

THE CRIMINAL LIABILITY OF CORPORATIONS AND OTHER GROUPS

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I. HISTORICAL BACKGROUND

The history of corporate criminal liability has been dealt with in detail elsewhere.¹ In this article, an outline only is presented.

The development of corporate criminal liability represents tension and synthesis in legal concepts. It also represents a response to economic and social fact. It does not represent the application of a developed theoretical response to social problems. The general principle at common law was that corporations were not criminally liable.² That was the rule for several reasons. The most fundamental bar to liability lay in the inability of a corporation to think or act for itself. The corporation was never quite regarded as acting under tutelage;³ it enjoyed certain capacities—the right to sue and be sued in its corporate name, the right to hold and alienate property, and the right to pass by-laws regulating its internal government.⁴ The will of its governing body could be imputed to it.⁵ Yet, until the advent of vicarious liability there was no basis upon which positive acts could be imputed to corporations. Criminal liability could, however, be imposed for omissions causing nuisances.⁶ Liability for misfeasance was a later development, coming under the head of vicarious liability. This provided both a basis for liability and, in the English cases (but not so evidently in the Canadian and American), a limitation thereof. For the historic view was, and is, that there shall be no vicarious liability for serious criminal offences.⁷ In order to

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¹ L. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 1-28 (1969).

² *Case of the Abbott of Home*, Y.B. 21 (1446); C. VINER, 6 *A GENERAL ABRIDGMENT OF LAW AND EQUITY* 309 (2d ed. 1792).

³ Pollock, *Has the Common Law Received the Fiction Theory of Corporations?* 27 L.Q.R. 219 (1911); Maitland, *Introduction* to O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* xxx-xxxi (1900). For a statement of the position which is now generally accepted, see Hart, *Definition and Theory in Jurisprudence*, 70 L.Q.R. 37 (1954).

⁴ W. BLACKSTONE, 1 *COMMENTARIES* 475-76 (4th ed. 1770).

⁵ *The King v. City of London*, 8 St.Tr. 1039, at 1146 (K.B. 1682).

⁶ J. CHITTY, 3 *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 574 (1816); *The Queen v. Stephens*, L.R. 1 Q.B. 702, at 709, 35 L.J.Q.B. 251, at 254 (1866).

⁷ *Rex v. Huggins*, 2 Ld. Ray. 1574, 92 E.R. 518 (K.B. 1730). See Winn, *The Criminal Responsibility of Corporations*, 3 CAMB. L.J. 398 (1929).

surmount this impediment the courts had either to deny that the same rules which applied to natural persons applied to corporations or to distinguish between vicarious liability and personal corporate liability. The former approach involved imputing the acts of directors and officers to the company on the footing that the company could only act through its directors and officers. The latter approach involved selecting some persons on a formal, functional or mixed formal and functional basis as persons whose thoughts and actions could be imputed to the company as thoughts and actions personal to it.⁸

Another inhibition stemmed from the doctrine of *ultra vires*. This was not a difficulty which beset Canadian courts. The doctrine refers to corporate activities beyond its powers and not to the illegal or tortious character of particular acts as such. Indeed, had it been accepted that illegal or tortious acts were *ultra vires* (on the assumption that a corporation has power to pursue only lawful objects) corporate liability for torts as well as crimes would have been impossible.⁹ The *ultra vires* limitation was therefore almost universally rejected.¹⁰

Procedural difficulties also inhibited liability in indictable cases. In England as in Canada an accused had to appear in person. If committal proceedings were held, the accused had either to be committed to prison or released on bail, pending trial. The intangible nature of corporations made this procedure impossible. The solution was to prefer a bill before the grand jury. If a true bill were returned, the matter could be removed from assize to a superior court by *certiorari*. The Criminal Code of 1892 provided that every corporation against which a bill of indictment was found should appear by attorney,¹¹ making it no longer necessary to remove any indictment into a superior court by *certiorari* in order to compel appearance.¹² If a corporation failed to appear, a plea of not guilty was to be entered,¹³ and the court might proceed to try the case regardless of whether the corporation appeared or a plea of not guilty were entered on its behalf in default of appearance.¹⁴ But these provisions did not surmount all the problems. There was some doubt whether the appearance of a corporation to answer a purely summary charge could be compelled, the better view being that it could be.¹⁵ In the case of an indictable offence, the general view before 1909 was that the holding of a preliminary inquiry by a magis-

⁸ See Part II *infra*.

⁹ Note, *Criminal Liability of Corporations*, 14 COLUM. L. REV. 241, at 242 (1914).

¹⁰ *Rex v. Fane Robinson Ltd.*, [1941] 2 W.W.R. 235, 76 C.C.C. 1961, [1941] 3 D.L.R. 409 (Alta. C.A.), and in tort *see Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423, 73 L.J.P.C. 102, [1904-07] All E.R. Rep. 925.

¹¹ CRIMINAL CODE, S.C. 1892 c. 29, s. 635.

¹² *Id.*, s. 636.

¹³ *Id.*, s. 638.

¹⁴ *Id.*, s. 639.

¹⁵ Doubts were expressed in *Ex parte Woodstock Electric Light Co.*, 34 N.B.R. 460, 4 C.C.C. 107 (S.C. 1892). For the better view, *see The Queen v. Toronto Ry. Co.*, 30 O.R. 214, 2 C.C.C. 471 (H.C. 1898), *aff'g Starey v. Chilworth Gunpowder Co.*, 24 L.R.Q.B. 90, 59 L.J. Mag. 13 (1889).

trate was not possible. The practical difficulty was that a corporation could not take advantage of the speedy trial provisions of the Criminal Code by electing summary trial of an indictable offence before a magistrate.¹⁶ This problem was met by successive amendments, each of which gave rise to minor difficulties. By 1939, however, the present provisions of the Code existed, specifying a convenient mode of procedure in all cases.¹⁷

The course of liability can be traced briefly. In 1840, in *The Queen v. Birmingham & Gloucester Railway*,¹⁸ a corporation was indicted for disobeying an order of the Justices, confirmed at Quarter Sessions, directing it to remove a bridge which it had erected over a road and which constituted a nuisance. The court upheld the indictment, holding that the liability of corporations was to be equated, so far as possible, with that of natural persons. Four years later, in *The Queen v. Great North of England Railway Co.*,¹⁹ a company was convicted for a nuisance caused by the misfeasance of its servants, a result made possible by the then recent growth of doctrines of vicarious liability.²⁰ It was, Lord Denman C.J. held, "as easy to charge one person or a body corporate with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission".²¹ Liability for nuisance is a unique offence, criminal in form, but essentially civil in substance. That being so, the court was not prepared to impose liability under the head of treason, felony, offences against the person or perjury—offences that were seen as being violations of social duties pertaining to natural persons.

Another factor, especially important in relation to crimes of omission, must be noticed: the duty not to cause a nuisance was imposed upon corporations. Individuals who executed work amounting to a nuisance could be prosecuted,²² but the primary duty lay with the corporation, whose property might well be destroyed as a result of its breach.²³ In other words, the legal system thus gave practical expression to the view that the corporation was a primary repository of legal rights and duties.

Liability for nuisance was, of course, fully accepted by Canadian courts.²⁴ But so, too, were the limitations upon corporate liability enun-

¹⁶ *Regina v. Corporation of the City of London*, 32 O.R. 326, 37 C.L.J. 74 (H.C. 1900); *Re Chapman*, 19 O.R. 33 (Ch. 1890); *Re v. Standard Soap Co.*, 6 W.L.R. 64, 12 C.C.C. 290 (N.W.T. S.C. 1907).

¹⁷ The history is summed up in *Rex v. Robertson's Bakeries Ltd.*, 43 B.C.R. 377, 55 C.C.C. 163 (C.A. 1931), and *Rex v. Foothills Recreation Ass'n*, [1941] 1 W.W.R. 298, 75 C.C.C. 179, [1941] 2 D.L.R. 203 (Alta. C.A.).

¹⁸ [1842] 3 Q.B. 223, 11 L.J. Mag. 134.

¹⁹ [1846] 9 Q.B. 315, 16 L.J. Mag. 16.

²⁰ See W. HOLDSWORTH, 8 HISTORY OF ENGLISH LAW 472-79 (1925). C. FITZGERALD, JUDGE AND JURIST IN THE REIGN OF VICTORIA (1959) contains a good general discussion of the topic.

²¹ *Supra* note 19, at 326, 16 L.J. Mag. at 18.

²² *Rex v. Medley*, 6 C.&P. 292, 14 Digest 43 (K.B. 1834).

²³ *The Queen v. Great North of England Ry. Co.*, *supra* note 19. See also *Kentucky v. Pulaski County Agricultural & Mechanical Ass'n*, 92 Ky. 1971, 17 S.W. 442 (1891).

²⁴ *Regina v. Corporation of the City of London*, *supra* note 16.

ated by English courts.²⁵ Clarke's *Criminal Law*²⁶ barely mentions corporate liability. Curiously, perhaps, the Parliament of Canada was less reticent. The Criminal Code of 1892 made it punishable for a corporation, being bound to supply a municipal corporation with electric light, power, gas or water, to wilfully break such contract to the detriment of the inhabitants.²⁷ It is also fascinating to note that the original Combines Act, prohibiting as misdemeanours conspiracies for limiting facilities for transportation, restraining commerce, limiting production, hindering competition and the like, provided higher maximum and minimum fines for corporate offenders.²⁸ In 1906, the Criminal Code defined "person" to include corporation.²⁹

These developments led Canadian courts to consider an extension of liability beyond that obtaining elsewhere in the Empire. In *Union Colliery Co. v. The Queen*,³⁰ the Supreme Court left open the question whether or not "under the present state of the law and its constantly broadening and widening jurisprudence on the subject of the civil and criminal liability of bodies corporate they are capable of committing the offence [of manslaughter]".³¹ The Manitoba courts answered the question in the negative on the sole footing that the only punishment available for manslaughter was imprisonment, a punishment to which a corporation could not be subjected.³² They held that a corporation could be held liable for failing to maintain a bridge in a safe condition, a matter sounding in non-feasance and negligence. Similar liability was imposed in *Rex v. Canadian Allis-Chalmers Ltd.* in 1923.³³ The charge was one of causing grievous bodily harm by the negligent operation of heavy machinery, contrary to section 284 of the then Criminal Code. Personal negligence was imputed to the corporation. A 1905 case held that a corporation could be convicted of conspiracy in restraint of trade contrary to section 520 of the Criminal Code, 1892.³⁴ The seal upon the development of corporate personal liability was set by *Rex v. Fane Robinson Ltd.*³⁵ in 1941, a case in which a corporation was convicted of conspiracy to defraud and obtaining money by false pretences. The decision is noteworthy not only for the general principle of corporate liability which it contains, but also for its clear statement of the nature and operation of the doctrine of identification, founded upon *Lennard's Carrying Co. v. Asiatic*

²⁵ *Rex v. Master Plumbers & Steam Fitters Co-operative Ass'n*, 14 O.L.R. 295, 12 C.C.C. 371 (C.A. 1907).

²⁶ S. CLARKE, A TREATISE ON CRIMINAL LAW AS APPLICABLE TO THE DOMINION OF CANADA 169 (1872).

²⁷ S.C. 1892 c. 29, s. 521(2).

²⁸ An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade, S.C. 1889 c. 41, s. 1.

²⁹ R.S.C. 1906, c. 146, s. 2(13).

³⁰ [1900] 31 S.C.R. 81, 4 C.C.C. 400.

³¹ *Id.* at 90, 4 C.C.C. at 409.

³² *Regina v. Great West Laundry Co.*, 13 Man. R. 66, 3 C.C.C. 514 (K.B. 1900).

³³ 54 O.L.R. 38, 48 C.C.C. 63 (C.A. 1923).

³⁴ *Rex v. Master Plumbers & Steam Fitters Co-operative Ass'n*, *supra* note 25.

³⁵ *Rex v. Fane Robinson Ltd.*, *supra* note 10, at 235, 76 C.C.C. at 196, [1941] 3 D.L.R. at 410 (Ford J.A.).

*Petroleum Co.*³⁶ (examined below). It is appropriate to note that corporate criminal liability was imposed in Canada before it was imposed in England and with a clarity which the English cases lacked.³⁷

It should also be noted for the sake of completeness that vicarious liability was applied to companies on the same footing as it was to any other employer. This meant that, where appropriate, vicarious liability could be imposed for crimes involving intent—for example, offences under liquor licensing statutes.³⁸

One may ask whether the imposition of personal liability upon corporations rested upon policy or upon dialectic. It seems probable that both factors influenced the result. The English courts, in imposing liability for nuisance, plainly desired to curb giant repositories of economic power.³⁹ American combines legislation also sprung from this desire.⁴⁰ Liability for various forms of criminal negligence plainly sought to compel corporate employees to take greater care. Liability for fraud, by contrast, has an aura of dialectic about it. These differences probably reflect the way the courts think of corporations—as persons, as vehicles for enterprise, or both—and the stress they give to the particular characteristics perceived. This topic is dealt with in greater detail in a later portion of this study.

II. PERSONAL LIABILITY UNDER EXISTING CANADIAN LAW

Canadian courts, in dealing with personal corporate liability, have taken pains to differentiate such liability from vicarious liability. The accent has been upon the corporation as person rather than the corporation as vehicle. This gives a dialectical flavour to the law. The merits of this approach have later to be evaluated. It must, however, be borne in mind as this part of the study proceeds.

A. *Entities liable*

In Canadian as in English law, the sole entity to which liability could be ascribed at common law was the corporation, since it alone was regarded as a person capable of being a repository of rights and obligations. (Under the Quebec Civil Code,⁴¹ a partnership is a legal entity, and vicarious criminal liability has been imposed upon a partnership.⁴²) Exceptions to the general principle have of course been made by statute. Thus a ship may be

³⁶ [1915] A.C. 705, [1914-15] All E.R. Rep. 280 (H.L.).

³⁷ See LEIGH, *supra* note 1, at 31-40 (1969).

³⁸ *Rex. v. Piggly Wiggly Canadian Ltd.*, [1933] 2 W.W.R. 475, 60 C.C.C. 104, [1933] 4 D.L.R. 491 (Man. C.A.); *Regina v. Teperman & Sons*, [1968] 2 O.R. 174, [1968] 4 C.C.C. 67 (C.A.).

³⁹ *The Queen v. Great North of England Ry. Co.*, *supra* note 19, at 327, 16 L.J. Mag. at 18.

⁴⁰ See W. BALDWIN, *ANTITRUST AND THE CHANGING CORPORATION* (1961).

⁴¹ QUE. CIVIL CODE, art. 1838 (1974).

⁴² *Prices Bd. v. Côté*, [1947] Que. C.B.R. 795, 5 C.R. 237.

prosecuted for marine pollution.⁴³ Extensive liability may be imposed against, inter alia, trade unions and employers' organizations for violations of the Canada Labour Code.⁴⁴ Liability under sundry other statutes also exists.⁴⁵ While such statutory provisions are few, it is by no means clear that this should be so. It is open to argument whether more extensive liabilities should be imposed upon unincorporated bodies. The Model Penal Code contains provisions to this effect.⁴⁶ The matter is dealt with later in this study.⁴⁷

B. *Persons in respect of whose actions liability may be ascribed*

We here deal with the doctrine of identification. The history and development of the doctrine of identification has been dealt with elsewhere,⁴⁸ and it is not proposed to do so again in detail. Briefly, corporations could in general be held liable civilly on ordinary doctrines of vicarious liability.⁴⁹ Under certain legislation, such as the Merchant Shipping Act 1894,⁵⁰ the owner, in order to be held liable for certain categories of loss, had to be guilty of personal fault. The courts were ultimately faced with the problem of ascribing personal fault to corporate shipowners; this they did by developing the doctrine of identification, by which the fault of certain persons could be ascribed to a corporation as its personal fault. The ambit of search was conventional; the language in which the conclusion was couched was not.

The doctrine was elucidated in *Lennard's Carrying Co. v. Asiatic Petroleum Co.*,⁵¹ a case involving a claim for fire loss, as a defence to which the company urged that the loss arose without its actual fault or privity. The constitutional argument, that a company could not be guilty of actual fault or privity, was not made. The defendants argued that for the purpose of liability in negligence only the board of directors could be identified with the company and that the person at fault here was the managing director, who carried on the greater part of the company's business. The board of directors was unaware of the unseaworthy nature of the vessel concerned. In rejecting the company's argument, Viscount Haldane stated:

My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

⁴³ See ss. 752-761 of the Canada Shipping Act, as amended R.S.C. 1970 (2d Supp.), c. 27, s. 3(2), and *Regina v. The Vessel "Aran"*, 9 C.C.C. (2d) 179 (B.C.C.A. 1972).

⁴⁴ R.S.C. 1970, c. L-1, s. 9.

⁴⁵ E.g., Pension Benefits Standards Act, R.S.C. 1970, c. P-8, s. 20(5); Alien Labour Act, R.S.C. 1970, c. A-12, s. 2.

⁴⁶ AMERICAN LAW INSTITUTE, MODEL PENAL CODE, s. 207.3 (1962).

⁴⁷ See text at Part V, *infra*.

⁴⁸ LEIGH, *supra* note 1, at ch. 7.

⁴⁹ *Citizens' Life Assurance Co. v. Brown*, *supra* note 10.

⁵⁰ 57 & 58 Vict., c. 60 (1894).

⁵¹ *Supra* note 36.

That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.⁵²

Lord Dunedin spoke of a company being truly represented by one director to whom its business was in fact entrusted.⁵³

The House of Lords thus examined the control structure of a limited company in order to determine how a statutory provision which spoke in terms of personal liability could be ascribed to it. The search essentially was to determine who initiated policy within the corporation. It took account of the then modern development of the office of managing director, which was becoming the most important single position in corporate management.

The English courts did not consciously apply the doctrine of identification in criminal cases until the last decade.⁵⁴ In Canada a similar doctrine began to emerge, seemingly quite independently, as early as 1923. In *Rex v. Canadian Allis-Chalmers Ltd.*,⁵⁵ Rose J., in considering whose negligence might be imputed to a corporation as negligence personal to it, plainly saw the problem as one of personal liability. The corporation could not therefore be held liable for the negligence of a subordinate employee.

What the rank or position of the officer or employee or other agent would have to be in order that his negligence might be deemed to be that of the corporation cannot be stated generally; what would be said in the case of a "one man" company might be quite inaccurate in the case, say, of a railway company whose lines extend across a continent; but in every case the evidence must be such as to justify a finding that the company—the employer—was negligent, or there can be no conviction.⁵⁶

In *Rex v. Fane Robinson Ltd.*,⁵⁷ Ford J.A. consciously applied the *Lennard's* case in order to establish that corporate liability was truly personal liability and that a corporation could personally entertain the mens rea necessary for liability for criminal conspiracy. Thereafter, Canadian courts applied the doctrine of identification with some fidelity.⁵⁸

Much development of the doctrine has taken place. On a narrow view, a corporation should only be held personally liable for the acts and intent

⁵² *Id.* at 713, [1914-15] All E.R. Rep. at 283.

