition does, however, suggest practical limits to the use of group responsibility. The fact that some groups do not have status as lawful organizations and are regarded as criminal conspiracies inhibits our capacity to recognize them as groups. The shroud of secrecy that surrounds organized criminal activities, for example, precludes the kind of group definition that is necessary if we are to consider this kind of criminal action in group terms.

Second, the complexity of corporate structures. This, too, is an unrealistic way of distinguishing between corporations and other groups. We have already indicated that corporate structures vary tremendously and that corporations run the gamut from the one-man operation to the multi-national firm. While our concentration on corporate criminal responsibility was prompted by our sense of need to develop responses to action taken by larger corporations, we cannot discount the fact that some large firms that are not incorporated are considerably more complex than many corporations. The majority of corporations are, after all, closely-held and small.

Third, the capacity of corporations to hold property. In our view this is another tenuous basis for differentiation. Imposing group responsibility does not require that the group hold property in its name. While the capacity of corporations to hold property is obviously helpful in sanctioning a corporation, since a fine or restitution can be paid out of property "owned" by it, the fact that the property is held by the corporation is not, in our view, essential. Groups, though not incorporated, may have a common fund. Pecuniary sanctions can be related to the state of the fund so that the financial position of the group, not that of its members, can be taken as the basis for sanctioning. The technical question, who "owns" funds in a strict legal sense, is not of principal concern in criminal sanctioning, especially if there is a residual authority to deal with the members individually where the sanction is not complied with.

We have difficulty, therefore, in accepting formal incorporation as a relevant factor for delimiting the application of criminal responsibility to group processes. The considerations we have raised supporting the use of criminal law against corporations are often equally applicable to other groups, such as partnerships and labour unions. However, we have not considered all the implications of imposing group responsibility on groups other than corporations. Consequently, while our general conclusion is that notions of group and individual responsibility for collective conduct should not be restricted to corporations for purely technical reasons tied to corporate status, we recognize that a more detailed examination might reveal valid reasons for not imposing group responsibility in respect of the activities of certain groups. Further consideration must be given to the roles played by different groups in society to determine whether these roles are compatible with control through the criminal law, especially in relation to the problems of group sanctioning.

Criminal Responsibility for Corporate Action—A Limited Role

We have concentrated in this Working Paper on developing a framework for criminal responsibility and for corporate sanctioning, accepting the criminal law as an appropriate vehicle for responding to society's need to control group processes. But when we look at the demands that group process control makes on our legal system we see that criminal law, or at least the kind of criminal law we are prepared to recommend, is limited by its objectives, which, as we have seen, entail value reinforcement and the achievement of a measure of regulatory control of what corporations do.

Even in terms of its objectives criminal law is largely limited by the kind of instrument it is. Because it stresses fault and employs formal procedures and rules of evidence as restrictions on state power, as we believe it should, it sacrifices some measure of efficiency. And because criminal trials focus primarily on single acts, they cannot fully evaluate and respond to broad courses of conduct undertaken within corporations. While offences like criminal negligence do require an examination of patterns of conduct, and while the due diligence defence does tend to shift attention away from single incidents to overall practices, the emphasis remains on interpreting an isolated act to determine whether fault can be associated with it. Criminality is evaluated in terms of the act referred to in the criminal charge, and sanctions, whether fines, restitution, damages or specific directives as to future conduct, are necessarily related to the criminal act in issue in that proceeding.

The criminal trial, then, is not really a suitable forum for re-organizing a corporation's structure or reforming its business practices. While there are many creative measures that could be introduced through a more flexible sanctioning system than we presently have, the criminal trial is not inherently a regulatory device and simply provides a medium through which selective responses can be made to proven deviant acts.

But even with a higher capability in our criminal courts for dealing creatively with corporate behaviour, to use the criminal law as a primary vehicle for controlling corporations would be largely ineffective. Some situations may prove to be simply too large, or perhaps too politically charged, to allow for adequate resolution through the criminal law, especially where they involve large corporations delivering essential services. It may be necessary, if effective action is to be taken to protect the public interest, to submit the entire corporate operation to scrutiny in a special inquiry, and to look to remedies like nationalization or trusteeship. Again, the limited ability of the criminal process to examine the overall course of conduct of an organization, and to reshape organizational patterns, forces us to rely on other methods of control.

