Why Corporate Deviance is Not Treated as a Crime: The Need to Make "Profits" a Dirty Word

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Abstract
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WHY CORPORATE DEVIANCE IS NOT TREATED AS A CRIME — THE NEED TO MAKE “PROFITS” A DIRTY WORD

BY H. J. GLASBEEK*

In an indictment of a system which permits corporations — literally — to get away with what would be deemed criminal in a non-corporate setting, Professor Glasbeek examines a number of theories that apologize for and purportedly explain this phenomenon. He presents a compelling argument that corporate decision makers and controlling shareholders are exempted from culpability because they are members of or closely associated with the ruling class. His conclusion includes a rationale for changing the manner in which corporate wrongdoers are perceived (by regulators, legislators, the judiciary and society) so that sanctions will attach to criminals regardless of class.

I. INTRODUCTION

Horrified by violence in the workplace, Rowland and I wrote an article¹ in which we argued that it would be beneficial for society to use its ultimate sanction to demonstrate its moral abhorrence of the selective infliction of harm on one class of society’s members: workers. That is, we wanted to apply the force and vigour of criminal law to workplace “accidents”. We argued that, given the failure of normal regulatory systems to provide even a reasonably safe environment, drastic measures were in order. Much of the article demonstrated that injuries and deaths in the workplace could be treated as assaults and killings of the kind normally sought to be controlled by the criminal law proper, rather than by civil or administrative schemes. We felt that we furnished a plausible set of arguments. But some questions remained unanswered: Why had the criminal law seldom been so used? Why was, and is, there no real inclination to move in that direction?

These questions have posed serious conceptual problems for mainstream criminal lawyers and criminologists. They have had to offer ex-
planations as to why corporate wrongdoing is rarely perceived or treated as criminal behaviour. In this paper, I want to show not just that the arguments they have addressed are tendentious and, often, illogical, but also that the need to make them arises only because these traditional scholars make unwarranted assumptions about the nature and purposes of criminal law and of corporations. In particular, their underlying belief (which leads to a variety of sophisticated theories) is that there is a societal consensus about what conduct should be termed criminal and what should not. As to the nature of corporations, a sociological lore has grown up deeming corporations to be much like other organizations, at least in respect of deviant behaviour. These starting positions pose a conundrum for conventional wise: on the one hand, they demand evenhanded treatment for behaviour which appears to be criminal, on the basis of the perceived consensus about values, while on the other hand, the difficulty of applying criminal law focused on human behaviour does not make obvious sense when asked to deal with a dynamic entity — an organization — which transcends individual human beings' motivations. Inevitably, their discussion seeks either to explain away the lack of evenhanded treatment, or to argue that organizational restructuring is better than the crude application of criminal law if less deviant behaviour is the purpose of reform. I aim to establish that, if a different approach is taken to the genesis and nature of criminal law, the differential treatment of apparently similar behaviour will be seen to be exactly what is meant to happen. The argument will be that idealized economic premises of a particular kind — the tenets of free enterprise — mandate the results obtained and that criminal punishment is to be reserved for certain people and classes, not for others. That is, a variant of the conflict paradigm is offered as an explanatory theory for what happens. The special organizational aspects of corporate life will also be addressed from this perspective. Then I will show how advantage might be taken of the predominance of the consensual paradigm in our ideological framework to draw attention to the contradictions inherent in law in general, and to the plight of the victims of corporate crime in particular.

2 The central argument of this article is wrongdoing by corporations. The more general questions which arose from the first article had particular meaning in respect of corporations; most of the workforce in the private sector is employed by corporations.

3 The terms "consensus" and "conflict" are used as descriptive of poles at opposite ends of a theoretical spectrum. There are many varieties of both consensus and conflict theories. For the purpose of the analysis herein, however, these are grouped under an umbrella so that the essential difference between the two categories can be examined, that difference being that consensus theories do not, and conflict theories do, emphasize power differentials as vital in explaining the criminal law system. See text accompanying notes 96-101, infra.
II. CORPORATE WRONGDOING AS A PROBLEM FOR CONSENSUS THEORISTS: PREVALENCE AND IMPACT

The seminal work leading to the study of corporate crime in its own right was done by Sutherland. His investigations demonstrated that major corporations frequently broke the law and he argued that, if the usual approach to deviance from legal duties and standards were adopted, corporations would be treated as criminals. As it is evident that this seldom happens, an impetus has been provided for research in the area. The apparent lack of evenhandedness is suggestive of failure of consensual and liberal theory.

Beleaguered consensus theorists have already had to deal with the embarrassingly well-documented fact that rich people commit a great number of crimes, are disproportionally less often prosecuted and, if prosecuted, less often convicted than poor people. Moreover, even when convicted, their sentences are lighter than those of poor people, and they get preferred treatment in the parole system. Fortunately, these disparities can either be explained or justified by reference to factors which leave the consensual framework largely intact. This is done by contending that some of the difficulties arise from those associated with giving effect to any complex system, rather than being due to inherent problems. Such “natural” difficulties include the political biases of public officials and police forces in favour of well-to-do people, and the inadequate provision of legal representation for the poor. Such malfunctioning clearly can be remedied, at least in theory, whilst leaving the conceptual framework — the consensus analysis — firmly in place. Other justifications for what seems to be the selective use of criminal law against the poor may be found in theories surrounding the causation of crime. Such causal theories include theories of strain, which assume that crime is due to heightened levels of frustration leading to

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4 Some of Sutherland's most important works include: *White Collar Criminality* (1940), 5 Am. Soc. Rev. 1; *Crime and Business* (1941), 217 Annals 112; *Is “White Collar Crime” Crime?* (1945), 10 Am. Soc. Rev. 132; *White Collar Crime* (1949).