⁵³ *Id.* at 715, [1914-15] All E.R. Rep. at 284.

⁵⁴ See the judgments of Lords Reid and Dilhorne in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153, [1971] 2 All E.R. 127 (H.L.), and the authorities cited in LEIGH, *supra* note 1, at 37-40.

⁵⁵ *Supra* note 33.

⁵⁶ *Id.* at 46, 48 C.C.C. at 74.

⁵⁷ *Supra* note 10.

⁵⁸ *Rex v. Ash-Temple Co.*, [1949] O.R. 315, 93 C.C.C. 267 (C.A.); *Regina v. Elec. Contractors Ass'n of Ontario*, [1961] O.R. 265, 27 D.L.R. (2d) 193 (C.A.); *Regina v. Vedejs*, [1972] 1 O.R. 570, 5 C.C.C. (2d) 552 (Prov. Ct., Crim. Div. 1971). See also *The Queen v. H.J. O'Connell Ltd.*, [1962] Que. C.B.R. 666, which appears to employ tests indistinguishable from vicarious liability, and the criticism thereof by Yarofsky, *The Criminal Liability of Corporations*, 10 MCGILL L.J. 142 (1964).

of organs of the corporation—those persons who, by the constitutional documents of the corporation, are entitled to the primary management of its affairs. This argument has a certain anthropomorphic charm.⁵⁹ It also furnishes a neat, non-discretionary formula, making it easy to distinguish personal from vicarious liability. This strict constitutional formulation has therefore some judicial support.⁶⁰ It would, in general, imply that a corporation could only be held personally liable for acts or omissions which are brought home personally to the corporation through one of its governing organs—the board of directors, the managing director or the general meeting.

The difficulty with this formula is that it does not fit the case of the large, decentralized corporation in which decisions of importance may well be taken by middle-range managerial officers who are answerable only in some ultimate sense to board members. These considerations led the English courts in *The Lady Gwendolen*⁶¹ to extend the doctrine to persons other than directors, where such a person is one to whom the owner has extended all relevant powers of control. In general, there is a disposition in England to employ a “responsible officer” formulation which, while now founded on the doctrine of identification, is not restricted by considerations of strict constitutionalism.⁶² As Lord Reid stated in *Tesco Supermarkets Ltd. v. Natrass*:

But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.⁶³

In Canada, in the leading case of *Regina v. St. Lawrence Corp.*,⁶⁴ Schroeder J.A. reached a similar conclusion. Liability is not imposed *respondeat superior*; however,

if the agent falls within a category which entitles the Court to hold that he is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason thereof. It should be added that both on principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied.⁶⁵

⁵⁹ Consider, for example, the formulation of the principle by Denning L.J. in *H.L. Bolton (Eng'r) Co. v. T.J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159, [1956] 3 All E.R. 624 (C.A.).

⁶⁰ *E.g.*, *Tesco Supermarkets Ltd. v. Natrass*, *supra* note 54, at 199-201, [1971] 2 All E.R. at 155-56 (Lord Diplock).

⁶¹ [1965] 2 All E.R. 283, [1965] 3 W.L.R. 91 (C.A.); see also note by Leigh, 28 MODERN L. REV. 584 (1965).

⁶² *See, e.g.*, *Regina v. Andrews Weatherfoil Ltd.*, [1972] 1 All E.R. 65, [1972] 1 W.L.R. 118 (C.A. 1970); *Regina v. Sporle*, [1971] Crim. L.R. 706.

⁶³ *Supra* note 54, at 171, [1971] 2 All E.R. at 132.

⁶⁴ [1969] 2 O.R. 305, 5 D.L.R. (3d) 263 (C.A.).

⁶⁵ *Id.* at 320, 5 D.L.R. (3d) at 278.

This is an impeccable statement of the doctrine of identification as it is applied in Canadian courts. It has been followed as such.⁶⁶

Certain aspects of the doctrine deserve emphasis. The doctrine of identification is a doctrine of ascription—i.e., of ascribed liability. The conditions for ascription are therefore matters for determination by the courts. We are not dealing with inherent qualities of one sort or another. The ascription is performed for a purpose: to impose personal liability. Therefore, the doctrine must be formulated upon conditions which enable personal and vicarious corporate liability to be adequately differentiated. This, given a discretionary formula of the character employed in Canada, is not easy, but it is possible. The test essentially stresses the autonomy of the director or officer within the sphere of activity in which he operates. Inevitably there will be cases in which the same set of facts could support either personal or vicarious corporate liability (assuming that the offence could be committed vicariously).⁶⁷ This possibility of blurring is inevitable if the test is to fit the realities of the large decentralized corporation.⁶⁸ The reasons for differentiating between personal and vicarious liability are partly dialectical and partly founded on policy, i.e., the desire to impose personal corporate liability rather than vicarious liability in a situation stemming essentially from a failure to supervise officers, agents and employees. A broad test is in part dictated by the view that ignorance by top management of the criminal activities of subordinates is often founded on expediency. This concern, it may be noted, underlies some of the American cases as well. Canadian courts stress function rather than form. The question is not whether the relevant human actor occupies a particular place within the corporation, but whether, whatever his title, he exercises substantially autonomous powers in respect of a significant aspect of the corporation's activities. Thus, as Schroeder J.A. pointed out in *Regina v. St. Lawrence Corp.*,^{68a} a company with branch offices in territories widely separated from its head office can have directing minds in the several territories. It is, however, not clear whether the doctrine of identification operates in respect of a person who, while in fact manipulating the company, occupies no formal position in it.

There is a further and more difficult question as to whether identification is essential in crimes of intent or criminal negligence involving omissions. Is it enough to show that an omission causing the harm occurred, or must this, together with a state of mind, be attributed to a responsible officer? The *Allis-Chalmers*^{68b} case suggests that such attribution is necessary. Later

⁶⁶ *Regina v. Vedejs*, *supra* note 58; *Regina v. Hamilton Harvey Ltd.*, 6 C.C.C. (2d) 566, 5 C.P.R. (2d) 248 (B.C. Ct. 1972); *Regina v. Waterloo Mercury Sales Ltd.*, [1974] 4 W.W.R. 516, 27 C.R.N.S. 55 (Alta. Dist. Ct.).

⁶⁷ See, e.g., *James & Son Ltd. v. Smee*, [1955] 1 Q.B. 78, [1954] 3 All E.R. 273.

⁶⁸ This is recognized in *Regina v. St. Lawrence Corp.*, *supra* note 64. There are some striking statements in recent American cases: see *W.T. Grant Co. v. Superior Court*, 100 Cal. Rptr. 179 (App. Dep't Super. Ct. 1972); *Commonwealth v. Beneficial Fin. Co.*, 275 N.E. (2d) 33 (Mass. Sup. Ct. 1971); see further R. GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* (2d ed. 1961).

^{68a} *Supra* note 64.

^{68b} *Supra* note 33.

authority holds, however, that it is enough to show that the established practice of the corporation amounted to criminal negligence.⁶⁹ This seems reasonable. If in every case of negligence it was necessary to show that some high officer had direct knowledge of the situation in respect of which negligence is alleged, grave difficulties of proof could arise. There is no ready solution at common law to the problems posed by intentional or reckless omissions, where the relevant state of mind must be shown to render the omission culpable. It would seem appropriate to legislate specifically to meet the problem. The matter is dealt with further in this article in connection with liability for manslaughter.⁷⁰

It is thought, despite American authority to the contrary,⁷¹ that a dishonest purpose cannot be ascribed to a company where no responsible officer has knowledge of dishonesty, but where several such officers have elements of knowledge which, if blended together, would disclose dishonesty.⁷²

C. Conspiracy

It is plain that corporations can be convicted of criminal conspiracy. There are circumstances, however, in which this could not appropriately be done. If the only alleged conspirators are the corporation and, for example, the managing director who acted for the corporation, it is submitted that no conspiracy should lie. The reason is that the same person cannot be identified with the corporation as its mind and also be regarded as an independent conspirator. Nonetheless, in *Regina v. Electrical Contractors Association*,⁷³ the Ontario Court of Appeal held that a charge of conspiracy between a corporation and its controlling officer would lie. The court reasoned that the officer acted in two capacities and that a conspiracy could exist between two capacities of the same mind. This result is to be deprecated. Conspiracy requires two minds, and as was said in an English case, it would be "artificial to take the view that the company, although it is clearly a separate legal entity, can be regarded here as a separate person or a separate mind . . .".⁷⁴ The same principles should apply if a committee of directors or the board of directors were charged with conspiring with their company. A conspiracy charge should, however, be possible where a director acting on his own behalf or on behalf of another company conspired with the managing director or the board.⁷⁵

⁶⁹ *Regina v. Can. Liquid Air Ltd.*, 20 C.R.N.S. 208 (B.C.S.C. 1972).

⁷⁰ See text at note 95 *ff. infra*.

⁷¹ *Inland Freight Lines v. United States*, 191 F.2d 313 (10th Cir. 1951).

⁷² *Cf. Armstrong v. Strain*, [1952] 1 K.B. 232, [1952] 1 All E.R. 139 (C.A. 1951). See also THE LAW COMMISSION, WORKING PAPER 44, para. 39(d) (1972) which comes to the same conclusion.

⁷³ *Supra* note 58.

⁷⁴ *Regina v. McDonnell*, [1966] 1 Q.B. 233, at 245, [1965] 3 W.L.R. 1138, at 1148 (Assizes Ct.).

⁷⁵ See further *Rex v. Martin*, 40 Man. R. 524, [1933] 1 D.L.R. 434 (C.A. 1932); *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3rd Cir. 1960); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952).

Can parent and subsidiary corporations, each of which is a separate legal entity, conspire together? Canadian and American courts hold that, provided each has a separate organization and its own management, such corporations can conspire together.⁷⁶ However, where a business organizes itself in separate departments of one entity rather than formally separate entities no conspiracy lies between such departments.⁷⁷ The result is artificial, turning upon matters of organizational framework rather than criminal policy. On one view it would be preferable to look upon a group of corporations subject to common control as being an enterprise entity, the members of the group being therefore incapable of conspiring with one another.⁷⁸ Conspiracy charges against individuals in the employ of one or more companies in the group would remain possible. Most such cases have arisen in relation to anti-trust laws, and the U.S. Supreme Court has usually allowed conspiracy charges between parent and subsidiary without much regard for the above distinctions.⁷⁹ The emphasis has been on enforcing the statutes preventing restraint of trade. It is thought that Canadian courts would probably stress the separate legal entity principle and uphold charges of conspiracy between corporations under common control, *i.e.*, as in the parent-subsidiary or group situation.

D. *Course of employment and corporate benefit*

In *Regina v. St. Lawrence Corp.*,⁸⁰ Schroeder J.A. as noted held that the agent with whose actions the company is to be identified must be acting within the scope of his authority, express or implied. This is a reasonable limitation on the doctrine of identification. The real problem is whether a corporation should be held liable *simply because* the agent was acting within the scope of his authority or in the course of his employment. In other words, is this consideration not only a necessary but also a sufficient condition of liability? The problem arose in an English case, *Moore v. I. Bresler Ltd.*,⁸¹ where the court held a company personally liable for conspiracy to defraud H.M. Customs and Excise, notwithstanding that the false information was submitted to the customs agent by the company's officers as a cloak for their own fraud on the company. Canadian authority holds that in such circumstances the wrongful acts cannot be imputed to the com-

⁷⁶ *E.g.*, *Regina v. Dominion Steel & Coal Corp.*, [1956] O.W.N. 753, 116 C.C.C. 117 (H.C.); and see *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259 (1951).

⁷⁷ *Poller v. C.B.S., Inc.*, 284 F.2d 599 (D.C. Cir. 1960).

⁷⁸ See, *e.g.*, Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947).

⁷⁹ For an exception, see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 82 S.Ct. 1130 (1962).

⁸⁰ *Supra* note 64.

⁸¹ [1944] 2 All E.R. 515 (K.B.).

pany as acts personal to it.⁸² The result seems appropriate if the law is cast in terms of personal liability. However, if the aim of corporate liability is precisely that of vicarious liability, *viz.*, the transfer of a policing function from the community at large to an employer, it seems less so. And, indeed, in vicarious liability cases, "corporate benefit" and the question whether the corporation employed "due diligence" may give rise to a clash of principles in a particular case.⁸³ The question whether a corporation exercised "due diligence" to prevent the commission of an offence could, one must note, arise in one of two ways. It could arise as part of an evidentiary showing that the acts in question were not committed with the complicity of the board of directors. This would be appropriate where corporate personal liability is in issue. It could also arise as a substantive defence, provided for under statutes creating vicarious liability offences. This aspect of the problem is dealt with below.⁸⁴

E. *Ultra vires*

Little space need be devoted to this topic.⁸⁵ As was previously explained, the doctrine of *ultra vires* refers to the capacities of a company incorporated under the enabling provisions of Companies Acts or under a special act of Parliament. Acts performed to attain objects which fall outside corporate capacities are *ultra vires*. Acts which are performed in the pursuit of the proper objects of the company are *intra vires* even though they may constitute torts or crimes. Thus the only real problem arises in respect of illegal acts performed in relation to such *intra vires* activities. Some Canadian authority holds, rightly or otherwise, that the doctrine of *ultra vires* does not apply in crime.⁸⁶ New Zealand⁸⁷ and American courts reach the same conclusion. The latter, however, start from the premise that the doctrine of *ultra vires* is an agency limitation on the power of directors and does not affect corporate relations with third parties.⁸⁸ On the other hand Eng-

⁸² *Regina v. J.J. Beamish Constr. Co.*, [1966] 2 O.R. 867, at 883, 59 D.L.R. (2d) 6, at 22 (H.C.), citing Welsh, *The Criminal Liability of Corporations*, 62 L.Q.R. 345, at 359-60 (1946). *Regina v. St. Lawrence Corp.*, *supra* note 64, at 316-19, 5 D.L.R. (3d) at 274-77, cites the English cases without qualification and without adverting to the point.

⁸³ See, *e.g.*, *United States v. Harry L. Young & Sons*, 646 F.2d 1295 (10th Cir. 1972).

⁸⁴ See text between notes 141 and 148 *infra*.

⁸⁵ For further examination of this topic, see LEIGH, *supra* note 1, at 46-51. On *ultra vires* and letters patent companies generally, see STUDIES IN CANADIAN COMPANY LAW chs. 7-8 (J. ZIEGEL ed. 1967).

⁸⁶ *Adams v. National Elec. Tramway & Lighting Co.*, 3 B.C.R. 199 (1893); *Le Barreau de Richelieu v. Saint-Jean Automobile Ltée*, [1957] Que. C.S. 310.

⁸⁷ *Blunden v. Inhabitants of Oxford Rd. Dist.*, 20 N.Z.L.R. 593 (C.A. 1901); *Northern Publishing Co. v. White*, [1940] N.Z.L.R. 75 (C.A. 1939).

⁸⁸ *Joplin Mercantile Co. v. United States*, 213 F. 926 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915); *Massa v. Wanamaker Academy of Beauty Culture, Inc.*, 80 N.Y.S. 2d 923 (New York City Ct. 1948); *United States v. Mirror Lake Golf & County Club, Inc.*, 232 F. Supp. 167 (D. Miss. 1964); *Florida v. Shouse*, 177 So.2d 724 (Fla. Dist. Ct. App. 1965). In general, see G. HORNSTEIN, 2 CORPORATION LAW AND PRACTICE s. 565 (1959).

lish,⁸⁹ Australian⁹⁰ and some Canadian courts⁹¹ have suggested that a corporation cannot be held liable in tort for ultra vires activities. The sensible response would be to clarify the matter by legislation since it is impossible to predict whether ultra vires will be seen as a limitation on contractual power or as a general limitation on corporate powers. A further reason for legislation is that, if ultra vires is a limitation to criminal liability, the limitation would apply unevenly depending on whether the corporation was incorporated under letters patent and therefore not subject to the classical rule in all its rigour, or under memorandum and articles. Different results might for example be yielded in Alberta and Quebec.

F. Limitations on liability

Corporations can now be held liable for almost all offences.⁹² Few convictions are for traditional crimes, a circumstance which suggests that prosecutorial discretion ensures that such crimes are charged exclusively to the individuals concerned. Manslaughter apart,⁹³ liability has not yet been imposed for crimes of violence. Nor has it generally been imposed for crimes against the state, or the traditional crimes of dishonesty contained in the Criminal Code. In 1969, I concluded:

In practice liability generally relates to certain types of commercial fraud or violations of regulatory legislation. Those traditional areas of the law in which corporations have appeared as the accused, such as fraud or obscene libel, involved offences closely related to the business activities of the corporation. It seems fair to infer that corporations, in general, are prosecuted only where the offence was closely related to the business affairs of the corporation.⁹⁴

The exceptions to liability, accepted or suggested, are heterogeneous. The first group of exceptions concern offences which cannot by their very nature be committed by corporations. This is a rapidly diminishing category, consisting of crimes like rape, bigamy and perjury. The English Law Commission states:

It may also be asserted with some confidence that there are certain offenses which, by their very nature, a company will never commit as principal, such as bigamy, rape or self-administration of a noxious drug to procure an abortion. Here the individual [*sic*] who participates in the offence as principal, however closely he may be identified with the company, always acts in a personal capacity.⁹⁵

⁸⁹ See LEIGH, *supra* note 1, at 48.

⁹⁰ Egan v. Barrier Branch of Amalgamated Miners' Ass'n, 17 S.R. (N.S.W.) 243 (1917); Williams v. Hursey, 103 C.L.R. 30, at 128-29 (1959) (Menzies J.).

⁹¹ Orchard v. Tunney, [1957] S.C.R. 436, 8 D.L.R. (2d) 273 (Rand J.); Upholsterers Union, Local 1 v. Hankin & Struck Furniture Ltd., 49 W.W.R. 33, 48 D.L.R. (2d) 248 (B.C.C.A. 1964).

⁹² For a list, see LEIGH, *supra* note 1, at 51-52.

⁹³ THE LAW COMMISSION, WORKING PAPER 44, *supra* note 72, para. 8.

⁹⁴ LEIGH, *supra* note 1, at 52.

⁹⁵ THE LAW COMMISSION, *supra* note 72, para. 37.