On another level, criminal law is difficult and expensive to enforce, and at best responds sporadically to unlawful conduct. While it is impossible to estimate the level of effectiveness of criminal law in this area, our impression from discussions with people involved in the investigation and prosecution of corporate criminal activities is that enforcement only touches the tip of the iceberg. Among many reasons for this are the lack of sufficient enforcement resources; the secrecy surrounding some corporate activities; the lax enforcement of laws that require information to be supplied; the need for greater expertise in investigation; the time taken up in single investigations and trials; and the difficulties involved in documenting cases that will meet standards of proof required in criminal trials. But the most significant reason may well be the sheer size of the problem. Many of the offences prescribed in our statutes and regulations are not founded on a common morality; either they do not have meaning to many of our citizens or the attitude is simply that if they can't be enforced they

are not to be regarded as law. And Parliament has created so many offences that, at best, efforts must be concentrated on the enforcement of serious ones, and even then on a selective basis. Setting rules and trying to catch those who break them is simply not, we think, an efficient way of achieving compliance with regulatory goals.

Some laws, of course, are easier to enforce than others. Those whose breach has a high visibility factor, such as Sunday closing laws, can be detected readily; and if prosecuted diligently in the courts and enforced through sanctions that make it economically unsound to violate them as a matter of practice, success can perhaps be achieved through the criminal law. But with less visible activities, securities' law violations, for example, the sophisticated investigation that is necessary lowers significantly the risk of detection. And the lower the risk of detection the lower the chances that a criminal penalty will outweigh the benefits flowing from a pattern of behaviour that violates the law. And while, obviously, a threat of a jail sentence for a corporate executive will be more of a deterrent than the prospect of a corporate fine that can simply be passed to the consumer, neither will have much impact if there is little chance of being caught.

We are not suggesting that criminal laws can never have an effect in the absence of diligent enforcement. Clearly in some cases they can. Many businessmen do conform to laws simply because they are there. Many offences only formalize what are good business practices in any event. But with offences that are not founded in business ethics or common morality, expectations of compliance seem to be rooted firmly in the capacity of the law to be enforced. We can, of course, increase our enforcement capability. We could pass laws requiring greater openness of corporate operations. More resources could be devoted to enforcement. But even with significant improvement in these areas, criminal law would still be an inefficient way of promoting compliance with public interest goals. Without a level of surveillance that would infringe upon our respect for privacy, and without harsh responses that would violate our democratic traditions, we do not see the criminal law model being effective as a primary approach.

Of course the criminal law does not operate in a vacuum. Controls are provided through other legal techniques, and the challenge of group process control is really one of melding a variety of approaches into a body of law that will encourage responsible decision-making. We use, and should perhaps encourage increased use of, economic incentives to influence policy choices within corporations through conditions imposed in tax concessions or government grants. We also make use of other administrative techniques, such as setting and enforcing standards for carrying out certain activities, and licensing those who wish to engage in them. Even here, of course, standards and conditions require enforcement if they are to be effective, but the problems are less difficult than those of the criminal process. Demands for information within an administrative framework can be justified in terms of program efficiency and regarded as less of an infringement of liberty than similar demands within a criminal process. Inspections can be made. Adjudication can be less formal, and attention can be focused on a course of conduct within a corporation rather than on isolated acts. Administrative orders can be issued quickly, to force non-conforming practices to be curtailed; questions of criminal responsibility are largely irrelevant where an activity threatens to injure people or destroy property, and one of our most important needs is a legal basis upon which governments can intervene swiftly to stop harmful practices and to seize injurious products. Where sanctions are necessary they can be imposed as administrative penalties without the trappings and stigma of criminal proceedings, subject to being supported in court proceedings. An administrative model offers more scope for using varied approaches to influence corporate behaviour and is therefore a more suitable regulatory vehicle than the criminal law. It is also more helpful than a prohibitory model to corporations who are seeking ways to conform their practices to accepted standards.

Emphasis must also be placed on the importance of internal regulation of corporations. Modern corporate legislation is focusing increasingly on minority shareholders' remedies and directors' obligations. It may be that further consideration will have to be given to more radical proposals like public interest representation on the boards of our larger corporations. And even civil remedies

can prove to be effective techniques for controlling corporations, especially if easier access to civil courts is provided through some of the techniques that appear to be emerging: class actions, for one, and government-sponsored suits on behalf of consumers, for another. Treble damage suits, such as those used in anti-trust legislation in the United States, are another example of civil control although the punitive damages awarded in these suits should be discretionary and based on considerations we stressed in our discussion of group sanctioning.