8 Dollard *et al.*, *Frustration and Aggression* (1939).
non-conforming aggression, notions of anomie, which suggest that, when cultural goals seem unreachable by legitimate means, some people will turn to criminal means to obtain them. Such tendencies will be strongest in those who have the greatest barriers to achievement: the ill-educated, the poor. Moreover, the likelihood that frustration and impotence will result in deviance is increased when the conventional bonds which tie actors to their environment are weak, when the domestic situation is not stable, where school does not have its usual overwhelming influence and where steady work with its associated discipline is notably absent. Again, these circumstances will prevail in disproportionate quantum amongst the poor. Add to these theories the labelling theory, which holds that once people (especially those with feeble conventional bonds) have been identified as deviants, the probability of future criminal behaviour is augmented.

While all these theories may have some merit, they do not explain why so many well-to-do people commit crimes. On the other hand, over time, the vigorous advocacy of the causality theories has undoubtedly influenced law-makers, judges and the police to hold the honest belief that most of the real problems to be controlled through the criminal law system arise from non-conforming behaviour by poor people. In this context, the lack of evenhandedness, while regrettable, is not seen as a serious cause for alarm by those who adhere to an idealized consensus model for their theoretical understanding of the law.

Sutherland made visible a kind of actor, the corporation, whose deviant conduct could not be attributed to any of the causal theories the behavioural sciences had spawned. Further, the impact of corporate deviance on the victims was enormous. Estimates abound to the effect that the adverse economic effect of corporate wrongdoing vastly outstrips that caused by mortal criminals. Thieves, muggers, bank robbers and confidence tricksters are truly small-time when compared with anti-trust conspirators, government bribers, false labellers and unsafe producers. Once it became recognized that both the incidence and the

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9 Merton, Social Theory and Social Structure (1957).
12 Although they, too, can suffer from anomie, have weak conventional bonds, etc. See Hirschi, supra note 10.
13 While such measurements are unavailable in Canada, attempts have been made elsewhere. The differences between white collar crime, corporate crime and street crime are difficult to define, but the figures are so mindboggling that this becomes a quibble. In A Handbook on White-Collar Crime (1974), the U.S. Chamber of Commerce reported the cost of white collar crime to be just under $42 billion — ten times the total amount taken in all thefts reported in the FBI
consequences of corporate deviance were large, the problem for maintaining the appearance of neutrality of the law was real. The possibility had to be faced that a Marxian conflict model of criminal law (positing that it is the coercive force used by the State to repress class struggle in order to serve the ruling classes) would become a more plausible analytical framework than a functional/consensus model. In large part, the scholarship in this area is a (perhaps often unconscious) reaction to this angst. Explanations for the lack of evenhandedness are offered on the basis that corporate crime is difficult to prove, at one end because of its diffuse effect, at the other end because of its diffuse commission; it is also argued that corporations are not the proper subject of criminal law because they are not humans (in the sense either that they cannot possess mens rea or that, like all organizations, they are inherently deviant). Purported justifications for different treatment are to the effect that punishment of corporations leads to unwarranted side-effects, that the wrong people ("innocent" shareholders, creditors, workers) will be punished, that it costs too much to prosecute corporate crime, especially since it diminishes resources which ought to be devoted to other criminal conduct and that the training of special investigators is expensive.

The need to make these arguments arises, in part, because the consensus theorist assumes that breaches of penal laws amount to crime. The gravity of corporate crime then becomes a serious problem. The breach of a provision of an occupational health statute by an employer would not, by itself, be more serious than a violation by a car owner of a parking bylaw. A light fine, even a reprimand, for both offenders would amount to equal treatment. And, by and large, this is what happens. But the consensus analysts are confronted by the unpalatable fact

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Index and 250 times the amount taken in all bank robberies in the U.S. in that year. See Reiman, supra note 7 at 106 et seq.; also Clinard & Yeager, Corporate Crime (1980); Task Force Report of the President's Commission on Law Enforcement and Administration of Justice, Crime and its Impact — An Assessment (1967); Conklin, Illegal But Not Criminal (1977); Box, Power, Crime and Mystification (1983).

14 Many people may be affected to a small extent, unaware of this or of one another.

15 It may well be difficult to isolate one particular actor or, indeed, one complete act which can be labelled deviant, as complex organizational models fragment decision-making and divide labour. See text accompanying notes 81-95, infra.

16 Id.

17 In the extreme, it may be argued, it will lead to the withdrawal of risk capital from the market, not only by the particular corporation, but by other investors.


that breach of an occupational health statute often (usually?) has a far greater adverse impact than the breach of the law dealing with murder or assault (that is, one which deals with acts which cause great and tangible harm). The demand for evenhandedness, in the sense of imposing more than a fine or to reprimand, thus arises from the knowledge that illegal corporate activity imposes concrete and serious injury. While the consensus theorists regard the gravity of the harm as very important, it cannot be their final determinant of whether or not the behaviour which inflicts the harm is so unacceptable that it must be characterized as criminal, in the sense that it will attract the full force of the criminal law as that is applied to "street" crime. This can be illustrated rather easily.