Section 226 of the Canadian Code is an obvious example of the point.⁹⁶ The Law Commission proceeds to point out that circumstances may make it appropriate to charge a corporation with being an accessory to such offences—"for example if an incorporated marriage bureau were to procure a bigamous marriage, or a director of an incorporated nursing home were to procure an illegal abortion . . .".⁹⁷ In some cases in which a corporation could be charged as principal the prosecution is likely to wish to adhere to personal liability and to charge the human actors concerned. This preference may be based upon considerations of policy, such as deterrence, or upon the view that it is incongruous to charge a corporation with some crimes of violence or burglary.⁹⁸ The former considerations would dictate a general policy of charging individuals. If this were strongly felt, a number of exceptions to liability might be devised, especially in relation to crimes of violence, even though the creation of such exceptions would defy the analytical premises upon which corporate criminal liability rests. The point is not yet academic. Manslaughter by way of criminal negligence and omission is clearly a crime for which corporations may be convicted in Canada,⁹⁹ and as we have seen, sundry other crimes of the same sort have been charged against corporations.

Crimes of violence involving acts of violence have not been charged as corporate crimes. In some jurisdictions non-liability is founded upon principles of interpretation, and in particular the principle of construction *noscitur a sociis*. Thus, where a statute prohibits, for example, the wounding of one human being by another, corporate liability is not possible.¹⁰⁰ These considerations do not apply in Canada in relation to manslaughter where, as the New Zealand courts have pointed out,¹⁰¹ the Criminal Code provides:

205.(1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

Could the *noscitur a sociis* construction apply to assault where the Code defines assault, in part, as follows?

⁹⁶ R.S.C. 1970, c. C-34:

226. A female person who, being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable assistance in respect of her delivery is, if the child is permanently injured as a result thereof or dies immediately before, during or in a short time after birth, as a result thereof, guilty of an indictable offence and is liable to imprisonment for five years.

⁹⁷ THE LAW COMMISSION, *supra* note 72, para. 37.

⁹⁸ See LEIGH, *supra* note 1, at 59-60.

⁹⁹ *East Crest Oil Co. v. The King*, [1949] 2 W.W.R. 503, [1944] 3 D.L.R. 535 (Alta. C.A. 1944), *rev'd on other grounds*, [1945] S.C.R. 191, [1945] 2 D.L.R. 353. Cf. *Union Colliery Co. v. The Queen*, 31 S.C.R. 81, 4 C.C.C. 400 (1900).

¹⁰⁰ *New York v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909); *Oregon v. Pacific Powder Co.*, 360 P.2d 530 (Ore. 1961).

¹⁰¹ *The Queen v. Murray Wright Ltd.*, [1970] N.Z.L.R. 476 (C.A. 1969).

244. A person commits an assault when, without the consent of another person . . .

(a) he applies force intentionally to the person of the other

It might be suggested that the word "person" has the same meaning in both places in the section. This would require a construction which either exempted corporations from the section or allowed corporations to be both assailant and victim. One might inquire what the "person" of a corporation might be in this context. Assuming that this argument is wrong, we must then determine whether on other grounds corporations are to be regarded as not liable for offences of violence other than such as may sound in omission.

The courts have never had to face these difficulties, and therefore the problem of limitations remains unexplored. It is by no means clear that a court must necessarily apply its doctrine of identification in all the cases in which it could be applied. A limiting principle is difficult to ascertain. It might perhaps be said, as Lord Denman C.J. said at a much earlier stage, that certain crimes are breaches of social duty which ought to be brought home only to the guilty individuals concerned.¹⁰² In analytical terms, such judicial limitations on liability might seem arbitrary, but, as a matter of policy, they are perfectly defensible; they leave liability available in respect of those crimes, if any, where enforcement policy seems to require liability. In other words, limits can be set on the operation of the doctrine of identification beyond those which stem from its internal necessities. The doctrine of identification originated as a device to ascribe personal liability to corporations where this was necessary in order to hold them civilly liable.¹⁰³ In criminal law, however, it tends to be assumed that the doctrine means that for all purposes of criminal liability a corporation possesses a mind—that of its controllers. But a court could return to the original root and hold that the doctrine of identification should apply only where for policy reasons it is necessary to hold a corporation liable. Thus the crime of manslaughter should perhaps attract personal corporate liability: the real point is often one of compelling adherence to safety standards. So it might or might not be thought proper policy to render a corporation liable criminally, for example, for the acts of its private police in wounding strikers. Perhaps the legal position is more flexible than has generally been assumed.¹⁰⁴ But these matters are largely unsettled; the best solution may yet lie in a wide theoretical liability mitigated by an intelligent prosecutorial discretion.

It is doubtful whether in Canada a corporation could ever be convicted of perjury. It is true that in civil proceedings a corporation may be compelled to produce documents, and, as a party, is liable to examination for discovery through its proper officers. The Ontario Court of Appeal has pointed out that on discovery the witness literally speaks for the corporation. But this does not make the corporation a witness. It applies to restrict the

¹⁰² *The Queen v. Great North of England Ry. Co.*, *supra* note 19

¹⁰³ See LEIGH, *supra* note 1, ch. 7.

¹⁰⁴ Cf. THE LAW COMMISSION, *supra* note 72, para. 36.

range of questions which may be asked of the proper officer to those matters which come to his knowledge as an officer of the company. However, a person who is called as a witness at trial is not the "mouthpiece" of the corporation. He is personally sworn as a witness, and the corporation is not regarded as a witness at all.¹⁰⁵

This is a distinct advantage to the prosecution, since, under the Canada Evidence Act, a witness may claim the privilege against self-incrimination.¹⁰⁶ A corporate officer may thereby be compelled to give evidence which implicates the corporation and which, but for the privilege, would implicate himself. The corporation, because it is not a witness, cannot claim a privilege against self-incrimination in respect of the officer's testimony.¹⁰⁷ By the same reasoning, an officer who has given evidence under the protection of the Act at an administrative inquiry into the company affairs may also be called later to give evidence against the company.

These considerations do not apply to production of documents. Officers cannot be called by the prosecution to produce documents in possession of the corporation. Such a practice would amount to self-incrimination.¹⁰⁸ This principle would appear to apply notwithstanding that a corporate officer might, for the purpose of directors' liability clauses, be treated as having possession of certain classes of corporate documents.¹⁰⁹

The argument from incongruity is unimpressive. Its appeal depends very largely on unstated premises concerning the proper function of corporations. Corporations have been, for example, convicted of keeping a disorderly house,¹¹⁰ and, in America, of "criminal syndicalism"¹¹¹ and violations of the Espionage Act.¹¹² The incongruity argument often expresses no more than an initial inability to perceive how the commission of a particular crime can be said to benefit a company.

A further point should perhaps be mentioned briefly. In its Working Paper No. 44 the English Law Commission argues that it is difficult to set judicial bounds to liability: "[F]or if . . . the person identified with the company is an embodiment of it, and his guilty mind is the guilty mind of the company, it ought to follow that imprisonment of that individual is imprisonment of the company with which he is identified."¹¹³ This is, with respect, wrong. The doctrine of identification enables the acts of a person or group to be ascribed personally to a company. It is a device created for

¹⁰⁵ *Ex parte* Corning Glass Works Ltd., [1971] 2 O.R. 3, 16 D.L.R. (3d) 609 (C.A. 1970).

¹⁰⁶ Canada Evidence Act, R.S.C. 1970, c. E-10, s. 5.

¹⁰⁷ *Ex parte* Corning Glass Works Ltd., *supra* note 105; *Regina v. J.J. Beamish Constr. Co.*, *supra* note 82. *But cf.* *Regina v. Ettenhofer Painting & Decorating Ltd.*, 58 W.W.R. 255, 59 D.L.R. (2d) 222 (Man. C.A. 1967).

¹⁰⁸ *Regina v. Bank of Montreal*, 39 C.R. 61, 36 D.L.R. (2d) 45 (B.C.S.C. 1962).

¹⁰⁹ *Regina v. Maunder*, [1966] 1 C.C.C. 328, 47 C.R. 101 (Ont. Mag. Ct. 1965).

¹¹⁰ *Rex v. Hudson's Bay Co.*, 9 Alta. L.R. 227, 9 W.W.R. 522 (C.A. 1915).

¹¹¹ *United States v. American Socialist Soc'y*, 260 F. 885 (D.N.Y. 1919).

¹¹² *Minnesota v. Worker's Socialist Publishing Co.*, 150 Minn. 406, 185 N.W. 931 (Sup. Ct. 1921).

¹¹³ THE LAW COMMISSION, *supra* note 72, para. 36.

a particular purpose. But the weight of authority is, rightly, that the company and its directors are not the same flesh in the sense suggested in the extract above.¹¹⁴

Sundry limitations stem from statutory construction. "Person" includes corporation save where the contrary intention appears.¹¹⁵ In some Code sections, a contrary intention is manifest. One such is section 251, dealing with procuring a miscarriage where the phrase "his intention" in subsection (1), when read with subsection (4), seems to make it clear that the section is directed against natural persons only. A contrary intention may also appear where the penalty is one which cannot be imposed upon a corporation. Such cases will be few. Section 647 of the Criminal Code provides:

647. Notwithstanding subsection 645(2), a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence,

(a) to be fined in an amount that is in the discretion of the court, where the offence is an indictable offence, or

(b) to be fined in an amount not exceeding one thousand dollars, where the offence is a summary conviction offence.

*Regina v. Swedler*¹¹⁶ exemplifies the point. The accused was charged that he, being an officer of a bankrupt corporation which made a fraudulent disposition of funds, did participate in the offence committed by the corporation. Under section 169 of the Bankruptcy Act,¹¹⁷ the offence section, the only penalty provided is imprisonment without the option of a fine, and the fining provisions of the Criminal Code are declared inoperative. The Ontario Court of Appeal held that a corporation could be fined, the above limitation applying only to natural persons. The reference to the Criminal Code in section 169 of the Bankruptcy Act is a reference only to section 646 of the Criminal Code, providing a fine as an alternative to imprisonment for natural persons. It does not refer to section 647 of the Criminal Code. As the corporation could thus be held criminally liable, its officer could be held liable for participation.

Other limited defences based on statutory construction sometimes appear. Thus an incorporated society which showed films on Sunday to its fully paid members was held not to be liable under the Lord's Day Act for exhibiting on Sunday for hire or reward.¹¹⁸ Occasionally a corporation is held not liable for a provincial crime where the statute does not define "person" to include corporation.¹¹⁹ Finally, Crown corporations will not be bound by a criminal statute unless an intention that they shall be so bound clearly appears. In general, Canadian statutes, unlike their British counterparts, provide affirmatively that such corporations function as agents of Her

¹¹⁴ See LEIGH, *supra* note 1, ch. 7.

¹¹⁵ CRIMINAL CODE, R.S.C. 1970, c. C-34, s. 2.

¹¹⁶ [1973] 3 O.R. 486, 12 C.C.C. (2d) 508 (C.A.).

¹¹⁷ R.S.C. 1970, c. B-3.

¹¹⁸ *Winnipeg Film Society v. Webster*, [1964] S.C.R. 280, 44 D.L.R. (2d) 126.

¹¹⁹ *Regina v. W. McKenzie Sec. Ltd.*, 55 W.W.R. 157, 56 D.L.R. (2d) 56 (Man. C.A. 1966).

Majesty and therefore share in the historic immunities to prosecution of the Crown.¹²⁰

G. *Pre-incorporation crimes and dissolution*

A corporation is not liable for crimes committed by its promoters before incorporation.¹²¹ Dissolution of a corporation abates any prosecution against it, in the absence of legislation to the contrary.¹²² The effect of amalgamation was considered in *Regina v. Black and Decker Manufacturing Co.*¹²³ In that case an information under the Combines Investigation Act was laid against a company formed by the amalgamation of three former companies. The new company bore the name of one of the old companies and the offence had been committed, if at all, by one of the old companies. Under the Canada Corporations Act, companies when amalgamated continue as one company and all liabilities of the old companies continue and are enforceable against the new company.¹²⁴ The Supreme Court of Canada, noting that the matter depends entirely on the wording of any applicable statute, held that under this particular statute an amalgamation does not create a new company or extinguish an old one. Parliament did not intend to allow a company to divest itself of its legal responsibilities by the simple expedient of amalgamation. The amalgamated companies continue in the amalgamation, without subtraction.

III. COMPARATIVE LAW OF CORPORATE LIABILITY

In this section we consider in what advanced legal systems corporate or group liability exists and the bases upon which it is imposed. The inquiry is primarily directed towards civil law systems and, above all, the United States legal system. No separate attention is directed towards England and other Commonwealth jurisdictions since, where these have a body of doctrine relating to corporate liability, it tends in all important respects to be similar to that of Canada.

A. *Civil Law systems*

In general, corporate personal liability has not been accepted as a general principle in civil law systems. French law is fairly typical. The

¹²⁰ *Canadian Broadcasting Corp. v. Attorney-General for Ontario*, [1959] S.C.R. 188, 16 D.L.R. (2d) 609.

¹²¹ If authority is needed, see *United States v. Crummer*, 151 F.2d 958 (10th Cir. 1945).

¹²² *Regina v. Howard Smith Paper Mills Ltd.*, [1945] O.R. 543 (H.C.). This case cannot be regarded as an authority on amalgamations. See also *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963).

¹²³ [1975] 1 S.C.R. 411, 43 D.L.R. (3d) 393.

¹²⁴ R.S.C. 1970, c. C-32, s. 137(13) *as amended*, S.C. 1974-75 c. 33, s. 180.

reasons for non-liability, as advanced in a study by Stefani and Levasseur,¹²⁵ are:

- (a) Subjecting corporations to physical penalties would be impossible.
- (b) The imposition of a penalty would amount to a *détournement*, since punishment is intended to reform the offender.
- (c) A corporation, being formed for lawful objects, cannot competently commit a fault.
- (d) Fault is personal; the directors of the corporation should be punished if a crime is committed.

However, this is only part of the picture. Stefani and Levasseur think the reasons advanced in (a) to (c) are not particularly cogent. Corporations can be fined; such fines serve the deterrent and preventive purposes of punishment. Argument (c) is only persuasive if one accepts the fiction theory of corporate personality. Last, and most interesting, is the observation that many crimes are today committed by bodies corporate and that this circumstance requires a rule imposing criminal liability upon bodies corporate. How extensive the rule should be is not stated. Stefani and Levasseur appear to contemplate violations of legislation governing corporate bodies, and also false representations and cheating. Furthermore, French law admits the principle of vicarious liability and applies it against corporations. Special legislation inflicts fines against corporations for infractions committed by the servants and agents of such bodies.¹²⁶ It is difficult to know how comprehensive such liability is. Much depends on the breadth of vicarious liability in French law, and this is the sort of knowledge which is likely to be possessed only by a specialist in the subject.

The same general principles apparently apply in Germany, Italy and Spain.¹²⁷ In Germany fines can be levied against associations in respect of tax violations and price-fixing. Again, the desirability of corporate liability is under debate.

In Scandinavia, also, criminal liability is generally restricted to natural persons. In Norway, under certain regulatory statutes, the corporation "may be fined in the event of a violation, if committed to further its interests or if it must be presumed to have benefited from it".¹²⁸ In order to punish

¹²⁵ G. STEFANI & G. LEVASSEUR, 1 DROIT PENAL GENERAL paras. 245-46 (6th ed 1972).

¹²⁶ *Id.*; THE LAW COMMISSION, *supra* note 72, paras. 17-19. M. DELMAS-MARTY, DROIT PENAL DES AFFAIRES (1973), remarks that for practical and for theoretical reasons French legal doctrine favours the criminal responsibility of bodies corporate. Most of the texts which impose such liability deal with such matters as fiscal fraud, infractions of economic legislation (a recognized category in French law) and certain cases of sales without invoice. In respect of traditional crimes, however, French legal doctrine still regards a corporation as unable to bear a penal responsibility.

¹²⁷ THE LAW COMMISSION, *supra* note 72, paras. 20-21; P. YANEZ ROMAN in a review of L. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS (1969), in ANUARIO DE DERECHO PENAL Y CIENCIAS PENALES (1972). I am indebted to Señora S. Pellett for a translation.

¹²⁸ J. ANDENAES, THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY 246 (1965).

the corporation, the natural person whose fault is responsible for the infraction must have the necessary guilt. "But the organization may be punished if the actor himself is not prosecuted."¹²⁹

In Scotland, the law recognizes corporations as liable for offences of strict liability or vicarious liability.¹³⁰ It is considered probable that Scottish courts would, if the issue arose, hold corporations liable for offences involving *mens rea*.¹³¹

It is difficult to know what conclusions to draw from this sort of comparison. The English Law Commission states:

Our survey of foreign law suggests that it would be feasible to adopt a basis of liability different from the present one; for example, the complete exclusion of liability which appears to be the position in Italy; limitation of liability to exceptional and specified offences as in other civil law systems; or the limitation by reference to the presence of a particular fault element, which appears at present to obtain in Scotland. Our examination of the development of English law further suggests that a liability parallel to the vicarious liability of natural persons is another possible solution.¹³²

If the Law Commission is asserting that its comparative research suggests that each of these possibilities represents a feasible basis of liability, one would wish with respect to differ. Procedure in Continental systems differs from ours; powers of interrogation, for example, are entrusted to the judiciary. One cannot be sure that the corporate façade is as opaque there as it is here. Nor is it clear how extensive vicarious liability is in, for example, French law. It is doubtful whether a recapitulation of the rules of civil law systems relating to corporate liability will yield any very useful result until more is known about their operation in the context of those systems.

B. *United States*

The principles of corporate criminal liability have been more extensively developed in the United States than elsewhere. One line of authority, developed by the federal courts and expounded by some state courts as well virtually assimilates corporate liability to vicarious liability. Another line of authority, which in a sense culminates in the formulation advanced in the Model Penal Code,¹³³ differentiates corporate personal liability and simple vicarious liability, making a corporation liable only for faults personal to it. This is akin to the formulation adopted by Canadian courts. It is suggested that the American experience is of value in telling us something about both the reasons for liability and the bases upon which it might be imposed.

The rule employed in the United States federal courts reflects the assumption that corporate criminal liability is primarily designed to secure

¹²⁹ *Id.*; M. DELMAS-MARTY, *supra* note 126, at 446-52.

¹³⁰ *Shields v. Little*, [1954] Sess. Cas. 25 (Ct. of Justiciary 1953); *Clydebank Co-operative Soc'y v. Binnie*, [1973] Sess. Cas. 17 (Ct. of Justiciary 1936).

¹³¹ G. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 283 (1967).

¹³² THE LAW COMMISSION, *supra* note 72, para. 23.