Civil remedies have the added advantage of providing a more suitable basis than criminal law for compensating people for injuries attributable to corporate activities. While earlier in this Working Paper we stressed the importance of restitution in a scheme for corporate sanctioning, and while we feel this should be a component of a sanctioning scheme in a legal system that emphasizes the use of regulatory offences, we hasten to add that we do not regard it as a satisfactory vehicle for imposing a system of financial responsibility on corporations. Making recovery dependent on the successful mobilization of the criminal justice system is hardly an efficient way of achieving goals related principally to the transfer of wealth. The kind of assessment that must be made is more suited to civil courts, and we would prefer to see these needs satisfied by civil responsibility standards in regulatory statutes.

Of course, to properly evaluate each of these alternative approaches would require extensive research, and we do not presume to do more here than to raise them as possible alternatives that, either alone or in combination, can be equally or more effective than criminal law to support policy choices for controlling corporate action. Some of these techniques are already in use. And while some could be implemented by the federal Parliament, others perhaps could not. One of the problems we face in Canada is that legislative authority is divided under our constitution. Effective ways of handling problems will not always be within the capability of a particular government so that cooperative federal-provincial action may be required if a coordinated approach to corporate control is to be developed.

Different techniques of control are capable, to some extent, of supporting each other, so that the use of administrative controls

like mandatory inspections and compulsory reporting may conduce to more effective criminal controls by increasing the rate of detection and allowing for better documentation of cases to secure criminal convictions. This is especially true where alternative measures are provided in a single statute and coordinated through a central authority. It is less true where jurisdiction is split between federal and provincial agencies, or even between agencies of the same government, although even here coordination of effort is often achieved. It appears, then, that as our capacity to deal with problems in ways other than the criminal law increases, so does our capacity to deal with matters within the criminal law. This forces us to face an important issue: When should we use the criminal law and when should we stress other ways of responding to situations?

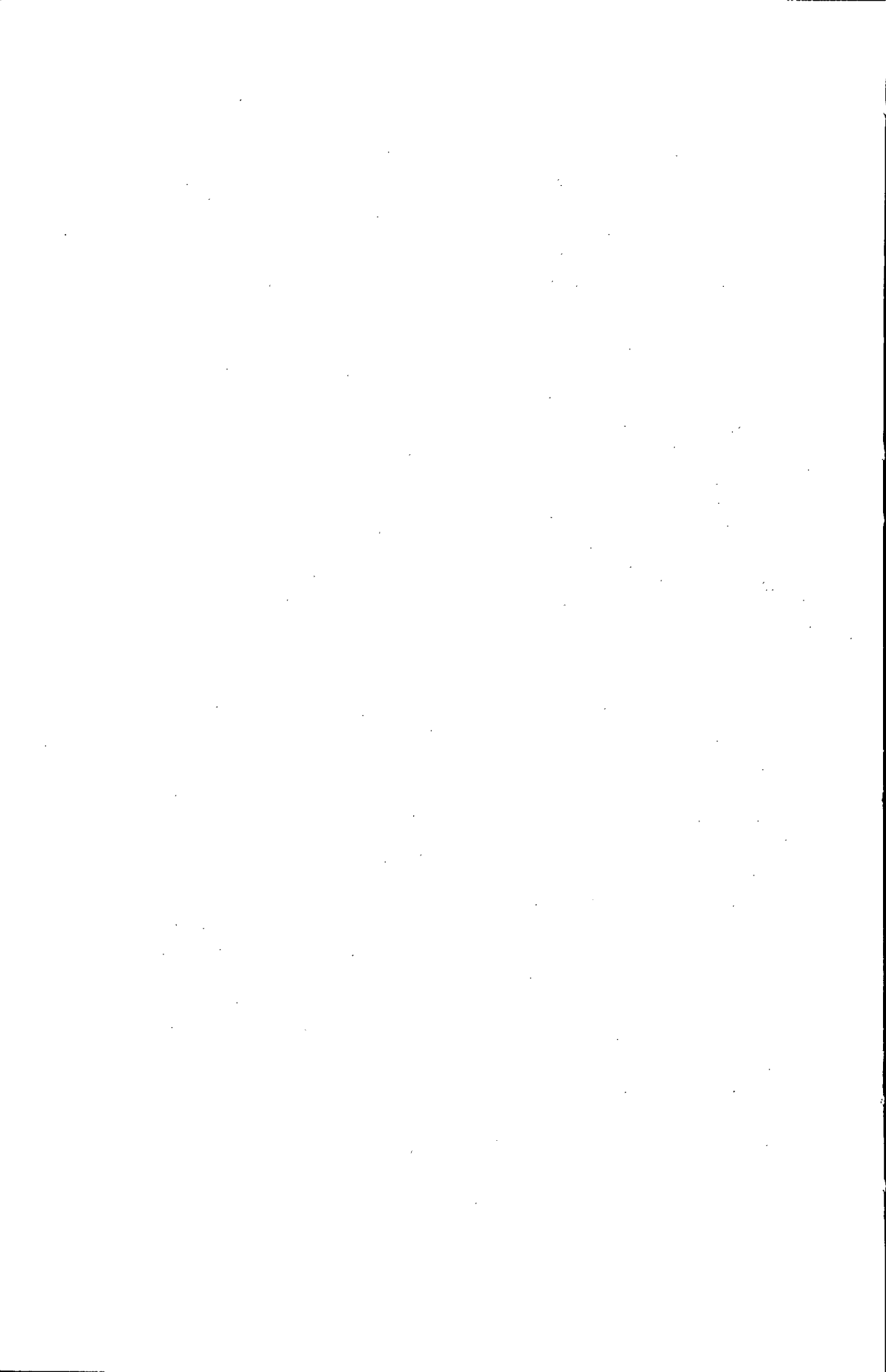
In general, we advocate an attitude of restraint in using criminal law, a position we have consistently taken in our Working Papers. Parliament should consider carefully whether it wishes to add to the proliferation of offences by inserting criminal provisions in new legislation, or whether other measures would be as effective to achieve its goals. And where offences are prescribed, restraint should be exercised in their enforcement so that the criminal process is used principally where other methods have failed to secure legislative goals and where a suitable basis for resolving the problem cannot be found outside it. Criminal law should not be the routine response we make as a society to conduct that does not conform to rules we wish to establish. As a matter of broad policy, therefore, we would encourage the development of alternative measures, placing more emphasis on administrative and civil controls than on criminal ones.