The present economic depression/recession (choose one) has many causes. One of its effects is a level of unemployment which some (I for one) think is intolerable. There can be no gainsaying that it causes terrible harm: loss of educational opportunities, lowering of living standards to the point of deprivation as people are rendered homeless and left hungry, creation of emotional and psychological stress which causes increased rates of suicide and alcoholism, all of which heighten the tendency (the need?) to commit crimes. In short, people are dispossessed, made desperate. Yet, it cannot be argued that there is a dearth of productive work which could be done, some would say needs to be done: There are housing shortages, short-staffed hospitals, roads and streets in disrepair, transit systems lacking equipment and workers, technological devices and machinery needing to be invented, designed and produced for environmental protection. People could be employed. One of the major reasons they are not is that other individuals, who have the means to fund such work-creating and socially useful projects, do not do so because they believe that they will not make sufficient profit from such investments. Indeed, the level of unemployment has become what it is as they have deinvested because profits no longer accrued at all or only to an unsatisfactory extent. These investors and potential investors — capitalists — have made deliberate decisions which cause harm. As it happens, most of these "people" turn out to be corporations. To my knowledge, the scholars in the area of corporate crime have not claimed that this refusal to invest or to continue to in-

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vest is deviant or criminal. It may be that this is because would-be investors or investors are themselves victims of the workings of an economic system for which others (the State) or no one is responsible. I would merely note that this does not seem to be an available defence for a welfare mother when she is charged for not revealing that she had some money of her own which she could have spent on her dependent children. Coercion by “the system” is not the difference between the cases. It is crystal clear why the refusal to invest is not treated as deviant or criminal: the conduct is exactly what is wanted from a corporation which lives up to the expectations for which it was created. For this reason, the horrible consequences of such model behaviour are, from the standard legal and moral points of view, inconsequential.

While some may think the illustration not very helpful because it addresses the issue by way of a reductio ad absurdum argument (a form of reasoning which is seldom an aid to understanding and solving real life problems), it was chosen for a reason which will become clearer below. In the meanwhile, the next illustration will demonstrate that, not only do the incidence and gravity of harm, by themselves, not characterize an act as either criminal or non-criminal (that would ignore the nature of the act which caused the harm), but that the law treats apparently identical conduct, causing the same harm, differently. Thus, drinking to excess, knowing that a car will be driven and then driving in that condition will permit the conviction of the driver. If someone is injured, the driver may be convicted of criminal negligence or manslaughter because driving in these circumstances exhibits a recklessness towards human life and limb which amounts to mens rea. Conversely, if an experienced builder carefully plans the construction of an eighty-storey building, knowing that for every ten storeys above fifty a worker on the site will be seriously hurt, the builder will not be deemed to have had the necessary mens rea to warrant conviction of criminal negligence or manslaughter when three workers are hurt. It cannot be contended that a dangerous situation was not knowingly created. Indeed, if anything, this case is worse: it is unlikely that the drunk driver planned the escapade. To distinguish the two cases (that is, to justify the different treatment by the criminal system), the argument which suggests itself is that the builder’s harm-causing conduct was not immoral. Presumably, the driver’s harm-causing conduct was

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22 Faced with making the distinction Howard, in *Australian Criminal Law* (2nd ed., 1975) at 46-47 was unusually candid about the difficulty, but offered no explanation:
morally unacceptable. Thus, in addition to the gravity of the consequences, the morality of the harm-inflicting actor is important to the consensual theory.

III. THE SUPPOSED LINK BETWEEN CRIMINAL LAW AND MORALITY IN CONSENSUS THEORY — THE BUILT-IN DIFFICULTY

Only a simplified account of the underlying notions of liberal (consensus) theorists (those to whom neutrality of law is important) is presented.

Each juristic person starts with a bundle of inherent rights the enhancement and protection of which the State facilitates and the State is given coercive power to this end. This, in itself, presents a danger to the individuals as the State may abuse its overwhelming power. Constraints on its use must, therefore, be imposed. In this light, the most repressive aspect of State power — its right to command people under pain of punishment from fines to incarcerations to execution — should only be available where the conduct of individuals threatens to rent the delicate social fabric woven by the consensus of society’s members. The consensus revolves around the inherent rights of individuals. Because it is essential to this model that individuals be given freedom to act to achieve their legitimate aims, the State will have to assume that, when it is feared that a person has unwarrantedly interfered with another’s rights, the suspect is innocent until proven guilty. Moreover, the State ought to start from the position that conduct is not criminal in order to maximize the potential for individuals to pursue their own aims in their own way. Before conduct can attract the coercive power of the State in its most trenchant form — application of criminal law — it must be established that the conduct is harmful to essential social values. Thus, not all behaviour which might be morally condemned will be considered criminal. In addition, it must be deleterious to important, shared

D may be in charge of a dangerous constructional operation such as tunnelling through a rock. It may be a statistical certainty that over a period of one month at least one man under his command will be killed. D will nevertheless not be guilty of murder if he knows the statistics and orders the work to proceed. It is difficult to draw a satisfactory distinction between cases where foresight of certainty is equivalent to intention in murder and cases where it is not. The difference does not lie in the introduction of statistics, for these, when used predictively, merely express a degree of probability in a conveniently exact form. Neither does the difference lie in the lawfulness of D’s activity, apart from the homicide, for a man lawfully blasting holes in rock would be guilty of murder if he knew that by setting off the charge he would certainly kill a trespassing onlooker.