¹³³ *Supra* note 46.

compliance with regulatory legislation.¹³⁴ The federal courts have not been disposed to clearly differentiate personal corporate liability from vicarious liability. Their approach has been realistic: they have not assumed that crimes have necessarily originated in the board room, and have imposed liability in respect of the middle range of corporate officials, such as area and branch managers,¹³⁵ regardless of whether the offence reflected the policy of the corporation as seen by the highest levels of management.¹³⁶ Furthermore, it has been recognized that if it were necessary to prove complicity on the part of the highest range of managerial officials in order to hold corporations liable, it would frequently prove impossible to convict corporations.¹³⁷ Accordingly, the courts have adopted a basis of liability which is, essentially, that of vicarious liability.

The history of this development has been dealt with elsewhere. The fundamental rule, articulated in *Egan v. United States*,¹³⁸ is that a corporation is criminally liable for the acts of its officers, agents or servants who, in doing the acts complained of, were engaged in exercising corporate powers for the benefit of the corporation while acting in the scope of their employment. This test is now generally employed, even in the case of crimes involving mens rea, and the fact that an action was performed contrary to corporate policy has not been permitted to influence the result. There seems a distinct strain of judicial scepticism inherent in the conclusion that a corporation "cannot divorce itself from its responsible agent to insulate itself from criminal prosecution".¹³⁹ At one time the rule was so far-reaching that the human agent's intention to benefit the corporation was considered irrelevant to liability. There was and is a certain logical strength in this position.¹⁴⁰

The applicable principles are summed up in *Standard Oil Co. v. United States*.¹⁴¹ The case concerned alleged violations of the Hot Oil Act, sections 715a(1), 715b, 715d, and 715e. The acts were performed by employees of the company who, ostensibly acting in the performance of their duties, were really co-operating with a third person in the accomplishment of a criminal

¹³⁴ LEIGH, *supra* note 1, at 114-18; U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPER 1, 181 ff. (1970).

¹³⁵ *Steele Tank Lines, Inc. v. United States*, 300 F.2d 719 (5th Cir. 1963); *United States v. Johns-Manville Corp.*, 231 F. Supp. 690 (D. 1963); *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960); *C.I.T. Corp. v. United States*, 150 F.2d 85 (9th Cir. 1945); *United States v. Armour & Co.*, 168 F.2d 342 (3rd Cir. 1948).

¹³⁶ *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943), *cert. denied*, 88 L. Ed. 474 (1943); *United States v. Armour & Co.*, 168 F.2d 342 (3rd Cir. 1948). But *cf.* *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946).

¹³⁷ *Egan v. United States*, *supra* note 136; and *see* R. DONNILLY, J. GOLDSTEIN, R. SCHWARTZ, CRIMINAL LAW 1087 (1962). The authors refer to the pre-sentence remarks of Chief Justice Ganey in *General Elec. Co. v. I-T-E Circuit Breaker Co.* (Dist. Ct. East Pa. 1960), in which the learned judge assumed that top management is frequently implicated in serious violations, whatever the state of the proof.

¹³⁸ *Supra* note 136.

¹³⁹ *Continental Baking Co. v. United States*, *supra* note 135, at 150 (Weick J., Cecil and Kent J.J. concurring).

¹⁴⁰ *See* text between notes 150-51 *infra*.

¹⁴¹ 307 F.2d 120 (5th Cir. 1962), *rev'g sub. nom.* *United States v. Thompson-Powell Drilling Co.*, 196 F. Supp. 571 (D. 1961).

purpose for the benefit of that third person. The actions of the employees not only did not benefit the employer but in some instances resulted in the theft of its property. The employees were of a relatively minor status, save one who was acting in fact as a superintendent in the absence of the regular superintendent. The defendant corporation, on becoming aware of the fraud, immediately reported the matter to the appropriate government body. No benefit was obtained by the corporation. The court held that in relation to crimes of intent, a corporation cannot be charged with guilty knowledge acquired by employees outside the scope of their employment; a servant is not regarded as acting within the scope of his employment unless his acts are motivated by a purpose to benefit the master or, as the proposition is sometimes expressed, to further the master's business. It should be noted, parenthetically, that these two expressions do not seem to mean quite the same thing. The corporation may be criminally bound by the acts of subordinate, even menial, employees; mere violation of instructions will not shield the corporation from criminal responsibility for actions which its agents have taken for it. A corporation may be held liable even though no benefit has resulted to it. However, a purpose to benefit the corporation is decisive in equating the agent's action with that of the corporation:

For it is an elementary principle of agency that "an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed".¹⁴²

The touchstone is not simply whether the employee was performing his allotted functions: a corporation is not to be held liable for embezzlement if a faithless employee diverts funds as an embezzler. Nor is benefit decisive; its value is evidentiary as tending to establish whether or not the servant or agent acted with a view of furthering the employer's business. In this case there was no benefit. None was conferred, neither was one intended.

In sum, no criminal intent is imputed to corporations where the servants, *via* whom such imputation may be made, acted in order to advance the interests of parties other than their corporate employer.¹⁴³ The point is illustrated in *United States v. Harry L. Young & Sons*,¹⁴⁴ where liability was imposed on the corporation for knowingly violating a regulation forbidding the leaving of any vehicle laden with explosives. The vehicle was left unloaded by a driver, in breach of specific instructions to the contrary. Here, lack of intent to benefit the corporation was treated as irrelevant. This seems correct; the guilty act was not performed otherwise than in the course of the master's business and there was no intent to benefit any other person or corporation. On the other hand, where servants do not act with a view to furthering the corporation's benefit, the corporation may still be held crim-

¹⁴² *Supra* note 141, at 128.

¹⁴³ *United States v. Ridglea State Bank*, 357 F.2d 495, at 498 (5th Cir. 1966).

¹⁴⁴ 464 F.2d 1295 (10th Cir. 1972).

inally liable where superior agents were aware of the violations and took no steps to report or prevent them.¹⁴⁵

Somewhat different rules apply where the offence does not involve mens rea. It would seem that a corporation may be held liable for crimes of strict liability where these are committed by an employee while acting in the course of his employment, whether or not he intended to benefit the corporation.¹⁴⁶

For offences requiring mens rea, the federal courts do not recognize due diligence as a defence. The fact that the actor disobeyed corporate instructions in acting as he did will not prevent his intent from being imputed to the company.¹⁴⁷ It is said to be a factor militating against corporate criminal responsibility, but having no higher status.¹⁴⁸ What more would have to be shown to result in acquittal is not clear, but it seems to be assumed that nothing less than acts performed to defraud the corporation would suffice.

The officer, servant, or agent whose fault is to be imputed to the corporation as personal to it may be of a lowly or menial status.¹⁴⁹ In practice, however, liability is imposed only in respect of middle-range managerial personnel, both in the federal courts and in those States which have adopted rules similar or identical to the ones applied by the federal courts. Where inferior personnel might have acted to benefit themselves, superior personnel must know of their activities before a conviction will be allowed.

Finally, it should be noted that Congress has not restricted liability to corporations. In *United States v. A. & P. Trucking Co.*,¹⁵⁰ the Supreme Court held that partnerships could be convicted of offences against regulations for the safe transportation in interstate commerce of explosives and other dangerous articles. "Person", under the relevant legislation, was held to include partnership. Similarly, wide definitions have been urged under proposed environmental legislation. A list of statutes defining "person" to include corporations and other artificial entities is contained in Appendix A to the Federal Working Papers of 1970.^{150a}

The width of these rules will be appreciated. The cases no doubt pose difficult analytical problems which the federal courts have not resolved, not least in connection with what is meant by acting in furtherance of the employer's business. Liability is not unlimited, as the exception relating to the embezzling employee, dealt with above, discloses. Intent to further the corporation's business is coupled with the matter of scope of authority to provide the necessary and sufficient bases of liability. Evidently, if it is

¹⁴⁵ *Steele Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963).

¹⁴⁶ *Standard Oil Co. v. United States*, *supra* note 141, at 125-26. *See also* *United States v. Dotterweich*, 88 L. Ed. 48 (1943).

¹⁴⁷ *United States v. Armour & Co.*, *supra* note 135.

¹⁴⁸ *United States v. Harry L. Young & Sons*, *supra* note 144.

¹⁴⁹ *Standard Oil Co. v. United States*, *supra* note 141, at 127.

¹⁵⁰ 3 L. Ed. 2d 165 (1958).

^{150a} U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, *supra* note 134.

desired to hold a corporation liable only for matters of policy decided upon at the highest appropriate level in relation to the area of business concerned, the federal rule is unsatisfactory. If one is imbued with analogies between corporations and natural persons, the rule again appears flawed. A human employer is not held liable merely because his employee, acting within the scope of employment, commits a crime, intending thereby to benefit the employer's business. On the other hand, if it is decided that, for policy reasons principally relating to the size of much corporate business and the difficulty of detecting high-ranking offenders, a wide vicarious liability must be imposed, the federal rule is attractive. These are matters for resolution in the light of the policy which the Law Reform Commission believes to be appropriate.

One should also note the wording of the Study Draft of the proposed Federal Criminal Code.¹⁵¹ The draft provided:

402. Corporate Criminal Liability

(1) *Liability Defined.* A corporation may be convicted of:

(a) any offense committed in furtherance of its affairs on the basis of conduct done, authorized, requested, commanded, ratified or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs, by any of the following or a combination of them:

(i) the board of directors;

(ii) an executive officer or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in managerial capacity of subordinate employees;

(iii) any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy;

(iv) any other person for whose act or omission the statute defining the offense provides corporate responsibility for offenses;

(b) any offense consisting of an omission to discharge a specific duty of affirmative conduct imposed on corporations by law;

(c) any misdemeanor committed by an agent of the corporation in furtherance of its affairs; or

(d) any offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation in furtherance of its affairs.

(2) *Defense Precluded.* It is no defense that an individual upon whose conduct liability of the corporation for an offense is based has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

403. Criminal Liability of Unincorporated Associations.

An unincorporated association may be convicted under circumstances corresponding to those set forth in section 402 with respect to corporations.

This wording represents a codification of present case law with minor

¹⁵¹ U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE 30-31 (1970). The FINAL REPORT of the Commission (1971) recommends a somewhat narrower basis of liability.

variations. It may be slightly narrower than the existing law. It reflects a felony-misdemeanour structure which has no analogue in Canadian law. The draft also reflects certain assumptions which appear in the Study Notes and throughout this area of the law. Of these the most significant is the assumption that a primary purpose for imposing criminal sanctions is to induce the punished entity to take action to reduce the possibility of causing harm to others through the conduct of its affairs.¹⁵² The examples given are adulteration of food and drugs, failure to comply with safety standards and the like. Some offences of this sort are felonies rather than misdemeanours; presumably this would include regulatory offences where mens rea is required, as well as such offences as conspiracy.

The note to sections 402 and 403 provides that in the case of felony the prosecution must prove authorization by management. The terms of the draft do not, seemingly, require that the offence inevitably be committed pursuant to corporate policy; the acts and intent of a manager having supervisory duties over subordinates would engage corporate responsibility, and there is no "due diligence" defence nor a defence based on the simple proposition that the acts were performed contrary to corporate policy. To this extent, liability could still be imposed for a failure of supervision. In the case of misdemeanours a pure rule of *respondeat superior* applies. But even in felony, there is a pronounced element of vicarious liability present, which leads one to wonder whether in fact the premises underlying corporate liability were fully worked out. It would be possible to impose liability only for corporate policy as determined at the highest level. One could still employ the acts of managerial supervisors to provide the foundation of a prima facie inference against the corporation, the inference being rebuttable. Such an approach was adopted in California in *W.T. Grant Co. v. Superior Court of California*.¹⁵³ In that case the manager of the television department in one of the applicant's stores sold used television sets as new sets to its customers. The corporation was a nationwide corporation operating hundreds of stores. It was held that the acts of the manager afforded a prima facie case of criminal intent against the applicant. As manager, he "functioned as the company's directing arm and spoke with the voice of its authority. Strangers to [the company's] internal operation and organization are entitled to assume that [the manager] possessed authority to instruct on company sales policy at that particular store".¹⁵⁴ This could be rebutted by showing that the manager lacked authority to formulate company sales policy at the particular store. This comes closer to a personal corporate liability.

This sort of defence is not provided for in the draft. It may be that the reason is that such a defence would be inconsistent with the role of protecting the public in situations less akin to the classical fraud situation than that in *Grant's case*. But if so, it must be conceded that corporate liability

¹⁵² U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, *supra* note 134, at 181-82.

¹⁵³ *Supra* note 68.

¹⁵⁴ *Id.* at 180.

for felonies under the draft contains a striking element of vicarious liability. This may well be justified given the particular pattern of offences concerned. Indeed, the restrictions on vicarious liability may be essentially unhelpful. At this juncture one simply notes the point. Essentially, the framers of the section sought to penalize corporations in respect of policy decisions and relied on hierarchical considerations to accomplish this. The ascription of liability in respect of the acts of a person who controls the corporation, notwithstanding that such person is not an officer of the corporation, is an advantage over the formulation in the Model Penal Code.

C. *Liability in Canada and under the Model Penal Code*

The principles of the doctrine of identification in Canada and England need not be restated here.¹⁵⁵ It is perhaps enough to note that the doctrine is intended to allow for the attribution of mens rea to a corporation where the actor concerned is of such a status that he represents the controlling mind and will of the company, at any rate within the sphere of responsibility allotted to him.¹⁵⁶ The provisions of the Model Penal Code represent an attempt to produce the same result.

In relation to corporate personal liability, the Model Penal Code provides:

2.07(1) A corporation may be convicted of the commission of an offense if: . . .

(c) the commission of the offense was authorized, requested, commanded, or performed by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his employment.

Section 2.07(4)(c) defines "high managerial agent" to mean an officer of a corporation, or any other agent of a corporation "having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association".

The American Law Institute sought, in adopting this formulation, to devise a formula which would impose corporate personal liability on a footing different from that of simple vicarious liability. The difference is corporate policy: when the actor concerned is a high managerial agent, it is reasonable to assume that his conduct represents corporate policy.¹⁵⁷

Several criticisms of the Model Penal Code formulation may be advanced. First, the formula is discretionary. This is probably inevitable, and it does not necessarily invalidate the proposal. It is difficult to see how a non-discretionary formula could be devised. The court must start from some vantage point. But should the matter end there? It is one thing to *begin* with an ascription of guilt from the acts of an officer whose conduct probably

¹⁵⁵ See Part II of text.

¹⁵⁶ *Regina v. St. Lawrence Corp.*, *supra* note 64.

¹⁵⁷ MODEL PENAL CODE, *supra* note 46, Comment at 151 (Tent. Draft No. 4, 1956).

represents corporate policy, but quite another thing to *end* there. Quite important corporate officers may not share in the primary function of policy making. The notion of an "inner circle" of policy makers is dangerously attractive,¹⁵⁸ but corporate structures differ; not all "policy" decisions come before the board of directors. Some policy matters may well be dealt with by the managing director or by specialist committees. Some, in large decentralized companies, may be left to branch offices. There are different levels of policy making in many large corporations.¹⁵⁹ "Common sense" assumptions about the extent to which corporate officers' actions represent corporate policy are demonstrably deficient. There is evidence to suggest that area managers of large corporations have been responsible for American anti-trust violations. Their actions were dictated by a desire to stabilize trading in their own areas in order to better secure their own positions, not by any desire to implement agreed corporate policies.¹⁶⁰ The Model Penal Code draft affords an admirable statement of the criteria which should be present before a *prima facie* imputation of guilt is made, but it should not be considered an exhaustive statement of principle.

Another criticism, advanced by a Massachusetts court, is that the draft relies unduly upon matters of form in stating the criteria of ascription.¹⁶¹ The courts ought to inquire not into the formal position of the actor, but into whether he was given the powers, duties, responsibility and authority to handle the particular business or operation or project of the corporation, whatever his status in the corporation. The same court notes that the question is not exclusively what power the individual has over the entire corporate business, but rather what power he has over the particular area to which the allegedly criminal conduct relates. These defects are overcome in the Federal Study Draft. They are also overcome, let it be noted, by the doctrine of identification as it is presently formulated in Canadian decisions. The avowed purpose of the Massachusetts court—to impose personal corporate liability for corporate policy decisions—will be coincidentally achieved, though there is a potential margin for error present.

A final point may be ventured. The American formulations which we have discussed yield broadly similar results in most cases. For, while in the federal courts liability for *mens rea* offences can be imposed in theory for the acts of menial servants, in practice it is restricted to the acts of middle-range officers. The Study Draft of the Federal Code and the Model Penal Code formulation would probably yield the same results. Two considerations

¹⁵⁸ Cf. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

¹⁵⁹ There are a number of relevant studies. See, e.g., R. GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 114 (1944); P. FLORENCE, *OWNERSHIP CONTROL AND SUCCESS OF LARGE COMPANIES* 80-82 (1961). On decentralization, see publications of the General Electric Company reported in R. DONNELLY, J. GOLDSTEIN, R. SCHWARTZ, *supra* note 137. See also P. DRUCKER, *THE CONCEPT OF THE CORPORATION* ch. 5 and Epilogue (1964).

¹⁶⁰ See Galgay, Comment, 19 THE BUSINESS LAWYER 637 (1964). Cf. SMITH, *THE INCREDIBLE ELECTRICAL CONSPIRACY* (1962); W. BALDWIN, *ANTI-TRUST AND THE CHANGING CORPORATION* 238-40 (1968). The area is contentious.

¹⁶¹ *Commonwealth v. Beneficial Fin. Co.*, 275 N.E.2d 33 (Mass. 1971).

are pertinent: first, that a rule which restricted liability to the determinations of the highest level of management would be insufficiently inclusive in an era in which large, decentralized corporations trading over a wide geographical area are commonplace; second, that important corporate functions are not, as a rule, entrusted to menial servants. The first consideration operates also in Canada, resulting in a wide, functional doctrine of ascription, and results similar in practice to those in America. The characteristic features of modern large corporations do not lend themselves to crude anthropomorphism or to rigid non-discretionary formulae.¹⁶²

If it is desired to perpetuate the present broad structure of corporate liability, improvements to existing formulations can readily be suggested. These have been advanced before and in outline are as follows:

(a) Any draft should make provision for ascribing personal liability to corporations for the actions of high managerial officers or persons who, though not formally high managerial officers, have been entrusted with an ample authority over a particular area of the corporation's activities. Such ascription should be possible in respect of the actions of both executive and high supervisory personnel. It is important to devise a formula which will prove to be sufficiently inclusive to deal adequately with the affairs of large, decentralized corporations.

(b) But the inference that the determinations and actions of such persons represent corporate policy should be rebuttable by the corporation. It should be accepted that in some cases the corporation may leave particular policies to be determined in an area; in others, by taking no action or insufficient action in respect of some problems the existence of which the ultimate controllers are aware, the corporation should be held to have connived at the violations. An example of the latter might be a case in which a corporation failed to advise and warn concerning anti-trust matters and in which it was found that widespread violations by the company were occurring within a given area.