Related to the need for developing alternative techniques for encouraging responsible decision-making within corporations is the need to question why certain forms of criminal conduct occur within corporations. Part of the reason, we have already suggested, may lie in the proliferation of unenforceable legislation. Part of it may lie in attitudes that support different moral standards for business activities than for "every-day" activities. But if some of our corporate crime can be traced to the pressures of operating in a competitive economy—if there is truth in the observation that it

is the businessman under pressure who cheats—perhaps there is a need to look at our business assistance programs as we upgrade our criminal process. Or if, as others have observed, corporate crime is committed by dishonest people who take advantage of our failure to restrict the use of incorporation as a way of organizing, perhaps we should be looking more carefully at ways of limiting access to corporations by those with criminal tendencies.

Nor can we ignore the fact that corporate criminals often feed off other corporations that fail to adopt preventive measures to reduce their susceptibility to fraud. Corporations can be easy victims, and perhaps it is necessary to focus on positive steps to frustrate those who thrive on the failure of corporations to take simple precautions. We raise these points, not to advance theories on why we have “white collar crime” or to advocate measures that should be used to combat the phenomenon, but only to make the point that we should not be diverted, by demands for better criminal law enforcement and for more criminal responsibility, from the need to inquire into more fundamental problems surrounding conduct within corporate institutions.

The success of any approach, of course, whether it be civil, administrative or criminal, is largely dependent on the people who operate within the system, the resources that are made available to do the job, and the political climate within which regulation is attempted. The recommendations we have made in this Working Paper for a criminal sanctioning model are worthless unless people in the system are prepared and equipped to use criminal law effectively. Similarly, administrative controls are useless if they become subjugated to the processes they are designed to regulate. Much depends on societal attitudes towards corporate control and the extent to which positive attitudes are reflected in our political processes. In recommending greater emphasis on administrative and civil controls, then, we do not mean to overlook the fact that these models too have their limitations; we simply point out that the limits of these processes should be exhausted before criminal law is invoked as an ultimate response.



Summary of Main Conclusions

While our general approach is to call for restraint in using the criminal law as a way of regulating corporations and other groups, we cannot ignore the fact that anti-social acts do occur in the course of their activities. If criminal law is to be a respected force in society, it is important that these acts not be treated more leniently than anti-social acts in the streets. To ignore, for example, evidence of fraud or corruption in corporations, to ignore deliberate or even careless action that threatens to destroy order within the economy, can create the dangerous impression that people and groups controlling economic power are beyond the law. The integrity of the criminal justice system, therefore, would seem to demand a basis for assessing group conduct in relation to the behavioural standards we support in the criminal law.