Certain people, then, may be killed with impunity, others not. In the Howard hypothesis, note that it is non-culpable to kill a productive, useful worker, but not an idle trespasser. This is raised to foreshadow the argument made below about the nature of the legal system’s bias.
values.\textsuperscript{23}

To better understand the import of this model, it is useful to compare it to the civil branch of the law, that is, when individuals seek redress from other individuals. Redress will be based on the notion that a social value requires legal support (for example, sanctity of a bargain, freedom to do what one likes on one's own property, right to rely on reasonable driving by another, protection of reputation, and so forth). The remedies available are not always very different from the punishments imposed by criminal law. Fines and damage awards do not differ in their impact; indeed, the latter may inflict much greater economic distress on the "loser" in the case and the economic cost of damages might even exceed the pain of incarceration. In civil cases there is, of course, no equivalent to the death penalty. But, even though there is not complete symmetry between civil remedies and criminal sanctions, very often the objectives sought are congruent. Thus, it is common to argue that success in a civil action is to be based on whether a remedy would appease the plaintiff, ethically punish the defendant, satisfy the need to have the defendant ethically compensate the victim, provide specific deterrence so that the defendant will not act wrongfully again and deter others from such behaviour.\textsuperscript{24} Criminal lawyers and criminologists will recognize these goals! Further, in many kinds of civil actions (such as trespass, defamation, contract and even some negligence cases),\textsuperscript{25} punitive damages are awarded which, in effect, impose serious fines on the civil wrongdoer. Moreover, even when other forms of legal regulation or administrative control are used, some of the goals will coincide with those of the criminal/civil law (for instance, specific and general deterrence and compensation of victims). All of this suggests

\textsuperscript{23} Although this simplified model may offend the more sophisticated, it served as the point of departure for a major review of criminal law undertaken by the Law Reform Commission of Canada: Our Criminal Law (1976).

\textsuperscript{24} See Williams, The Aims of the Law of Tort (1951), 4. Curr. Leg. Probs. 137; Williams & Hepple, Foundations of the Law of Tort (1976). While other raisons d'\textsuperscript{etre} for the law of torts are offered, these form the core of the conventional wisdom, i.e. of the legal consensus theorists. Just as consensus theory proves unsound in the criminal law area, so it fails as an explanatory mode in the civil sphere, see Glasbeek & Hasson, “Fault, The Great Hoax”, Klar, ed., Studies in Canadian Tort Law (1977) at 395.

that there must be a good deal of overlap in the aims and objectives of criminal and civil law (and administrative regulation). In particular, there must be a great deal of coincidence in the social values sought to be protected. The question this raises is: When is it appropriate to further such social values through the use of the repressive power of the State rather than through the civil or administrative mechanisms? Remember that for the adherents to the liberal/consensus model this question is raised from within a framework which assumes that the State should be inhibited in its use of its coercive powers.

The answer must be that the criminal law is attracted when the conduct is such that, in addition to sanctions of a kind which can be inflicted civilly or administratively, public condemnation and stigma are to be attached to it. The social value attacked must be vital, the way in which it is violated reprehensible. When the social value in question is essential to social cohesion, it is relatively easy to hold criminalization appropriate. The most obvious example is that sanctity of life must be respected. Violence to other individuals usually will be deemed criminal. Killing or maiming of people may be held to be criminal. But, after this relatively easy to agree upon category, what?

The difficulty with liberal rights' theories analysis is that, at bottom, it is indeterminate. Much as it talks about fundamental, natural, inherent, basic individualistic rights, it is able to identify such rights only if agreement can be reached that conventional perception of those rights is correct. If it is contended, as I do, that the conventional perception of what reality is may itself be the product of a consciousness created by the status quo, then the idea of inherent/fundamental individualistic rights, unrelated to political organization, must be rejected. The modern prophet of liberal rights' theorists, Ronald Dworkin, noted that when a court is faced with the issue of determining if a legislative or executive act violates a constitutional or fundamental right, the court's approach must start from the proposition that "[a] claim of right presupposes a moral argument and can be established in no other way." But where is the court to find the criteria to make the necessary moral judgments? Dworkin argues that when judges are looking at principle and morality to identify which rights ought to be enforced, they are to search for institutional rights, those which can be extracted from existing institutions and accepted practices. His advice to a judge is:

26 Not all conduct with the certain consequence of physical harm will be held to be criminal, see text accompanying note 22, supra.
27 Dworkin, Taking Rights Seriously (1978) at 147.
The constitution sets out a general political scheme that is sufficiently just to be taken as settled for reasons of fairness. Citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme, and they must take the burdens as well, at least until a new scheme is put into force either by discrete amendment or general revolution. But he must then ask just what scheme of principles has been settled. He must construct, that is, a constitutional theory... we may suppose that he can develop a full political theory that justifies the constitution as a whole. It must be a scheme that fits the particular rules of this constitution of course.28

Inherent human rights are thus those which will help the status quo to perpetuate itself. But, at any one time, these are hard to identify and controversy will exist. For the consensus criminal law theorist, then, the problem of which social values need to be protected through the criminal law system looms large.29

IV. FREE ENTERPRISE IDEALS AS THE MORAL BASIS FOR CRIMINAL LAW

Whatever the extent of disagreement about basic social values, liberal/consensus criminal law theorists assume the right of private ownership (although its scope may be a matter of contention) to be the paradigm of rights to be defended by the criminal law system.30 The

28 Id. 106. Although Dworkin here is speaking of constitutional adjudication, he unquestionably would hold that the reasoning is applicable to all other spheres of adjudication. For a more detailed working-out of the indeterminacy of liberal rights' theory, see Glasbeek & Mandel, "The Legalization of Politics in Advanced Canadian Capitalism: The Canadian Charter of Rights and Freedoms," in Martin, ed., Critical Perspectives on the Constitution (forthcoming).