(c) Attention should be given to problems of evidence and, in particular, to the status of corporate documents and the like.¹⁶³

These suggestions beg the question whether there should be liability, and, if so, upon what basis it should be imposed. These matters are dealt with below.¹⁶⁴ It is not intended to overlook the wider problems. At this point one merely notes the possibility of interstitial amendment.

IV. PERSONAL LIABILITY OF INDIVIDUALS

It is appropriate to anticipate somewhat by noting that of the justifications advanced for corporate criminal liability two are particularly cogent. The first is that it is often difficult to determine who in any organization was

¹⁶² For this latter reason, the formulation advanced by Lord Diplock in *Tesco Supermarkets Ltd. v. Nattrass*, *supra* note 54, is, I submit, undesirable.

¹⁶³ LEIGH, *supra* note 1.

¹⁶⁴ See text at Part V *infra*.

responsible for an infraction. It may be, and in general will be, necessary to identify some person in order to attribute guilt to a corporation, but such identification does not necessarily exhaust the list of those who may be guilty of varying degrees of complicity. In the case of omissions, it may be difficult to identify any culpable person at all.¹⁶⁵ In general the doctrine of identification is not applicable to negligent omissions.¹⁶⁶ Furthermore, superior officers are not vicariously liable for the acts of underlings, since only the corporation can be regarded as the employer.¹⁶⁷

There are two problems regarding the personal liability of individuals. The first concerns the appropriate ambit of liability, whether or not it is to be confined to accepted doctrines of complicity or is to be expressed more widely; the second concerns the manner in which that liability is to be made effective. At common law, corporate criminal liability is cumulative rather than substitutionary. Thus, a natural person upon whose actions corporate guilt is founded is not excused from liability upon the conviction of the corporation.¹⁶⁸ Where the words of the statute dictate that only the corporation can be guilty as a principal, natural persons can be held liable *via* doctrines of complicity only.¹⁶⁹ However the ambit of liability at common law does not extend to vicarious liability for the acts of other employees and thus is not appropriate to enforce a wide duty of supervision on the part of superior officers. In some modern drafts,¹⁷⁰ a regime extending little beyond liability at common law is established.

These gaps have provoked much concern. The view has been taken that the best deterrent available is the conviction and punishment of natural persons. Accordingly, recent law reform projects, discussed below, have sought to establish an extended regime of personal liability. In addition, in Canada as in England, directors' liability clauses are to be found scattered through much legislation.

The Model Penal Code¹⁷¹ adopts a relatively restricted formulation. Section 2.07(6) provides, in part:

- (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated associ-

¹⁶⁵ *Regina v. Tyler & Internal Commercial Co.*, [1891] 2 Q.B. 598, [1891-1894] All E.R. Rep. 1093.

¹⁶⁶ See text at note 69 *supra*.

¹⁶⁷ *Mallon v. Allon*, [1964] 1 Q.B. 385, [1963] 3 W.L.R. 1053 (Div. Ct.); *Rushton v. Martin*, [1952] W.N. 258 (K.B.); *Booth v. Helliwell*, [1914] W.N. 226, 30 T.L.R. 529 (K.B.).

¹⁶⁸ *Rex v. Hendrie*, 11 O.L.R. 202, 10 C.C.C. 298 (C.A. 1905). See also *Dellow v. Busby*, [1942] 2 All E.R. Rep. 439 (K.B.); *Rex v. Sorsley*, 30 Cr. App. R. 84, [1944] 2 All E.R. 333 (K.B.); *United States v. Wise*, 370 U.S. 405, 82 Sup. Ct. 1354 (1962); *Regina v. Sheridan*, [1972] 2 O.R. 192; 10 C.C.C. (2d) 545 (Dist. Ct.); *Regina v. Continental Cablevision Inc.*, 18 C.P.R. (2d) 209 (Ont. Prov. Ct. 1974).

¹⁶⁹ *Graham v. Strathern*, [1927] J.C. 9, [1927] S.L.T. 368 (H.C. of Jud., Scot.); *Glasgow Corp. v. Strathern*, [1929] J.C. 5, [1929] S.L.T. 139 (H.C. of Jud., Scot.); *People v. Strong*, 363 Ill. 602, 2 N.E. 2d 942 (1936).

¹⁷⁰ *E.g.*, DELAWARE DRAFT CRIMINAL CODI. s. 141.

¹⁷¹ *Supra* note 46.

ation or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense as an accomplice of a corporation or an unincorporated association he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and degree involved.

Paragraph (a) essentially restates the accepted position concerning liability for complicity generally. Paragraph (b) deals with liability for omissions. It casts a substituted duty upon corporate agents and renders them liable accordingly. It does not, however, overcome the practical problems of identifying the person who under the circumstances ought to have acted and of proving that his omission to do so was culpable. The purport of paragraph (c) is plain. The provision is unnecessary in the light of the applicable Canadian Criminal Code provisions.¹⁷²

Thus, the provisions of the Model Penal Code do not impose a liability much greater than that provided for now by accepted doctrines of complicity. The exception to this statement is the provision concerning omissions.

By contrast, the provisions of section 404 of the Study Draft of the Federal Criminal Code¹⁷³ imposed a wide supervisory liability upon senior corporate officers. The section provided:

404. Individual Accountability for Conduct on Behalf of Organizations.

(1) *Conduct on Behalf of Organization.* A person is legally accountable for any conduct he performs or causes to be performed in the name of an organization or in its behalf to the same extent as if the conduct were performed in his own name or behalf.

(2) *Omission.* Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute or regulation thereunder, any agent of the organization having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself.

(3) *Accomplice of Organization.* When an individual is convicted of an offense as an accomplice of an organization, he is subject to the sentence authorized when a natural person is convicted of that offense.

(4) *Default in Supervision.* A person responsible for supervising relevant activities of an organization is guilty of an offense if his willful default in supervision within the range of that responsibility contributes to the occurrence of an offense for which the organization may be convicted. Conviction under this subsection shall be of an offense of the same class as the offense for which the organization may be convicted, except that if the latter offense

¹⁷² R.S.C. 1970, c. C-34, ss. 21-23, and Part XX, which disclose no difference in the penalties applicable to principals and parties.

¹⁷³ *Supra* note 151.

is a felony, conviction under this subsection shall be for a Class A misdemeanor.

As the notes to the section state, it makes explicit the rule that the human actor involved is not excused by the fact that the corporation is liable for the offence. Liability for omissions is dealt with in the same manner as in the Model Penal Code. Liability is also imposed on individuals for wilful default in supervision within the range of acts for which they are responsible where this default contributes to the occurrence of the offence. In this respect the Study Draft goes beyond the Model Penal Code. There is a history of provisions in federal statutes penalizing officers who wilfully permit the doing of acts prohibited by statute.¹⁷⁴ The precise formulation adopted in the draft goes farther and penalizes wilful defaults in supervision. It followed suggestions which had been made concerning earlier legislative drafts. Similar suggestions have been made more recently.¹⁷⁵ We deal with the practical difficulties associated with the enforcement of such legislation later.

While no such general principle as that in subsection 404(4) appears in Canadian law, the Revised Statutes of Canada contain many examples of directors' liability clauses imposing an extended duty of supervision and employing either a normal or a reverse onus of proof. The situation is thus similar to that in England.¹⁷⁶

Such provisions exist in several forms. Under some statutes the applicable provisions are narrow, not extending liability beyond the accepted doctrines of complicity.¹⁷⁷ The normal form of clause in use is somewhat wider.¹⁷⁸ Section 6(2) of the Agricultural Products Board Act provides:

¹⁷⁴ *Id.* at 187.

¹⁷⁵ See, e.g., the following language which was proposed in 1921 for inclusion in the Packers and Stockyards Act:

If any person acting for or employed by any individual, partnership, corporation, or association, negligently or willfully omits personally to perform any necessary act or properly to supervise or apportion duties among his subordinates, in the execution of the authority or functions vested in him, and by reason of such omission a violation of this Act directly results, he shall be liable to all the penal and other provisions of this Act with respect to such violation.

And see Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928), and U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, *supra* note 134, at 186-87.

¹⁷⁶ See LEIGH, *supra* note 1, at 176-81; G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART, s. 284 (2d ed. 1961).

¹⁷⁷ See, e.g., Proprietary or Patent Medicines Act, R.S.C. 1970, c. P-25, s. 16; Combines Investigation Act, R.S.C. 1970, c. C-23, s. 42(3).

¹⁷⁸ See, e.g., Excise Tax Act, R.S.C. 1970, c. E-13, s. 55(3); Estate Tax Act, R.S.C. 1970, c. E-9, s. 58; Emergency Gold Mining Assistance Act, R.S.C. 1970, c. E-5, s. 8(2); Corporations and Labour Unions Returns Act, R.S.C. 1970, c. C-31, s. 7(2); Canada Wheat Board Act, R.S.C. 1970, c. C-12, s. 42(2); Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 106(2); Bankruptcy Act, R.S.C. 1970, c. B-3, s. 175; Agricultural Products Board Act, R.S.C. 1970, c. A-5, s. 6(2); Unemployment Insurance Act, R.S.C. 1970, c. U-2, s. 110; Pension Benefits Standards Act, R.S.C. 1970, c. P-8, s. 20(5); Livestock Feed Assistance Act, R.S.C. 1970, c. L-9, s. 20(2); Income Tax Act, R.S.C. 1970, c. I-5, s. 197; Canada Corporations Act, R.S.C. 1970 (1st Supp.), c. 10, s. 11.

6(2) Where a corporation is guilty of an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence.¹⁷⁹

Under this formulation it would seemingly be possible to convict an officer, director or agent who knew of the offence and failed to take steps to prevent it. This is made explicit under the Atomic Energy Act.¹⁸⁰ It would seem to be immaterial that the offence occurred in an area with which the person was not primarily concerned. The onus of proving both the commission of the offence and the culpability of the officer rests throughout on the prosecution.

Some clauses impose an affirmative duty of supervision upon officers. Section 49 of the Immigration Act¹⁸¹ provides that where an offence against the Act or regulations has been committed by a corporation, and whether or not the corporation has been prosecuted or convicted, every person who at the time of the commission of the offence was a director or officer of the corporation is guilty of the like offence, "upon proof that the act or omission constituting the offence took place with his knowledge or consent, or that he failed to exercise due diligence to prevent the commission of the offence". This provision is theoretically very wide. It is wider than the United States Study Draft because it imposes liability for the lack of due diligence to prevent the commission of the offence. It is therefore available in cases of negligence in supervision. Furthermore, unlike the Study Draft, it does not require a showing of causation: it is enough that the default in supervision contributed to the occurrence of the offence, whatever that somewhat obscure phrase may mean. But it will be necessary to show that the offence occurred within the sphere of responsibility of the director or officer concerned, and this could prove difficult.

In some cases an extended liability is coupled with a reverse onus provision.¹⁸² The form employed in Canada is typified by the Defence Production Act,¹⁸³ section 21(5), which provides that where a corporation is guilty of an offence, any officer or director of the corporation is a party to and guilty of an offence

if it was committed with his knowledge unless he exercised all due diligence to prevent the commission of the offence; and in any proceeding against a person who was a director or officer of a corporation when the corporation committed an offence under this Act for being a party to and guilty of such offence, the burden of proving his absence of such knowledge or the exercise of such due diligence by him is upon the accused.

¹⁷⁹ R.S.C. 1970, c. A-5.

¹⁸⁰ Atomic Energy Control Act, R.S.C. 1970, c. A-19, s. 19(2).

¹⁸¹ R.S.C. 1970, c. I-2. *See also* Railway Act, R.S.C. 1970, c. R-2, s. 343; Export and Import Permits Act, R.S.C. 1970, c. E-17, s. 20.

¹⁸² *See, e.g.,* Aeronautics Act, R.S.C. 1970, c. A-3, s. 17(3); Official Secrets Act, R.S.C. 1970, c. O-3, s. 14(3).

¹⁸³ R.S.C. 1970, c. D-2.

Under this form the onus of disproving guilt lies upon the director: he must show an absence of knowledge or, affirmatively, the exercise of due diligence. But it is not clear what matters the prosecution must prove in order to establish *prima facie* liability on the part of directors and officers. Proof that the corporation was guilty of an offence is plainly essential. It is unclear what more needs to be proved, but it seems unlikely that a director or officer would be prosecuted unless there were reason to think that he might be directly implicated in some manner.

It would be possible, but unprofitable, to attempt to construe these statutes in detail. A number of general points, however, may be made. It is striking that little use has been made of these extended provisions in Canada, England or elsewhere.¹⁸⁴ The first and most obvious difficulty with the clauses of the type mentioned above¹⁸⁵ is that the prosecution must find it very difficult to prove that particular persons (other than the person with whose act the company is to be identified) directed, authorized, acquiesced in or participated in the commission of the offence. A similar difficulty arises from the clauses imposing an affirmative duty of supervision. In order to prove that an officer failed to exercise due diligence it will be necessary for the prosecution to prove that the matters complained of fall within the scope of authority of the particular officer concerned. This may well prove difficult to establish, for there is no standard structure of organization which companies adopt or are obliged to adopt. The duty of a director, for example, does not necessitate his giving his full attention to the corporation or attendance at all board meetings. A service director must, by contrast, devote such time to the affairs of the company as his contract stipulates. It is considered proper for directors to delegate duties to other officials and, in the absence of suspicious circumstances, to trust those officials to perform their duties honestly and competently. These propositions probably apply both in civil and criminal law.¹⁸⁶ The brunt of liability will fall in practice upon the managing director, secretary and other like officers.¹⁸⁷ Regrettably, perhaps, there has been no disposition to follow the example of Lord MacKay in *Edwards & Sons Ltd. v. MacKinnon*,¹⁸⁸ where he refused to regard directoral ignorance of activities carried on by their company as excusable. In the absence of a prior administrative investigation of the sort provided for under such legislation as the Combines Invest-

¹⁸⁴ See also Iseman, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALBANY L. REV. 61 (1972).

¹⁸⁵ See text at note 177 *supra*.

¹⁸⁶ See Palmer, *Directors' Powers and Duties*, in STUDIES IN CANADIAN COMPANY LAW, *supra* note 85, at 365 ff.; *Re City Equitable Fire Ins. Co.*, [1925] Ch. 407, [1925] All E.R. Rep. 453 (C.A.); *Huckerby v. Elliot*, [1970] 1 All E.R. 189 (Q.B.).

¹⁸⁷ See remarks of Lord Goddard C.J. in *Rex v. Yorkshire Elec. Bd.*, *The Times*, Nov. 17, 1951.

¹⁸⁸ [1943] J.C. 156, [1944] S.L.T. 120 (H.C. of Jud., Scot. 1943).

gation Act¹⁸⁹ and, now, the Canada Corporations Act,¹⁹⁰ it may well prove impossible in practice to cast the net of personal liability very wide.

The reverse onus clauses considered above appear to be wider. It is, however, inconceivable that a court would require an officer to answer unless the prosecution could adduce some evidence of direct implication. Any wider formulation would seem intolerable.

One method of surmounting these difficulties is the administrative inquiry. Provision for such inquiries is now made in both federal and provincial statutes.¹⁹¹ Typically, there is a wide power to subpoena witnesses and documents and to compel answers on oath. Some major areas, such as combines and tax evasion, are thus covered.¹⁹² But if such devices are to become commonplace, it will probably be in the context of a fundamental alteration of our system of criminal procedure. It seems likely that provision for administrative investigations will otherwise continue to be made on a selective basis. Under the Canada Corporations Act¹⁹³ or the various Canada¹⁹⁴ and Provincial¹⁹⁵ Evidence Acts, witnesses are protected from self-incrimination, and therefore the utility of such devices is somewhat lessened.

Another suggestion is advanced in the Study Notes to the United States Study Draft.¹⁹⁶ The authors suggest:

The duty imposed upon corporate managers to prevent offenses could include the duty to *allocate* responsibility for compliance as well as a duty to manage and supervise. Perhaps provision could be made for Congressional or administrative direction, with specific reference to the types of business covered by any particular regulatory statute, as to the individual to be responsible for the duty to allocate and liable in case the allocation is never made and the required act never performed.¹⁹⁷

It is not altogether clear how workable such a system of directions would be. It would perhaps help in the case of omissions to which it is primarily directed. But how would liability be formulated? Would the organ responsible for allocation of the duty be criminally liable for non-allocation? If so, would this meet the real problem? How would the prosecution prove that a duty had not been allocated in fact? One fears that the corporate façade would remain opaque and that in practice the corporation would alone be made liable. Of course, legislation could provide that where a corporation

¹⁸⁹ R.S.C. 1970, c. C-23, ss. 5-15.

¹⁹⁰ R.S.C. 1970, c. C-32, s. 114, *as amended*, R.S.C. 1970 (1st Supp.), c. 10, s. 12. Witnesses are bound to answer in such proceedings, but are protected from prosecution, except for perjury, in giving such evidence. *See* Canada Corporations Act, R.S.C. 1970 (1st Supp.), c. 10, s. 114.3.

¹⁹¹ *E.g.*, The Public Inquiries Act, R.S.O. 1970, c. 323.

¹⁹² Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 8-18; Income Tax Act, R.S.C. 1970, c. I-5, s. 175.

¹⁹³ R.S.C. 1970 (1st Supp.), c. 10, s. 114.3.

¹⁹⁴ Canada Evidence Act, R.S.C. 1970, c. E-10, s. 4(2).

¹⁹⁵ Ontario Evidence Act, R.S.O. 1970, c. 151, s. 9(2).

¹⁹⁶ *Supra* note 151.

¹⁹⁷ *Id.* at 187, n. 73.

is guilty of an offence of omission, the person who by law (assuming the existence of such a law) is under a duty to allocate functions is *prima facie* guilty of a failure to allocate. The suggestion is, however, of doubtful utility. In many cases the duty will have been allocated, but neglected, perhaps with the connivance of top management, resulting in non-performance of the act.

Desirable, therefore, as personal liability is, the machinery for imposing it in any efficient manner is sadly lacking. Our system of criminal evidence and procedure imposes constraints upon the ability of the prosecution to secure information. There will inevitably be situations in which, if corporate liability is not relied on, activities will effectively fall outside the criminal law.

Some relatively minor suggestions concerning the improvement of directors' liability clauses may be made. It is desirable that the guilt of both the corporation and its officers be dealt with in the same proceedings. Some statutes adopt the word "guilty".¹⁹⁸ There is authority that where the word "guilty" is used, it is necessary that the corporation be first convicted before proceedings can be taken against the officer.¹⁹⁹ It is desirable that persons who purport to act as officers or directors, or who in fact control the operation of the business, should be subject to conviction. Provision to meet such exigencies is commonly made in England, and that example might be followed here.²⁰⁰ The Canada Corporations Act now employs an extended definition.²⁰¹ It would also appear desirable that the statutory forms be standardized so as to impose a supervisory liability on officers by means of a due diligence clause. Where the onus is to be put is a difficult matter. No consistent pattern in employing reverse onus provisions can be discerned, but two statutes in which such provisions appear relate directly to the safety of the state.²⁰² Reverse onus clauses look more efficacious than normal onus provisions, though whether in practice they are so remains unproven. If they are to be made fully effective, their form will have to be Draconian.