Clearly there is a need for standards of personal accountability, and we have attempted to articulate a basis for criminal responsibility that relates fault to responsibilities actually exercised by people within corporations. People should be held responsible for "real" crimes where they have participated in causing a prohibited harm, either intentionally or with knowledge of the risk that the harm will occur. They should also be responsible if they acquiesce in criminal activities while having the authority to prevent them.

In addition to the criteria set forth for "real" crimes, people should bear responsibility for regulatory offences they participate in without taking reasonable steps to avoid, or where they fail to act reasonably to prevent offences by others they have responsi-

bility to supervise. In short, responsibility for regulatory offences should be based on the negligent performance of duties within the corporation and the onus should lie on an accused to show that he exercised due diligence.

We have taken the position that a corporation should be held criminally responsible for the conduct of its officers, agents and employees causing a prohibited harm if the harm is related to policies adopted by the corporation to achieve its objectives, to the corporation's accepted practices, or to the failure of corporate policy-makers to take steps to prevent its occurrence.

From a practical standpoint, the onus would be on a corporation charged with an offence to show the absence of fault. A corporation could be held criminally responsible for a "real" crime if the facts presented by the prosecution would lead a reasonable person to infer that the acts or the risks in question must have been known to management. The corporation could, however, raise the issue of actual knowledge and call witnesses to show that those responsible for policy relating to the activity in issue did not have the necessary knowledge to warrant the criminal conviction of the corporation.

For regulatory offences the prosecution would only have to prove that the prohibited harm had occurred. But the corporation could raise a defence of due diligence, showing at a minimum that all reasonable care to prevent the offence was taken by officers and employees to whom supervisory responsibilities were delegated.

We have left open to some extent the question whether similar standards should apply to unincorporated groups and to certain classes of corporations (e.g. Crown corporations), but we have stressed that notions of group criminal responsibility need not be restricted to corporations. There is nothing special about the corporation that qualifies it to be held criminally responsible to the exclusion of other group structures. While we have not looked in any detail at groups other than corporations, we believe that the considerations we have raised supporting and limiting criminal law as a means of controlling corporations are relevant in deciding whether to extend criminal responsibility to other groups.

Success with group responsibility in the criminal law would seem to rest largely with the approach taken by courts in sanctioning offenders. More attention should be placed on organizational patterns within corporations. Economic sanctions may fall unfairly on shareholders who have no direct involvement in the criminal activities of the corporation and who may be incapable of taking effective action to change the course of corporate decision-making.

Sanctioning corporations must occur on the basis of a more detailed understanding of economic factors that relate to the commission of the offence and to the effects of the sanction on the corporation and on the community of interests within which it operates. Considerably more expertise must be brought to bear on the sanctioning process if criminal sanctioning objectives are to be realized.

In addition, more attention will have to be placed on the range of disposition options available to courts. While fining corporations for criminal violations is a possible sanction it should not be principally relied on. It is too limited to achieve the full range of objectives of corporate sanctioning, which includes denouncing behaviour, changing behavioural patterns within corporations and compensating victims.

Consideration should be given to formulating a more equitable basis for fining corporations, using economic analysis to adapt the day-fine concept to corporate offenders in order to equalize the marginal deprivation imposed on corporations in relation to such factors as profits, total assets and capacity to deflect a fine.

Fines should not be used to deprive the corporation of illegal profits. A separate sanctioning authority should be available to judges to estimate illegal profits and to order payment.

More attention should be placed on the capacity of corporate offenders to make restitution to victims and to pay damages for injuries inflicted on the general public through the commission of criminal offences. Amounts paid by corporations pursuant to judicial estimates of illegal profits could be used to finance measures to improve the public's protection against corporate abuses.

Further consideration should be given to developing the potential of sanctions like adverse publicity and those that involve

more direct action by the court to counter unlawful corporate activities.

We have also suggested that some of the difficulties facing courts in sanctioning corporations may be alleviated in appropriate cases through experimentation with negotiated sanctions, allowing victims and offenders to voluntarily negotiate a sanctioning proposal for a court to approve. This approach could be adopted after conviction, or, as a diversionary technique, at a pre-trial stage of proceedings.

Our call for restraint, then, does not imply the need to refrain from sharpening the tools of the criminal law to deal with criminal acts that take place in a corporate or group context. Nor does it imply immunity for corporations or corporate executives. It simply reflects our view that there are limits on the extent to which the tools can and should be used and that other approaches seem to provide a greater potential for control over group action.