29 There is no obvious way to rank moral precepts. For instance, why should acts which offend biblical notions — ingratitude, hardheartedness, absence of natural affection, habitual idleness, avarice, sensuality, pride, covetousness — not be treated as crimes? See Stephen, 2 History of the Criminal Law of England (1883). To avoid this, resort must be had to such notions as that the conduct would fill reasonable persons with revulsion; see the famous essay, which is mandatory reading for all criminal law students, by Lord Devlin, "The Enforcement of Morals" (1959), Maccabean Lecture in Jurisprudence of the British Academy, reprinted in The Enforcement of Morals (1965). This leads to derision by those who doubt the wisdom of the mythical reasonable person, see Hart, Immorality and Treason (1959), 62 Listener 162. The Law Reform Commission of Canada, supra note 23, at 20-25, simply argued that there were some broad categories of social values which everyone could agree should be protected: order, rather than anarchy; peace, rather than violence; honesty, rather than deceit; individual liberty rather than not; private ownership of property. It failed, however, to indicate with much clarity whose order, liberty, ownership, etc., or what qualitative aspects of these concepts, would be valued so highly. See text accompanying notes 57-64, infra.

30 From Our Criminal Law, supra note 23, at 21:

One matter, though, deserves special mention — the value we set on private property. No society today allows unbridled free enterprise and ownership. But no society today completely abolishes them. All societies compromise. Canada, like most Western countries, finds its compromise close to the private ownership end of the spectrum. Hence the place traditionally given in our criminal law to property offences. Our paradigm of crime is theft. The confidence with which this is stated contrasts sharply with the Law Reform Commission's inability to articulate clearly a distinction between real crime and regulatory offences, one of its aims. In view of the earlier analysis about the indeterminate nature of liberal rights, note that
argument seems to be that the private property right, with its associated rights to deal with one's property as one wishes, itself promotes the attainment of political freedoms and rights which are worth protecting through law. The argument in its modern capitalistic form is familiar.

Friedman argues that it is only with capitalism that one gets freedom. He describes how, in early societies, families or small, closely-knit groups combine to produce for their own needs. Soon it becomes more efficient to specialize in production and exchange goods and services with other specializing groups. As each group could provide for its own needs, its choice to produce only part of what it needs and to exchange for the remainder, is an exercise of freedom. As more people behave in this way, then the more self-reliant they are and the less need there is for government interference. Decentralized, private decision-making is enhanced; the most efficient use of abilities and resources will develop as private-decision makers, as fully informed as possible of the availability of resources, goods and services, will demand and supply to suit their individual needs. This is as true of the commodities market as it is of the labour market. The fact that modern society has developed corporate structures and money is of no concern to the proponents of this idealized model. Corporations are merely aggregates of individuals making decisions. Money is merely a facilitator of exchanges. Free exchanges between sovereign, informed individuals are thus the elements of good society; free enterprise and freedom are synonymous.

The importance of this idealized model is its centrality within the legal system. The Adam Smith/Milton Friedman-type economy it posits does not require much of a legal system. “All” that is required is

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property rights are much more concrete than “freedom”, “peace”, “liberty”, etc. It is thus less obvious when intrusions on the more abstract rights should be prohibited.

This, of course, is an underlying reason why refusing to invest, causing harm to others, cannot be treated as a crime. I will return to this below. For now, note the devastating critique of the argument that private property leads to freedom by Cohen, Justice and Capitalism (1981), 126 New Left Rev. 3.

Friedman’s Capitalism and Freedom (1962), is, surprisingly, one of the very few explicitly worked out defences of capitalist philosophy found anywhere. By contrast, there are numerous undocumented assertions of faith.

He believes that restraints on movement (as a result of restrictions on the freedom to do with one’s property as one likes) are just as real as overt political restraints—economic freedom is characterized as no less important and as being of the same nature as political freedom. While he does not suggest, eventually, that free enterprise is a sufficient condition for political freedom, Friedman argues that it is a necessary one. See, id. ch. 1.