There is the further problem of whether directors' liability clauses should be put in the Criminal Code. One may ask whether there is any necessity for placing a section imposing a criminally enforceable general duty of care in the general body of the criminal law. If such a necessity appears, is it wise on policy grounds to single out as responsible only officers of bodies corporate? What is the nature of the harm guarded against by such provisions? It is perhaps noteworthy that examples of such a general duty of care are few, one example being found in the English Theft Act, 1968.²⁰³ If directors' liability clauses are placed in the Criminal Code and made gener-

¹⁹⁸ See, e.g., Income Tax Act, R.S.C. 1970, c. I-5, s. 197; Aeronautics Act, R.S.C. 1970, c. A-3, s. 17(3); Official Secrets Act, R.S.C. 1970, c. O-3, s. 14(3); Defence Production Act, R.S.C. 1970, c. D-2, s. 21(5).

¹⁹⁹ *Rex v. Hawthorne*, [1944] O.W.N. 237 (C.A.).

²⁰⁰ LEIGH, *supra* note 1, at 178-79.

²⁰¹ R.S.C. 1970, c. C-32, s. 3(1), as amended, S.C. 1970 c. 10.

²⁰² Official Secrets Act, R.S.C. 1970, c. O-3, s. 14(3); Defence Production Act, R.S.C. 1970, c. D-2, s. 21(5).

²⁰³ The Theft Act, 1968, c. 60, s. 18.

ally applicable, it would probably be necessary to select a normal onus provision. But there seems little reason to do so. One might simply leave directors' liability clauses to particular statutes, as is presently the case. This enables different forms of onus to be used depending on what is desirable in the particular case. It also enables different measures of duty to be adopted, ranging from a simple duty to refrain from criminal acts to a duty to supervise. Whether these different forms of words provide significant advantages is unclear. Apart from the onus provisions, the different formulations may represent no more than stages in an evolution not very closely related to actual problems of enforcement as they have been encountered by particular government departments and agencies. This is not a matter about which one can be dogmatic in the present state of knowledge.

A further possible avenue of control is essentially prophylactic: the employment of civil disability measures against persons convicted of offences involving their corporations. At least three problems are evident, assuming that it is desirable to employ civil disability measures at all:

- (1) Where are such measures to be placed—in the Criminal Code or the various federal and provincial corporations statutes?
- (2) What sorts of disability are to be imposed and for what duration?
- (3) In respect of what offences are such measures to be applied—all offences wherever occurring, all indictable offences, all offences tried on indictment, all offences involving dishonesty in relation only to the corporation, etc.?

Such measures do not appear in the Canada Corporations Act. In the United Kingdom, section 188 of the Companies Act, 1948²⁰⁴ enables the court to make an order that any person who has been convicted of any offence in connection with the promotion, formation or management of a company, or who has been guilty of fraudulent trading or breach of duty to the company, shall not act in the management of the company for such period, not exceeding five years, as may be specified in the order. The report of the Jenkins Committee on Company Law recommended that this be extended to cover *inter alia* persons convicted on indictment of any offence involving fraud or dishonesty whether in connection with the company or not.²⁰⁵ A similar clause appeared as subsection 405(2) of the United States Study Draft.²⁰⁶

It is not desired to discuss the provisions of such legislation in detail. The British section indicates the sort of civil disability measure which could be imposed were it desirable to do so. If that decision were taken, the other questions outlined above²⁰⁷ would have to be considered, together with the problem of whether similar disability provisions should be extended to other forms of business organization. Any such proposal can involve fundamental

²⁰⁴ The Companies Act, 1948, 11 & 12 Geo. 6, c. 38.

²⁰⁵ REPORT OF THE COMPANY LAW COMMITTEE, para. 85(b) (Cmnd. 1749, 1962).

²⁰⁶ *Supra* note 151.

²⁰⁷ Text at note 204 *supra*.

questions as to what civil consequences should follow from criminal conviction. It is not surprising that corporation lawyers in the United States dislike civil disability measures of the sort referred to above and argue that they go further than is really necessary.²⁰⁸ The English experience indicates, however, that they are useful, and the fact that such measures are in the court's discretion should militate against any unjust or unnecessary imposition of them.

V. SOME PROPOSALS FOR REFORM

In this section proposals for reform will be considered. Some matters, however, deserve a preliminary clarification. We cannot proceed *de lege ferenda*. Unless our entire system of evidence and procedure is to undergo a fundamental recasting, we must evaluate proposals in the light of the characteristics of that system. Secondly, we cannot entirely overlook the fact that in much of our statute law the existence of group liability is assumed and much legislation drafted accordingly.²⁰⁹ Thirdly, and as a necessary consequence of what has been said, we cannot assume that the enforcement experience of other countries with different systems of law and procedure necessarily affords a guide or model appropriate to Canada.

It will be plain from the discussion throughout this paper that I favour the retention of group criminal liability, both personal and vicarious. The reasons are plain and relate to the commonly advanced reasons for imposing corporate liability, of which much the most important is the difficulty of locating the guilty individuals responsible for the offence. Some clarification of this point is desirable. In the case of negligent omissions, the doctrine of identification may have, and probably should have, no part to play.²¹⁰ In the case of offences of commission, identification will only be necessary where the offence requires *mens rea*. Many modern offences do not, and thus a number of questions are in some measure begged when these are referred to as "mere" public welfare offences.²¹¹ Is it really more immoral to steal a trifling sum than to pollute a stream?²¹² Even in offences involving

²⁰⁸ Liebmann, *Economic Crimes—The Proposed New Federal Criminal Code*, 27 BUS. LAW 177 (1971).

²⁰⁹ See, e.g., the statutes cited *infra*.

²¹⁰ See discussion in text *supra* note 69, and Hamilton, *Corporate Criminal Liability in Texas*, 47 TEXAS L. REV. 60 (1968).

²¹¹ See e.g., J. HALL, *PRINCIPLES OF CRIMINAL LAW* 285 (1st ed. 1947); Sayre, *Public Welfare Offences*, 33 COLUM. L. REV. 55 (1933); *Lim Chin Aik v. The Queen*, [1963] A.C. 160, [1963] 1 All E.R. 223 (P.C. 1962); *The Queen v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 5 C.C.C. (2d) 193, 12 D.L.R. (3d) 591 (1970).

²¹² Newsom, *River Pollution and the Law*, 2 OTAGO L. REV. 381 (1971). It is plain that pollution offences are increasingly regarded as grave and that strict liability coupled with heavy penalties is increasingly being invoked against corporate entities and others. See, e.g., Roller, *Michigan Air Pollution Control Legislative Efforts at Reform*, 19 WAYNE L. REV. 89, at 126 (1972); Roush, *Statutory Water Pollution Control—The Michigan Water Resources Commission Act: Observations and Suggestions*, 19 WAYNE L. REV. 131, at 159 (1972); *Arctic Waters Pollution Prevention Act*, R.S.C. 1970 (1st Supp.), c. 2, s. 18; *Canada Water Act*, R.S.C. 1970 (1st Supp.), c. 5, s. 31; *Northern Inland Waters Act*, R.S.C. 1970 (1st Supp.), c. 28, s. 35; *Radiation Emitting Devices Act*, R.S.C. 1970 (1st Supp.), c. 34, s. 13.

mens rea, it by no means follows that the most guilty persons in the administrative structure of a company have been reached when the person who can be proved to have committed the offence is convicted. It could be argued that these persons can only be reached by convicting the corporation. But that argument might lead to imposing liability on the basis of an assumption which in many cases will be false.

Such criminological research as there is indicates that the best deterrent is the conviction and punishment of the actual offender.²¹³ Corporate criminal liability is in theory less efficacious because of its indirect character. For, whether the offence be one involving mens rea or strict liability, and whether committable only personally or vicariously as well, the sanction is directed towards the acts performed or omitted by human persons—the directors, officers, servants or agents concerned. A fine against the corporation alone could be seen as little more than a licence to do business.²¹⁴

Prima facie, therefore, the optimum solution is to impose a regime of personal liability. There are countervailing considerations however, and these cut across most of the accepted classifications of criminal law offences. Some of these considerations have been alluded to above. Further considerations can be advanced. In some cases it is reasonable, perhaps even necessary, to shift the burden of law enforcement from the community to an employer or person undertaking an activity. Some such cases are minor; others are substantial. But where it is decided that such a transfer should take place, corporate and group liability is again appropriate. These arguments are cogent and have been invoked to justify much corporate liability in the American federal courts.²¹⁵ Furthermore, because quite large or diverse enterprises can exist under any or all forms of business organization, strict and vicarious liability formulations must be capable of general application.

It is fashionable to speak of “public welfare” offences or matters prohibited by penalty. These phrases sometimes serve as rough guides to the construction of ambiguous legislation and, as such, are invoked as limitations to strict and vicarious liability constructions.²¹⁶ It would, however, be wrong to assume that all vicarious liability offences are minor; a perusal

²¹³ G. DESSON, *CRIMINAL LAW, ADMINISTRATION, AND PUBLIC ORDER* 200 (1948); and see Iseman, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALBANY L. REV. 61 (1972); STUDY NOTES TO U.S. PROPOSED DRAFT FEDERAL CRIMINAL CODE, *supra* note 151, 81 ff. Cf. Liebmann, *Economic Crimes—The Proposed New Federal Criminal Code*, 27 BUS. LAW 177 (1971), who regarded the proposals in the Study Draft concerning the personal liability of directors as too extensive.

²¹⁴ The United States Justice Department, aware of the problem, prosecutes identified guilty individuals as well as such persons who have “a responsible and proximate relation to the violation”: STUDY NOTES TO U.S. PROPOSED DRAFT FEDERAL CRIMINAL CODE, *supra* note 151, 180. In general there is a disposition to prosecute guilty individuals where this is technically feasible. See also Booth, *Criminal Aspects of Corporation Law, State and Federal*, 12 U. MIAMI L. REV. 44 (1957); Whiting, *Criminal Antitrust Liability of Corporate Representatives*, 51 KY. L.J. 435 (1963).

²¹⁵ See text at note 134 ff.

²¹⁶ *The Queen v. Pierce Fisheries Ltd.*, *supra* note 211.

of the statute book discloses that some are regarded as very serious. Indeed, in the case of some serious offences, strict and vicarious liability is necessary if the legislation is to be enforced efficiently or at all. The reasons why this is so are fairly clear. In many cases it is impossible to draw any inference about the mental state of the offender from the act done. We cannot infer, from the fact that milk deficient in butterfat was sold, that any person in authority in, for example, a supermarket selling the milk was aware of the deficiency. Similarly, the fact that noxious waste escapes from a filtration device does not lead inescapably to the conclusion that the occupier of the factory from which the waste escaped lacked an efficient and well-maintained filtration system. Considerations of this sort were clearly decisive in the decision of the House of Lords in *Alphacell Ltd. v. Woodward*,²¹⁷ and rightly so.

Thus corporate and group liability is in some cases not only desirable, but essential.²¹⁸ The choice may in some cases be between group or corporate liability or no liability. It may not be possible to locate a guilty individual to prosecute. Even in cases where such an individual can be found it may still be desirable to convict the organization, for it may be desired to cause the organization to police its own activities. This sort of consideration at present cuts across the strict liability - mens rea classification of offences. There have been cases, and in America many cases, in which statutory words prohibiting wilful violations of legislation have not prevented organizational liability on a basis of *respondeat superior*.²¹⁹ It is precisely the transfer of police functions which warrants such liability. Whatever the mens rea required, courts have punished persons and organizations on a footing of vicarious liability where to do so seemed essential to the enforcement of the legislation. The licensee cases in England and Canada exemplify this development. Indeed, the Canadian statute book contains many examples of offences bearing considerable penalties for which strict and vicarious liability are imposed, subject to a "due diligence" defence. Legislation relating to marine pollution is an obvious example.²²⁰

It may be asked whether it would not be sensible, therefore, to restrict corporate and group liability to cases where all employers are strictly and, where appropriate, vicariously liable. The difficulty is that, even for mens rea - personal liability crimes, there may still be a strong case on policy grounds for convicting the corporation in order to force it to regulate its activities. An obvious example is a conspiracy to commit regulatory offences.²²¹ Again, if combinations in restraint of trade occur at middle-management level, is a function other than a transferred policing function being served when the corporation is convicted? And is it wrong to force the corporation in this

²¹⁷ [1972] A.C. 824, [1972] 2 All E.R. 475 (H.L.).

²¹⁸ See Hamilton, *supra* note 210.

²¹⁹ See discussion in Part III *supra*.

²²⁰ Statutes cited *supra* note 212.

²²¹ I am grateful to Professor R. Fox for suggesting this point in his review of LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* (1969), in 21 U. TORONTO L.J. 458 (1971).

way to police its activities? Even the traditional crime of manslaughter can serve this purpose when applied to cases of criminal negligence and omissions causing death. Other mens rea crimes are closely related to regulatory offences, differing only in respect of intent, but hardly otherwise. The former false advertisement section was of this sort.²²² If, therefore, groups are to be held liable for offences of strict liability, but not for offences involving mens rea, the solution must be arbitrary, at least from the point of view of policy.

It would, one supposes, be possible to provide corporate liability for offences of vicarious liability, together with conspiracy to commit such offences. Some of the traditional offences committable by corporations would then cease to be so. The solution would look neater still if no vicarious liability offences involved mens rea, or if all offences of a regulatory character or having a regulatory aspect needed no mens rea. This is a solution envisaged by the English Law Commission. But would this be desirable? Parts of the Combines Investigation Act would at once have to be excepted from this pattern unless indeed it is desired to extend those offences in the Act which are not based on conspiracy but which require mens rea into the area of strict liability.²²³ Does one wish to render corporations no longer liable for manslaughter? How should we answer if asked whether corporations should be convicted of offences involving fraud?

A traditional way of answering such questions is to suggest a distinction between vicarious liability and corporate personal liability. Such a solution achieves doctrinal parity between corporate offenders and natural persons. Thus one can conclude that corporations ought to be generally liable criminally in the same manner and almost to the same extent as natural persons. This is a perfectly possible solution and one which obtains in Canada and the Commonwealth. It probably does no harm. It also begs the most important question, for it assumes that the rather metaphysical line between personal corporate acts and acts of attribution has sufficient reality to warrant incorporation in the legal rules which found liability. But it ought to be plain that, as we are dealing with ascribed liability, metaphysical propositions of the sort alluded to are formulated in order to reach a conclusion the desirability of which has been assumed. If one assumes that corporate liability is in essence vicarious, discounting any analogy from natural persons, one has still to answer the policy questions referred to above.

Unfortunately, there is a tendency to assume that because a corporation is a person, the rules which apply to natural persons must apply to bodies corporate. It is no doubt true that some identity of rules is desirable. It is convenient for many purposes that corporations can buy, sell, sue, conduct businesses and the like. The use of analogy as a means of extending liability is often beneficial. The use of analogy as a means of concealing reality is less beneficial.

²²² CRIMINAL CODE, S.C. 1953-54 c. 51, s. 306.

²²³ Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 33-38 *as amended*, S.C. 1974-75 c. 76, ss. 16(1), 16(2), 17, 18(1), 18(2).

If one rejected an analogical approach, at least in part, one might ask, from the point of view of broad policy, what crimes corporations should be held liable for and in what circumstances. This might enable the basis of attribution of acts and intent to be widened. But to what policy or policies should one have regard, and what assumptions ought one to accept? Should one accept, for example, that the institution of corporate liability may induce juries to refrain from entering guilty verdicts against corporate officers? Should one assume, as Lord Denman C.J. did, that certain offences are concerned with the social duties of natural persons only, and, if so, why?

What considerations, then, support corporate liability? Two such have been mentioned: the difficulty in some cases of locating the actual offender, and the desirability in some cases of transferring a police function from the community at large to persons and entities active in an industry. Other suggested justifications are:²²⁴

- (1) The difficulty in implicating top management, a consideration which arises when the corporation is convicted in respect of the acts of middle-range personnel with whom it is for that purpose identified.
- (2) Reluctance on the part of juries to convict persons whose criminal acts may be the result of pressures felt in a corporation or throughout an industry.²²⁵
- (3) Obtaining compensation from an entity which has unjustly enriched itself.
- (4) Convenience and fairness, and in particular the undesirability of convicting a mere agent only (this point relates to (1) above).
- (5) Convenience and necessity, considering the difficulty in locating any or all of the guilty offenders, and perhaps of locating evidence relevant to particular individuals. It may, for example, be possible to seize documents under warrant from a company, and to demonstrate their relevance to corporate activities. It could be difficult in some cases to establish their status as relevant to a charge against a particular officer.
- (6) Fairness and social justice: it is important that the public realize that powerful entities are not above the law.²²⁶

Of these justifications, number (2) is unproven. Number (3) raises general difficulties concerning the propriety of compensation as an end of punishment in general. Numbers (1), (4) and (5) invite the making of assumptions about guilt which it is hard to prove in any particular case, though many

²²⁴ See LEIGH, *supra* note 1, at ch. 9; Fisse, *Consumer Protection and Corporate Criminal Responsibility*, 4 ADELAIDE L. REV. 113 (1971).

²²⁵ U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, *supra* note 134, at 180; H. MANNHEIM, CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION 31 (1946), citing remarks of the late Chief Justice Taft; MODEL PENAL CODE, *supra* note 46, Comment at 149 (Tent. Draft No. 4, 1956).

²²⁶ See also Baer, *Le Crime en col blanc aux Etats-Unis*, 24 REV. INT. DE CRIM. ET POL. TECHNIQUE 258 (1971).

would either concede or not wish to challenge the validity of the assumptions as general propositions. Number (6) is essentially *ad hominem*, which is not to argue that it lacks substance. It is no doubt very bad if the criminal law appears impotent in the face of economic crimes of great magnitude. This is a factor to which courts and legislatures in common law jurisdictions have often been sensitive.²²⁷ Corporate liability may be an imperfect response to the problem, but it is at least a response. The problem has not simply been ignored.

If it is accepted that the considerations listed above are the primary factors favouring imposition of liability, a number of consequences follow. First, as a consequence of the arguments developed above,²²⁸ there seems to be no single principle of a non-arbitrary character which will identify the offences that ought and the offences that ought not to be capable of commission by corporations and other bodies. The only imperative principle of exclusion would derive from the definition of certain offences, making their commission by corporations legally impossible. Secondly, however, there may be circumstances in which there should be no liability—policing arguments being unconvincing, or the idea of corporate guilt seeming otiose. An example might be a case in which two major shareholder-officers of a small corporation assault strikers picketing their warehouse, or in which they use such a corporation as a vehicle for fraud, perhaps by selling goods to the public under false pretences. Here the supervisory argument is weakest. The problem lies in seeking by rules to differentiate these cases from one such as that in *W.T. Grant v. Superior Court*,²²⁹ where goods were sold in a branch store to the public under false pretences.

One way to meet the problem might be to specifically exclude certain offences from the ambit of corporate liability. Thus the Criminal Code could, for example, provide that crimes involving assault should not be capable of commission by corporations. This would presumably reflect an overriding judgment that liability for such crimes ought to be imposed upon a basis of personal moral fault. Such a solution would seem reasonable enough, if somewhat arbitrary. It is one envisaged by a number of old cases. The task of formulating categories for exclusion might be simplified by the recognition that few crimes against the person are in any event charged against corporations. But the list of "corporate" crimes is extraordinarily diverse and occurs

²²⁷ One would not wish to suggest, however, that enforcement agencies have never been ambivalent or that there has been no propensity to refrain from prosecuting "respectable" businessmen, particularly where it is thought that the crime in question was not "truly criminal". See F. SUTHERLAND, *WHITE COLLAR CRIME* (1949); the sources collected and discussed in LEIGH, *supra* note 1, at 135-37; and Davids, *Penology and Corporate Crime*, 58 J. CRIM. L.C. & P.S. 524 (1967).

²²⁸ *I.e.*, text at note 220 *ff.*

²²⁹ *Supra* note 68.

throughout the area of fraud.²³⁰

Another solution would be to leave the ambit of liability as it presently is—viz., nearly unlimited—but to rely on prosecutorial discretion to mitigate it. There is evidence to suggest that prosecutors do not charge corporations in every case in which this is theoretically possible. In some cases, however, it is not clear why corporations were prosecuted, and it is possible that corporations are sometimes proceeded against simply because it is legally possible to do so. It should be possible to draft guidelines for prosecutors to indicate when corporations should not be charged, as in some of the circumstances outlined earlier.²³¹ One such criterion might well be to prosecute the corporation where it is beyond the resources of reasonable enforcement to locate guilty officers and employees and obtain convictions against them.²³²

Should account be taken of the different types of corporations? It is easy to see why some "one-man" companies should not be convicted of certain offences—for example, obtaining money by false pretences by selling used television sets as new—while it is certainly arguable that a large concern should be convicted. The difficulty with formulating rules by reference to the characteristics of corporations as these are reflected in company legislation is that the classifications generally relate to closeness of control by an ultimate person or group, and, therefore, contemplate dispersal of shareholding rather than the varying sizes of companies or the diversity of their activities, which are the key factors.²³³ An example is the definition of "private company" contained in subsection 3(1) of the Canada Corporations Act.²³⁴ Even perfectly satisfactory definitions cast in terms of control are hard to find; many

²³⁰ Apart from restraint of trade cases, corporations have been convicted in Canada of conspiracy to defraud and of obtaining money by false pretences (*Rex v. Fane Robinson Ltd.*, *supra* note 10); running a lottery (*Rex v. Hudson's Bay Co.*, *supra* note 110); corrupt dealings with government (*Sommers v. The Queen*, [1959] S.C.R. 678, 124 C.C.C. 241; *Regina v. H.J. O'Connell Ltd.*, [1962] B.R. 666 (Que. C.A.)); keeping a disorderly house (*Rex v. Foothills Recreation Ass'n*, *supra* note 17); offences concerning trading stamps (*The Queen v. Loblaw Groceries (Man.) Ltd.*, [1961] S.C.R. 138, 129 C.C.C. 223, 24 D.L.R. (2d) 324 (1960)). For examples from other jurisdictions see LEIGH, *supra* note 1, at 51-52.

²³¹ Text at note 224 *supra*.

²³² See Fisse, *supra* note 224.

²³³ F. O'NEAL, 1 CLOSE CORPORATIONS ss. 102-103 (2d ed. 1971). Distinctions based on the size and wealth of corporations are too inexact to be of much use here. For such a definitional scheme see T. HADDEN, COMPANY LAW AND CAPITALISM 102 *ff.* (1972.)

²³⁴ *Supra* note 124, s. 3(1). "Private company" means a company as to which by letters patent or supplementary letters patent

(a) the right to transfer its shares is restricted,

(b) the number of its shareholders is limited to fifty,

not including persons who are in the employment of the company and persons, who, having been formerly in the employment of the company, were, while in that employment, and have continued after the termination of that employment to be shareholders of the company, two or more persons holding one or more shares jointly being counted as a single shareholder, and

(c) any invitation to the public to subscribe for any shares or debentures of the company is prohibited.

statutes use an arbitrary formula in terms of the numbers of shareholders concerned. On the whole, it seems best to leave the problems associated with different forms of corporations to prosecutorial discretion. What one wants is a decision not to prosecute a corporate entity where the actual offender is identified and there has been no failure in supervision by the company. This sort of problem cannot be dealt with by existing schemes for classifying companies.

There is, however, a substantial problem in relation to the public or Crown corporation. It has been persuasively argued that such corporations should not be held criminally liable, that the effect of fining such a corporation is simply to fine the public at large.²³⁵ This argument is, *prima facie*, attractive. It is not decisive. There seems no reason to assume that the officers of a public corporation will view with indifference the imposition of criminal liability upon it, nor that criminal liability will be any more ineffective in setting and maintaining standards in the case of the Crown corporation than in the case of a privately owned corporation. It cannot be assumed that government as ultimate proprietor will be more ready to intervene in managerial affairs than a general body of shareholders. Its power is more concentrated, but is often constrained by statutory formulae vesting managerial powers in a board, and it is in the interests of the government to maintain a remoteness between itself and the company.²³⁶ But government as ultimate controller may not be indifferent to a management—surely an atypical management—which permitted repeated convictions for breaches of regulatory legislation to take place. Such corporate liability may well prove a useful means of ensuring adherence to standards, as it is in the case of a privately owned corporation. There is no reason to assume that directors and officers of public corporations will be more solicitous to maintain standards than are their counterparts in the private sector.

Should all groups be treated alike? That is, should all groups be fully liable criminally? And what is meant by "group"? Historically, Canadian courts, in the absence of statutory provisions to the contrary, impose criminal liability upon corporations, relying for justification on their status as legal persons. The American Study Draft Code explicitly rendered unincorporated associations fully liable criminally.²³⁷ If the aim of such liability is to impose a regulatory burden, and if one of the justifications for so doing is the opacity of the group façade, then general group liability seems appropriate. This sort of problem is concealed by treating corporate criminal

²³⁵ G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 864-65 (2d ed. 1961). This argument seems to have prevailed at least in part in U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *STUDY DRAFT OF A NEW CRIMINAL CODE*, *supra* note 151, s. 406(a), and in MODEL PENAL CODE, *supra* note 46, s. 2.07(4)(a).

²³⁶ Hodgetts, *The Public Corporation in Canada*, in *GOVERNMENT ENTERPRISE* 201 (J. Garner & W. Friedmann eds. 1970). Professor Hodgetts states: "The restriction on corporate freedom (in Canada) mainly takes the form of reducing financial independence rather than in providing for outright ministerial intervention in policy matters"; *id.* at 209.

²³⁷ See text accompanying note 268 *infra*.

liability as a set of propositions concerning persons. Corporate liability *via* doctrines of identification is said to be personal liability. It follows, if one accepts the premise, that arguments about vicarious liability and the shifting of police functions are misplaced. But unless one defines the meaning of group and provides that groups shall be legal persons, the traditional means of evading questions about the proper scope of vicarious liability is barred. Several alternatives remain. One has been dealt with above. The next is to admit that group liability is essentially vicarious liability, permitting the imposition of such liability on groups where individuals would not be so penalized. One more alternative would be to seek a formula which would delimit the area of vicarious liability and restrict group liability to that area. The difficulties attendant upon this solution have been adverted to. Again, one could seek a formula upon which to attribute personal liability to groups, on the same basis as one attributes personal liability to corporations, thereby avoiding the vicarious liability problem, at least on the doctrinal level. One could for example identify the group with the actions of any committee of management. Finally, one might simply not render groups criminally liable at all. This solution would appear simply doctrinaire. It would probably not be particularly harmful, since some legislation already makes special provision for group liability and the use of this device could be extended. It would, however, seem a pity to eschew a general solution from considerations of this character.

One ought to consider not only the scope of liability but the bases upon which it may be attributed. If the basis of liability is vicarious liability, then the corporation or group could be held liable whenever the prohibited act is performed by a servant or agent of the group acting within the course and scope of his employment or authority. In fact, provisions of this sort presently appear throughout the Revised Statutes of Canada.²³⁸ An example is subsection 9(2) of the Seeds Act, which provides:

In a prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence.

Whether a "due diligence" defence to such liability should be recognized is considered below.²³⁹ I have found little authority construing these sections. The form used above plainly affords a very wide *prima facie* attribution of liability and is, in my submission, an admirable drafting model.

So broad a basis of attribution represents the position generally accepted in American federal courts. It is by no means unreasonable; it corresponds to the principal justifications for the imposition of corporate liability. Thus

²³⁸ See, e.g., Agricultural Products Standards Act, R.S.C. 1970, c. A-8, s. 13; Feeds Act, R.S.C. 1970, c. F-7, s. 10(1); Canada Dairy Products Act, R.S.C. 1970, c. D-1, s. 9; CANADA LABOUR CODE, R.S.C. 1970, c. L-1, s. 9; Meat Inspection Act, R.S.C. 1970, c. M-7, s. 10(2).

²³⁹ Text at note 242 *ff.*

Mr. Fisse, discussing consumer protection legislation, ²⁴⁰ notes that the justifications for corporate liability are inconsistent with the restriction of liability to a superior range of corporate officers. The position of the officer or employee in the organizational structure seems largely irrelevant. The principal difficulty with this solution, and one which causes much unease, is that it is apt to render groups vicariously liable in situations where an individual would not be so liable. If an employee of a company embezzles money paid in by clients, should the corporation be convicted of embezzlement? As we have seen, American courts limit their principle by requiring that the individual intended to benefit the corporation. But even so, some element of incongruity must remain. One does not convict a natural person, for example a parent, simply because his son steals money in order to buy articles, whether luxuries or necessities, to benefit the parent. I assume no substantive element of complicity in the situation.

Various solutions to these difficulties have been suggested. The Model Penal Code seeks to distinguish between personal corporate liability and vicarious liability, attributing personal liability to decisions which represent corporate policy. The ambiguities inherent in this approach have been explored. Vicarious liability is imposed on the acts of servants or agents where the offence is one which is generally recognized as importing vicarious liability or where a legislative purpose to impose liability on corporations plainly appears. The Study Draft did not, as we have seen, attempt clearly to distinguish between personal and vicarious liability. It imposes liability for the default of persons in a managerial supervisory capacity, but does not require in terms that the default reflect a corporate decision not to enforce a particular policy. A wider liability is, however, imposed for misdemeanours. Canadian courts rely on a wide doctrine of identification which responds well to the problems posed by autonomy and decentralization.

It is not easy to determine which basis of attribution is to be preferred. The formula now employed by Canadian courts achieves a doctrinal unity at a cost in functional efficiency. That cost is probably very small. Its true significance is at present unknown. The same remarks apply to the approach adopted in the Model Penal Code. The rule now employed in American federal courts is apt to maximize functional efficiency. It is also a reasonably simple test, but there is a cost in terms of disunity of doctrine. The Study Draft represented a compromise between opposing modalities.

A further question arises once a basis of attribution has been chosen. Is such attribution to be defeasible, and if so, on what conditions? ²⁴¹ In some cases the attribution must be regarded as fixed simply because, in terms of company law, the sole appropriate organ has in fact acted. Thus, if the board of directors acting within the scope of its powers decides upon

²⁴⁰ See Fisse, *supra* note 224, at 118. For Fisse, as for the writer, this conclusion represents a fundamental change of approach. See Fisse, *The Distinction Between Primary and Vicarious Corporate Criminal Liability*, 41 A.L.J. 203, at 210 (1967).

²⁴¹ Lord Reid in *Tesco Supermarkets Ltd. v. Nattrass*, *supra* note 54, treats identification as indefeasible.

criminal conduct, its acts will be attributed to the corporation. The general body of shareholders may disapprove but since management, including the formulation of policy, is exclusively vested in the board of directors, it would seem inappropriate to preclude liability because of such disapproval. The board of directors is, between general meetings, responsible for policy. The general meeting can hardly be expected to supervise the board in the exercise of the board's functions. The executive organ having acted, attribution of its action to the company must be regarded as fixed.²⁴²

Different considerations arise where the acts of officers are attributed to a corporation or group as acts personal to it. Almost *ex hypothesi* it is assumed that persons higher in the corporate structure than the identified offender may be guilty of complicity in one mode or another. The difficult question then arises as to whether a corporation or group should be allowed to show that the acts complained of were done contrary to company policy. If the purpose of corporate liability is to impose a duty of supervision, it is not clear that a corporation should be allowed to challenge the application of rules of identification. One would have to go further to inquire into the merits of such a facility, and the inquiry would probably concern the desirability of allowing in effect a due diligence defence, examples of which are to be found in the Revised Statutes of Canada in relation to public welfare offences.²⁴³ This argument might well turn upon whether enforcement experience showed that such a defence could be allowed consistent with the due enforcement of the legislation.²⁴⁴ It has, for example, been argued that English factories legislation would be emasculated by the recognition of such defences.²⁴⁵ If, on the other hand, corporate liability were seen as directed towards policy decisions of the corporation itself, a doctrine of defeasibility would seem to be warranted by considerations of simple justice. The identification of the company with any director or officer would thus be preliminary and tentative—sufficient to enable the prosecution to proceed and to permit conviction unless the identification is challenged.²⁴⁶ Whether allowing defeasibility would result in a substantial failure of corporate liability is problematic. Certainly there would appear to be dangers in restraint of trade cases, where the argument would probably be raised that the acts of subordinates contravened company policy. Even if this argument is form-

²⁴² See Beck, *An Analysis of Foss v. Harbottle*, in *STUDIES IN CANADIAN COMPANY LAW*, *supra* note 85, 552-53.

²⁴³ See, e.g., Canadian Dairy Commission Act, R.S.C. 1970, c. C-7, s. 21(3); Pest Control Products Act, R.S.C. 1970, c. P-10, s. 10(2); Plant Quarantine Act, R.S.C. 1970, c. P-13, s. 10(2); Freshwater Fish Marketing Act, R.S.C. 1970, c. F-13, s. 30(2); Consumer Packaging and Labelling Act, S.C. 1970-71-72 c. 41, s. 21(1); Clean Air Act, S.C. 1970-71-72 c. 47, s. 36; Canada Water Act, R.S.C. 1970 (1st Supp.), c. 5, s. 31; Northern Inland Waters Act, R.S.C. 1970 (1st Supp.), c. 28, s. 35; Oil and Gas Production and Conservation Act, R.S.C. 1970, c. O-4, s. 52; Arctic Waters Pollution Prevention Act, R.S.C. 1970 (1st Supp.), c. 2, s. 20(1); Motor Vehicle Safety Act, R.S.C. 1970 (1st Supp.), c. 26, s. 18(1).

²⁴⁴ See also Fisse, *supra* note 224, at 119.

²⁴⁵ Barrett, 34 *MODERN L. REV.* 220 (1971).

²⁴⁶ As in *W.T. Grant Co. v. Superior Court*, *supra* note 68.

ally valid, the fact is that subordinates may have erred in response to real, if unrecorded pressures emanating from the corporate hierarchy.²⁴⁷ There can be no entirely satisfactory response to this conundrum. Once one assumes complicity at higher levels, one must either accept that the purpose of liability is indeed to impose a duty of supervision and proceed upon that assumption, or assume that guilt is personal only and accept acquittals resulting from any reasonable doubt arising on the evidence, giving full scope to defences based on corporate policy. At present, Canadian law ignores these difficulties by treating identification, once made, as fixed.

A further alternative is to allow a defence where the actual offender acted without intent to benefit the corporation and with a willingness to impose a detriment upon it—in effect the American rule.²⁴⁸ This would be appropriate as a limitation on both vicarious liability and personal guilt. One would wish to insist on both limbs, since in many cases the offender might act without intent to benefit the corporation but still within the course and scope of his employment and, thus, in a sense on behalf of the corporation. A rule which, for example, excluded liability where the offender acted without consciously intending to benefit the corporation would virtually preclude the enforcement of supervisory responsibilities by means of the criminal law. The addition of an intent or willingness to inflict detriment would seem to be desirable.

Finally, one must consider what sanctions ought to be provided against groups. As we have noted, the fine is the penalty most commonly invoked. Under the Criminal Code in the case of an indictable offence the amount of any fine is in the discretion of the court.²⁴⁹ Other statutes provide for high maximum fines against corporations.²⁵⁰ Even though the detriment to the proprietors of an endocratic corporation may be negligible, such fines must still be seen as substantial and therefore an inducement to management to adhere to proper standards in the conduct of business. The limitations on the utility of fines against corporations are really limitations on the utility of corporate criminal liability itself. In some cases guilty officers simply are not adequately reached by fining the corporation.²⁵¹ Their positions have not been imperilled; their salaries and perquisites remain unimpaired. It is tempting to stress this factor, thereby justifying Draconian measures. The notion, however, of stimulating shareholders to action by inflicting a crippling fine on corporations is not, ultimately, very attractive. It can be economically wasteful. It is also unjust: one of the great justifications of corporate enterprise and limited liability is that it enables persons who are not desirous of directing an enterprise to invest in it with the minimum possible risk.

²⁴⁷ H. SIMON, *ADMINISTRATIVE BEHAVIOUR* 129-33 (2d ed. 1963).

²⁴⁸ See Part III *supra*.

²⁴⁹ CRIMINAL CODE, R.S.C. 1970, c. C-34, s. 647.

²⁵⁰ See, e.g., Motor Vehicle Safety Act, R.S.C. 1970 (1st Supp.), c. 26, s. 17; Canada Grain Act, S.C. 1970-71-72 c. 7, s. 89(1).

²⁵¹ See Dershowitz, *Increasing Community Control over Corporate Crime—A Problems in the Law of Sanctions*, 71 YALE L.J. 280 (1961); LEIGH, *supra* note 1, at 153-55.