While I will make use of the argument that corporations are really just an aggregate of individuals and assets, consensus theorists try to reject this notion; see text at note 81, infra.
that individuals are capable of owning property which they can put to use. Law has the function of defining what is capable of being owned and how the boundaries of ownership are to be drawn. In the supply/demand economy, free, voluntary exchanges must take place. In order to do that on a continuous basis, the beginning and end of exchanges must be defined and rules devised to ensure that the will of the exchangers is truly expressed. The law of contract thus becomes a significant construct of this economic regime. In addition, for this economic scheme to work, the right to private property must be protected. Those with property must be safe from coercive interference by others. The need for a policing system is apparent; a very specific rule for the criminal law is added to what would be its function in a different society: the protection of physical integrity. Finally, this model of economics hypothesizes that, if everyone is free to demand and to supply (and is given perfect information) the most efficient use of resources will ensue. For this to happen, the exact cost of the goods and services rendered must be attached to them: this will determine the exact level of demand for these goods and services, regulate their supply and ensure the appropriate commitment of resources. Frequently, some of the cost of production will be imposed on persons who do not play a part in a specific exchange: the neighbourhood which is polluted as a result of the manufacture of lead batteries (bought by people living elsewhere), for example. For the economic model, this external cost should be internalized to the lead battery transaction. The legal system contributes to this aspect by letting the victims of pollution seek redress from the polluting activity — the modern law of torts. All this is merely to say that capitalist relations of production require capitalist law. But, in the search for fundamental social values protected by law, it is easily forgotten how deeply embedded in law the basic needs of capital really are. By setting out the obvious, several of the issues raised above can

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35 See Papandreau, Paternalistic Capitalism (1972) at 14 et seq.

36 A pedagogue's comment is in order here: To my knowledge, there is not a single common law law student who is not forced to study property, contract, criminal and tort law (usually in the first year of law school) no matter how open-ended the curriculum purports to be. (See Consultative Group on Research and Education in Law, Law and Learning, Report to the Social Sciences and Humanities Research Council (1983) at 33 et seq.). The explanation ordinarily offered for this rare educational unanimity are that these courses are "building blocks" for other subjects. This is correct, but not in the sense in which it is usually meant. It is not because these courses are taught in an historical context; often, two hours of history through some case law is its only semblance — e.g., an hour on the development of assumpsit from debt, plus another on Slade's Case does it in contracts, references to laissez-faire and its effect on 19th century courts are made in torts and contracts, although analysis of the philosophy is seldom offered; feudal history is hinted at through the Statute of Uses and trespass law is given a modern context after 2-4 hours on 12th and 13th century cases. Nor are these courses peculiarly suited to the teaching of judicial methodology, which could be equally well taught in, say, labour or trust law. They are building
The economic system to be promoted expects individuals to search for novel means to use their capacities and resources. They are to be encouraged to take risks: to venture their assets and their abilities, to develop new products and new technologies. Inevitably, this will have some unexpected harmful side-effects which, while regrettable, can hardly be classified as the outcome of unacceptable behaviour. If history teaches us that certain kinds of risk-taking are likely to cause more (or more serious) harm than others, some controls may be imposed, but total repression would be inapposite since it would undermine the genius and spirit of the free enterprise system. Inasmuch as the proper costing of risk-taking activity demands this transference of cost from victims to economic actors, this ought not to attract the repressive power of the State: the appropriate inhibition of the activities can be left to the cost-transferring system. If the true cost of the activity, once calculated, increases the cost of the activity greatly, demand will drop and the activity will stop.

These arguments presuppose a competitive scheme. What, therefore, is required is a mechanism to ensure sufficient competition to allow these arguments to be supported. The emphasis here is on “sufficient”. At any one time there will be “imperfections” in the market system. This is so because there is uneven development; there are time lags in the demand/supply exchanges which prevent the Pareto equilibrium from being established immediately and remaining continuous; technological advances by one risk-taker may make it difficult (at least for a while) for other competitors to mount challenges; the international trade situation may put pressure on our market because people elsewhere do not strive for the competitive perfection we purport to seek; the model requires perfect information to be available to the economic actors so that efficient choices can be made. Given this complex situation, it is not likely that law-makers will assume that anything but perfect competition is intolerable and that deviance from this model must be treated as criminal and forbidden. Rather, the assumption will be that an indeterminate amount of deviation from perfection will be tolerated. This “distortion” is mandated by reality. Arguments about economic efficiency can be made to defend such a dilution of the model. For example, if a certain firm or plant size is needed to compete inter-
nationally, competition is not needed on all costs incurred by enterprises in order to attain the economic and political objectives to be furthered by a competitive market system; a few large competitors only, rather than many small ones, may be affordable if technological innovations are to be promoted. Thus, some deviance is to be permitted, or at least treated leniently. Under what circumstances, then, is the use of criminal law, *per se*, really warranted in the context of the pursuit of these social values by means of a market economy?

Conduct which clearly undermines essential components of the competitive system, no matter how watered down it is, must be constrained. Deliberate deceptions which make it impossible for people to obtain the necessary information to make reasonable choices must be outlawed. Thus, wilful frauds ought to be treated as crimes. So also should be the taking of another's private property without authority, by force or by trickery. Conspiracies wilfully designed to eliminate *all* competition could be expected to be perceived as serious crimes. Not surprisingly, these modes of behaviour are treated as crimes and, when the evidence is clear, criminal sanctions will be imposed.

In this vein, it could also be expected that not all maiming and killing of human beings will be subsidized to the full coercive power of the state. As was noted, such harm may be inflicted as a regrettable side-effect of risk-takers' market activities. Indeed, Posner — an apostle of free enterprise — argues strenuously how law should dovetail with market precepts and finds ("Thanks be to heaven!") that it actually does. He states:

> Only the fanatic refuses to trade off lives for property, although the difficulty of valuing lives is a legitimate reason for weighing them heavily in the balance when only property values are in the other pan."

Again, where people claim to have been deceived by a person who was seeking both to pass on facts and contemporaneously to persuade, it may be much more problematical to decide if such communications should be repressed by the use of criminal sanctions. Similarly, in a

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37 See *Report of the Royal Commission on Corporate Concentration* (The Bryce Commission) (1978), which made this a central argument in its contention that concentration in Canada served a useful purpose.


39 Schumpeter, 3 *Capitalism, Socialism and Democracy* (1942) at 84 *et seq.*


system which accepts both "natural" and some induced imperfections, mere concentration of economic activity, or the reduction of competition to some of the cost components only, might not obviously call for that kind of State intervention which we think of as the use of the criminal law proper. It is not surprising that these modes of behaviour are not (in fact as opposed to form) made subject to the criminal law in the sense they are controlled stringently by the State on the basis that they violate our fundamental mores, threaten our social values and, therefore, should attract serious penalties for specific and general deterrent purposes, as well as deserving stigmatization.

V. REFUSAL TO ACCEPT ECONOMIC BASIS AS EXPLANATORY OF LEGAL SYSTEM AS SUPERSTRUCTURE — REPRISE: THE NEED TO MANUFACTURE A MORAL JUSTIFICATION

The fact that wrongful corporate activity may cause the same or worse harm (to individuals, the public, the environment or property) as does an individual's criminal conduct is not, by itself, sufficient to make arguments based on evenhandedness of treatment valid. The essence of the capitalist system does not require that congruence of this kind exist, that is, that corporate activity should be deemed criminal. The very relations of production, which it is the law's role to protect and to encourage (in particular, behaviour which is consonant with the dominant mode of production), inhibit such an approach. But neither the law's functionaries — judges, practicing lawyers, legislators — nor the conventional analysts — liberal academics — accept this characterization of law. A paradox is created. It is their need to describe the law as a fully autonomous mechanism, one independent of economic relations, one which protects fundamental individual rights, which is the genesis of the controversy regarding the lack of apparent unequal treatment. It is their ideological myopia which throws up the apparent contradictions.

To solve the problem, these ideologues find it necessary to contend that there is a moral distinction which justifies the apparent unequal

42 Canadian courts have read the anti-trust legislation to mean that there will be an offence only when truly very little of a market is outside the sphere of a restraint agreement or if the agreement concerns prices rather than other cost items. See Cairns, "Conspiracies in Restraint of Trade," in Chant et al., eds., Canadian Perspectives in Economics (1972). See also R. v. K. C. Irving, [1978] 1 S.C.R. 408; R. v. Aetna Ins. Co., [1978] 1 S.C.R. 731.

Although the Combines Investigation Act is criminal in the constitutional sense, as well as in form, the administrative and judicial approach to it reflects the perception that it is very much like a road traffic rule; see Goff & Reasons, Corporate Crime in Canada: A Critical Analysis of Anti-Combines Legislation (1978).
treatment of harm-creating activity. The distinction used for this purpose is that some of the harm is inflicted with intent, whereas some (most corporate-induced harm) is not. Thus, injuring in anger is said to be quite different from injuring someone at work as a result of the use of a risk-creating process without appropriate safeguards. How logical is that distinction when the compared injury-causing situations are, on the one hand a mugging for profit and, on the other hand, a work injury arising from deliberate cost-avoidance? The latter is precisely the sort of situation which occasionally, very occasionally, causes criminal prosecutions to be initiated of the same kind as are launched against the muggers of the world. The usual response, however, is not that. The liberal theorist has difficulties here; the analysis presented herein does not. The work hazard, an outcome of the very mode of production being promoted by the law, is seen as a regrettable cost, but merely a cost, which must be weighed against the benefits of a (relatively) uninhibited competitive market system. Mugging, even though done with the same motivation, is not integral to the idealized free enterprise model.

To add to the difficulties of the conventional wisdomeers, it is not even true that the subjective intent of the accused is the moral constituent which differentiates real crime from other equally harm-causing conduct. Here I note again the comparison between the drinking driver and the sober tall-building constructor: it is now apparent that it is much easier to explain the contrast in treatment by noting that one activity (the "innocent" one) is the essence of the hallowed mode of production; the other (the "culpable" one) is only tenuously connected to such productivity. Divisions drawn on this basis will not always be dramatic or sharp, but do provide an organizing principle to explain otherwise unacceptable contradictory trends in the legal system. Here I return to the unemployment example used earlier. Harm is caused by wilful conduct. This intentional infliction of injury is not treated as criminal. The standard, consensus theory explanation is likely to be that there is no duty on an individual to do anything to help anyone.