Furthermore, it is not clear that fines do not deter simply because directors and officers have not been dismissed. A fine may well deter a corporation from future misconduct. Where directors are not parties to misconduct, and this may be true in many cases, a fine should stimulate them to greater care. Nevertheless, as a deterrent, the fine suffers from potential structural inefficiencies when applied against groups. But it remains better to accept an element of inefficiency than to seek a perfect regime of deterrence if it means wielding a power to levy severe fines. In some of the most contentious areas involving directorial complicity, such as antitrust, machinery such as the administrative investigation exists and can be used as an aid in enforcing a rule of personal guilt.

It has been suggested that publicity is a useful adjunct to the fine as a deterrent.²⁵² A provision for publicizing corporate convictions appears in subsection 405(1)(a) of the Study Draft.²⁵³ Such measures were at one time possible following conviction for offences against the food and drug laws. In order to assess the value of publicity as a sanction, one must first determine what the purpose of the sanction is. We may accept that in many cases the purpose of the sanction is to stimulate management to ensure that proper standards are observed in the enterprise. It is probably not necessary to inflict a direct monetary loss in order to produce this effect. Mr. Fisse argues that it is possible to deter by inducing a loss of prestige or respect, provided that prestige or respect are not merely qualities which reflect financial standing.²⁵⁴ Thus the use of publicity is aimed essentially at lowering the prestige of the corporation rather than attacking its products as such. It has also been argued that publicity enables government to enlist public opinion in support of legislative aims.²⁵⁵

It seems likely that such publicity, unless employed systematically, will either go unnoticed by the public or will make a transient impression only.²⁵⁶ This does not mean that such publicity will go unnoticed by management in all, or even most, cases. Directors do often tend to see their companies as more than mere vehicles. The company often is the primary repository of directorial loyalties. The argument that publicity acts as a sanction by lowering enterprise prestige seems persuasive. To the extent that the value of publicity as a sanction depends upon reaction by the public, publicity and the stigma of conviction are likely to prove useful with respect to regulatory legislation, the purpose of which is to ensure adherence to proper standards, particularly with respect to food-stuffs, drugs and other articles of consumption. It is also in areas such as these that one is most likely to encounter regulatory agencies able and willing to make systematic use of publicity as

²⁵² Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 M.U.L.R., 107 (1971).

²⁵³ *Supra* note 151.

²⁵⁴ *Supra* note 252.

²⁵⁵ McKay, *Sanctions in Motion The Administrative Process*, 49 IOWA L. REV. 441 (1964); Rourke, *Law Enforcement through Publicity*, 24 U. CHI. L. REV. 225 (1957).

²⁵⁶ See Dershowitz, *supra* note 251.

a weapon,²⁵⁷ but there the thrust is towards protection of the public rather than any punitive end or purpose.

A further sanction is the injunction. The Attorney General may sue for an injunction to protect the public at large from an invasion of its rights. An early and common example is the use of the injunction to restrain a public nuisance. The Attorney General has a useful power to sue for an injunction where the ordinary sanctions of the criminal law in relation to petty offences have proven incapable of deterring the commission of offences.²⁵⁸ Disobedience to an injunction is punishable by a fine, the amount of which lies in the court's discretion. English courts have not restricted the granting of injunctions to cases in which a small and inadequate penalty alone may be imposed for continuing offences, and injury to the public need not be proven. English courts hold that only in exceptional cases will the court decline the relief asked for by the Attorney General.²⁵⁹

There is little doubt that this procedure is available in Canada. It affords a device, perhaps a colourable device, for circumventing low monetary penalties provided for breach of minor offences. Injunction procedure need not be (and indeed is not) provided for in the Criminal Code; it exists in provincial law. Nor, it should be added, is the use of the injunction limited to corporate offenders. It is of general utility, though whether it should be commonly resorted to is doubtful. Where a penalty is inadequate, it might often be best to increase the penalty by statute. There is a danger that the injunction might be awarded in cases where no substantial detriment to the public in fact occurred. Furthermore, it would be undesirable if the safeguards built into the criminal process could readily be evaded by resort to injunction procedures.²⁶⁰

A further possibility is the use of orders dissolving the corporations or groups for violations, inter alia, of the criminal law. Such procedures do not exist under the Criminal Code. Under articles 828 and 829 of the Quebec Code of Civil Procedure²⁶¹ the Attorney General may move for an order that a company be dissolved and its letters patent revoked in cases where, inter alia, it violates the laws by which it is governed. There seems little doubt that this power enables the court to dissolve a company which performs fraudulent acts.²⁶² It would seem that the court could only dissolve companies and other bodies formed under the laws of the province.²⁶³ This

²⁵⁷ LEIGH, *supra* note 1, at 159-60.

²⁵⁸ *Attorney-General v. Premier Line, Ltd.*, [1932] 1 Ch. 303, 101 L.J. Ch. 132 (1931); *Attorney-General v. Harris*, [1961] 1 Q.B. 74, [1960] 3 All E.R. 207.

²⁵⁹ *Attorney-General v. Harris*, *supra* note 258.

²⁶⁰ LEIGH, *supra* note 1, at 156-57; S. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 252 (3d ed. 1973).

²⁶¹ CODE OF CIVIL PROCEDURE, 13-14 Eliz. II, c. 80.

²⁶² *People's Holding Co. v. Attorney-General of Quebec*, [1931] S.C.R. 452, [1931] 4 D.L.R. 317.

²⁶³ *British Columbia Power Corp. v. Attorney-General of British Columbia*, 44 W.W.R. 65, 47 D.L.R. (2d) 633 (B.C.S.C. 1963). See also Ziegel, *Constitutional Aspects of Canadian Companies*, in *STUDIES IN CANADIAN COMPANY LAW*, *supra* note 85, 149; Lederman, *Legislative Power to Create Corporate Bodies and Public Monopolies in Canada*, in *CONTEMPORARY PROBLEMS OF PUBLIC LAW IN CANADA* 108 (O. Lang ed. 1968).

power does not seem to be resorted to very frequently.

A similar sanction deriving from *quo warranto* also exists in the United States. The result of such *quo warranto* proceedings may be forfeiture of the corporate charter, but the more common order is one ousting the corporation from the right to carry on certain activities. Continuous breaches of the penal laws are regarded as perversions of the purposes for which incorporation was granted.²⁶⁴ Forfeiture has seldom been decreed nor, under the anti-trust laws, has the somewhat similar remedy of divestiture often been ordered. The potential economic dislocation involved is too great.²⁶⁵ The forfeiture remedy is unlikely to be used against large corporations and is probably unnecessary against small corporations. Ouster is very like the injunction, which might as well be left to cover the ground. Nonetheless, *quo warranto* provisions appear in the Model Penal Code.²⁶⁶

A further possibility is the use of civil damage actions in aid of criminal legislation. This device is much used in American anti-trust violations. The Study Draft goes further and provides:

405. Special Sanctions in Cases of Organisational Offenses

(1) *Organisation*. When an organisation is convicted of an offense, the court may, in addition to or in lieu of imposing other authorised sanctions, do either or both of the following:

(b) direct the Attorney General, United States Attorney, or other attorney designated by the court to institute supplementary proceedings in the case in which the organisation was convicted of the offense to determine, collect and distribute damages to persons in the class which the statute was designed to protect who suffered injuries by reason of the offense, if the court finds that the multiplicity of small claims or other circumstances make restitution by individual suit impractical.²⁶⁷

It is unlikely that such a provision would be much used. The federal courts are beginning to evince a reluctance to entertain class suits in corporation matters and to hedge their reception about with formal obstacles which, though appearing in Rule 23(b) of the Federal Rules of Civil Procedure,²⁶⁸ have not hitherto been much employed. It would not be surprising if courts refused to direct civil suits where the result would appear to be little more than the infliction of an additional fine. In any event section 405 is rather vague. What statutes are intended for the protection of a class or classes of persons? Must there be claimants with claims filed in court at the time when the

²⁶⁴ LEIGH, *supra* note 1, at 157-58; Rosenweig, *Quo Warranto*, 13 CORNELL L.Q. 92 (1927); *Quo Warranto and Private Corporations*, 37 YALE L.J. 237 (1928); Maddingan, *Quo Warranto to Enforce a Corporate Duty not to Pollute the Environment*, 1 ECOLOGY L.Q. 653 (1971).

²⁶⁵ *People v. North River Sugar Refining Co.*, 24 N.E. 834 (Cl. App. N.Y. 1890); and *see*, on divestiture, REPORT OF THE ATTORNEY-GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 353-58 (1955), pointing out that in the first fifty years of anti-trust enforcement, only 24 divestiture decrees were made.

²⁶⁶ MODEL PENAL CODE, *supra* note 46, s. 6.04 (1962); and for criticism *see* ALI PROCEEDINGS 197 ff. (1956).

²⁶⁷ *Supra* note 151.

²⁶⁸ FED. R. CIV. P. 23(b).

criminal case is heard? Is it likely that small claims will be filed before potential plaintiffs know how the court is likely to exercise discretion? Should there be some form of *partie civile* procedure?²⁶⁹ The general use of such a provision is of dubious validity and particularly under the Criminal Code, though such a proceeding could perhaps be useful under some regulatory legislation. The idea needs, however, to be carefully worked out if it is to be further entertained.

The issues with which this section deals are complex. They have never been squarely faced either by Parliament or by the courts. Perhaps it is better that they should not be. The common law rules concerning corporate liability represent a rough, and perhaps arbitrary, response to the enforcement problems posed by group activities and the characteristics of groups. It may be that any response must be rough and in some measure arbitrary; perhaps fundamental problems about the functions of criminal law, the moral bases for the attribution of guilt and the like cannot be perfectly resolved. Certainly there seems no single neat solution to problems of corporate and group liability.

VI. ENVOI

The Law Reform Commission of Canada has now published *Criminal Responsibility for Group Action*, Working Paper No. 16 (1976), which deals with the policy bases for the imposition of criminal responsibility upon corporations and other groups. Its appearance must be welcome to anyone who is interested in the theoretical justification for such liability. In this brief account I shall endeavour simply to summarize some of the Law Reform Commission's principal conclusions and to indicate where my views would differ from those of the Commission. A preliminary and fundamental point of disagreement must be the distinction, drawn by the Law Reform Commission, between real crimes and regulatory offences. Briefly, the Commission considers criminal offences to be real crimes which are intimately concerned with values, while regulatory offences are concerned with results and therefore primarily based upon expediency. This seems to me to state the contrast far too starkly. Part of the function of the criminal law is to mould values. Many regulatory offences cannot be said to be either minor in their effect or, from the point of view of the persons committing them, unattended by circumstances of moral fault. It is at least possible that such a mundane matter as the difficulty of proving intent to commit an act, for example to sell adulterated milk or to pollute watercourses, plays a significant part in determining whether or not the prosecution is required to prove intent, recklessness or negligence. This is, perhaps, not the place to explore the matter further, but it explains a difference in approach.

The Law Reform Commission proposes that corporate officers should be liable for "real crimes" where there is intention or recklessness. For

²⁶⁹ See further G. STEFANI & G. LEVASSEUR, *supra* note 125, at paras. 475-476.

regulatory offences they would impose an additional liability on such officers in respect of negligence. This emphasis is not unexpected. A clear articulation of a negligence standard in the case of regulatory offences might be of real value in helping to set general standards of care and skill for directors. It is entirely to be welcomed that the onus should lie on an accused to show that he exercised due diligence.

A most significant suggestion is that, in the case of a "real" crime, after the prosecution has led evidence which would lead a reasonable person to infer that the acts or the risks in question must have been known to management, the corporation could, as a matter of defence, show that conduct alleged to constitute an offence was not supported by the knowledge or intention of appropriate corporate officials. In the body of this article, I have submitted that one of two choices are open—either to hold the corporation liable for crimes on the basis that their commission represented corporate policy, or, generally, to adopt a wide supervisory approach. The Law Reform Commission has opted for the former alternative. They have done so in a logical fashion. The doctrine of *prima facie* imputability which they put forward really means the abandonment of the doctrine of identification as a basis for guilt. Instead, the doctrine of identification becomes a means of imputing guilt *prima facie*, but subject to the right of the corporation to disprove the offence. Identification would thus at best have a tentative significance. This is an important statement of principle.

The justifications for corporate liability advanced by the Commission are conventional but compelling. They draw attention to the difficulty in the absence of liability of regulating and controlling companies whose activities are conducted across jurisdictional boundaries. Because of the national character of criminal law in Canada this problem has not arisen as dramatically as it has in other jurisdictions—for example, Western Europe, where extensive machinery is being devised for the return of offenders and the transfer of criminal files between different jurisdictions.²⁷⁰ A second reason assigned for liability is that to hold only an individual liable does not allow a judgment to be made about a process, *e.g.*, a management process. Thirdly, it may be inefficient to deal with systems through their components and 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. This is of course a theme stressed in this article. The Commission further concludes that it might be possible to force the corporation to make restitution to victims.

The Commission concludes that corporate criminal responsibility should not replace personal responsibility, and that guidelines suggesting when a prosecution should be undertaken against a corporation in addition to or instead of an individual would be helpful. They conclude that a corporate sanction should include a designation of personal accountability at the time it is imposed.

²⁷⁰ See COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON THE TRANSFER OF PROCEEDINGS IN CRIMINAL MATTERS (1969).

In respect of sanctioning the corporate offender, the Law Reform Commission notes the present heavy use of fines, insisting that one should distinguish between fining the corporation and requiring it to surrender illegal profits. This degree of clarity is welcome. The principle which follows is that, in fining a corporation, the court should only look at the illegal profits in order to assess the severity of the crime. It might be noted that there will be many cases in which an illegal profit will not be present, or in which such a profit will be divined only by a tortuous and indirect process of reasoning. Difficulties of this sort might arise, for example, from isolated offences of pollution. On the other hand, a profit determination might be readily made in certain consumer cases and in cases of restraint of trade. However that may be, the conceptual clarity insisted upon by the Commission is welcome and leads to the conclusion that, if the court decides that the corporation should be stripped of its profits in addition to being fined, 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. This is of course somewhat tentative; machinery for the assessment of these matters has not as yet been devised.

The attention given to sanctioning extends beyond fining and restitution of profits. Attention is paid both to prophylaxis and to deterrence. For example, the Law Reform Commission notes the possibility of removing people from positions from which they have the capacity to inflict social harm. As has been noted in this article, such provision exists under companies legislation in certain jurisdictions. It also forms the basis of much sanctioning engaged in by the American Securities Exchange Commission, and is found in the criminal law of many Western European countries.²⁷¹ The Commission draws attention to a possibility that a sanction imposed upon a corporation will primarily injure innocent shareholders. This has always been viewed as an impediment to imposing penalties upon bodies corporate. The Commission puts the matter neatly in perspective, noting that injury to innocent persons may be the unavoidable effect of a choice that achieves the maximum good and is a phenomenon associated with the imposition of punishment generally. They treat it, however, as an important consideration for a court to take into account. By so doing the court may be induced to treat a conviction itself as the value reinforcement element and to concentrate on other objectives, perhaps restitution, in selecting an appropriate sanction. This is, necessarily, very speculative, but it is a suggestion worth exploring.

The Commission further attends to the need to bring the impact of conviction to bear on those in a position to make changes to the way in which a corporation or group carries on its activities. They point to the relative ineffectiveness of shareholder action. They draw attention to the possibility of invoking sanctions that directly remove the threat of injury

²⁷¹ See SOCIÉTÉ INTERNATIONALE DE DÉFENSE SOCIALE, *LES INTERDICTIONS PROFESSIONNELLES* (1969); M. DELMAS-MARTY, *supra* note 126, at 475-92.

by interfering with the corporate operation, rather than by attempting to reshape corporate decision making into a law abiding model. Thus, for example, they suggest that in the case of misleading advertising, an appropriate recourse may be to force the corporation to conform with a specific court order, providing for judicial or administrative monitoring or banning of advertising. They conclude that in the final analysis winding up the corporation or placing it under close court-sponsored supervision (a more likely alternative) may be more effective than attempting to influence the behaviour of individual decision-makers by imposing group economic sanctions. This is a wholly appropriate emphasis. The Commission proceeds to deal with restitution to victims of harm, envisaging class or group actions against a corporation or group for injuries suffered by individuals. They conclude that any amounts paid into court by a corporation in respect of unlawful profits made by it might be placed in a fund from which grants could be administered to suitable public interest organizations to encourage private representations of the interests of those victimized by the unlawful activities of corporations. Corporate criminal conduct damaging general interests in resources shared by the community as a whole, such as clean air and water, should in some cases attract a judicial order requiring the corporation to pay damages for public injury. This notion of compensation is, one supposes, somewhat akin to, and a logical development from, the common law offence of public nuisance, the object of which was always thought to be to force the offender to repair his wrong by abating the nuisance. Obviously, however, the suggestion is wider.

A further suggestion is that of negotiated sanctions, which would require the courts to think in terms of negotiations between corporate offenders and victims with a view to a consensual sanction that would not only provide restitution to victims but would require corporate managers to eliminate future violations. The court might, it is suggested, act as arbiter and might reserve the right to approve the final disposition of the matter and to impose supervision of the fulfilment of the terms of the agreement. This suggestion, if adopted, would render some classes of corporate criminal proceedings very similar to injunction proceedings employed in the United States as a means of policing the federal securities laws,²⁷² or to the role of the court in approving settlements in derivative suits. In order to avoid matters being wrongly diverted from the criminal process, it is proposed that the Crown prosecutor should determine whether the machinery of negotiated sanctions is appropriate in any given case.

The Commission concludes that liability should not be restricted to corporations but should extend to other groups. They point out that more detailed consideration is required, that there are problems in determining

²⁷² See *S.E.C. v. Manor Nursing Centers Inc.*, 458 F.2d 1082 (1972); *S.E.C. v. Bowler*, 427 F.2d 190 (1970); *S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (1968); and see Treadway, Jr., *S.E.C. Enforcement Techniques Expanding & Exotic Forms of Ancillary Relief*, 32 WASH. & LEE L. REV. 637 (1975).

which groups should be included in the ambit of liability and upon what terms.

Finally, the Law Reform Commission concludes that the role of the criminal law here is limited. It is difficult and expensive to enforce, and the lack of enforcement resources in the face of the sheer size of the problem leads to its being invoked at best only sporadically. Moreover, the courts are not suitable forums for re-organizing a corporation's structure or reforming its business practices. The criminal trial simply provides a medium through which selective responses can be made to proven deviant acts; it is not a regulatory device. This is an emphasis with which the author obviously agrees.

Even if the criminal trial were not so limited a device some situations might well be too large or too politically charged to allow for adequate resolution through criminal law. In some circumstances, it might be necessary to protect the public interest through devices such as nationalization or trusteeship, as was done, for example, in France after the Second World War in relation to companies such as Renault. In drawing attention to the use of administrative procedures and an administrative model, the Commission makes a valuable and most welcome contribution to the area.