43 Normally, prosecutions in respect of work injuries are launched under special legislation, e.g., The Occupational Health and Safety Act, 1978, S.O. 1978, c.83, which imposes ceilings on fines. Typically, where prosecutions are initiated — a rare occurrence — fines are light. In R. v. Ontario Gypsum Co. Ltd. (1982), C.C.H. Empt. Safety & Health Guide, para. 95,191, the corporation was fined $1,500 and a supervisor $500 for a violation which led to the death of a worker. There is, however, an upward trend as a result of the Court of Appeal's decision in R. v. Cotton Felts Ltd. (1982), 2 C.C.C. (3d) 287, where a fine of $12,000 (for a death) was upheld. This has led to an apparent inflation of fines: see R. v. Inco Limited (No. 3), C.C.H. Empt. Health & Safety Guide, para. 95,010 (death as a result of a violation) and it was reported in 6 Occupational Health & Safety Magazine 1, May 1984, that an employer had been fined $10,000 and jailed for three months.
This is not absolutely true, vide the parent or guardian who owes such a duty (under pain of criminal punishment) to care for a ward. Indeed, there used to be a duty imposed on a master to ensure the safety and well-being of apprentices and servants. In this context, not to regard workers — dependent on capitalists' investments — as people to whom a duty is owed, is a deliberate decision. From the point of view of liberal consensual analysis, it is a sensible decision: it is in harmony with the legal assumption that capitalists and the workers they hire are juristic equals. In economic terms this means that they are both equally free to enter into supply/demand exchanges in the classical sense. In this light, no duty can be imposed by law on either of the parties, either to invest or to work; but the symmetry is only apparent. Only the capitalists are truly economically free: they have a choice as to whether or not to invest. The workers have no similar choice: they must sell their labour. It is this objective fact of economic inequality, as opposed to the illusion created by juristic equality, which makes the freedom to create unemployment so offensive. If we were truly anxious that a sense of deep morality guide the instrument which we call law, the harm caused to the relatively defenceless by the wilful conduct of the powerful would be treated as unacceptable legal conduct. We do not, according to liberal theorists, permit the strong to take away the life, liberty and security of the weak just because they are strong. The deliberate blindfold liberals wear in the labour relations' situation suggests that morality, in any deep sense, is not as crucial a factor to them as it is made out to be.

Another, and simpler way, to explain (in consensual terms) why refusal to invest, or to continue to invest, is not criminal, is to argue that capitalists should be free to do with their property as they like. This is what differentiates them from welfare mothers. This assumes

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46 The former s. 201, repealed by amending Act, 1980-81-82, c. 125, s.14, proclaimed Jan. 1983.

46 This is one of McPherson's central points in *Elegant Tombstones: A Note on Friedman's Freedom* (1968), 1 Can. J. Pol. Sci. 95, a brilliant critique of libertarianism and the Friedmanite thesis of the conjunction between free enterprise and freedom. McPherson shows that Friedman assumes that a family which decides to produce for exchange is directly analogous to a worker for wages, even though the family could produce its own necessities and, therefore, never had to exchange, whereas this is clearly not true of the worker.

47 The phraseology is deliberately chosen — it is that of s.7 of the new Canadian Charter of Rights and Freedoms. Protection is to be given to these "rights" provided that they are abstract, not concrete or, better, economic. The separation of the economic from the political is crucial to a theoretical scheme which does not want to alter economic power relations through political/legal intervention. See Glasbeek & Mandel, supra note 28. *A fortiori*, the wielding of economic power in a way which affects alleged s. 7 rights is not to be criminalized.
that ownership of private property is a basic human right which is unquestionable in our society. But it is simply not true that the law permits people to do as they like with their own property. Creation of excess noise or noxious fumes on one's own property may be prevented because it interferes with other people's enjoyment of their property. Furthermore, in the right circumstances, such abuse by owners of their own property may well amount to a public nuisance which may be treated as a crime. To overcome this line of reasoning, the consensual apologist for the non-investing capitalist is forced to argue that there is an important distinction between commission (causing a nuisance) and omission (permitting unemployment). In moral philosophy this might be deemed sophistry. Even in law it is not a very persuasive argument: after all, deinvestment is commission in that it may require capital to be taken out.48

In sum, the notion that it is the essence of the act which will characterize it as criminal in the strictest sense is valid. What is not valid is the suggestion that there is some moral criterion which helps us to distinguish criminal behaviour from less reprehensible conduct, from conduct which can be controlled satisfactorily in other ways, and which our shared values require us to treat differently. Rather, the rationale for such different treatment is a seldom articulated belief that some activities, no matter how harmful and no matter how insensitive to their effects the actors were, are essential to the capitalist mode of production. This belief is embedded in law and is, in turn, generated by the law's mystification of it. What does all this mean for the study of corporate crime?

VI. CONSENSUS THEORY AND THE FORM V. SUBSTANCE PROBLEM

The extent of competition in Canada differs vastly from the idealized model on which the theoretical arguments are based. It is this which justifies some legal intervention in investment and production, whether of the direct or the social type. Through direct regulation, government aims to control prices and the price rate or structure (for example, rent, taxi rates, marketing boards), the rate of return (pipelines, distribution of gas), entry to or exit from economic activity (profes-


49 It is possible to differentiate, in philosophical terms, between omissions and commissions; no wizardry is required, however, to turn a characterization of omission into one of commission and vice versa. See, e.g. R. v. Forgeron (1958), 121 C.C.C. 310 (N.S.C.A.) at 313, per Isley C. J. and discussion in Glasbeek & Rowland, supra note 1 at 540.
sions, broadcasting, air transport, public utilities) and output (management of energy). Social regulation also controls economic behaviour, but it affects the conditions under which goods and services are produced and sold, as well as the physical characteristics of the goods produced. Thus, workers' health and safety, environmental integrity, accurate product and service information, notions of fairness in hiring production workers and the treatment of purchasers of produced goods and services, all form part of the web of social regulation.

Obviously, each intervention takes place in the context of the assumptions of a market economy. Each legislative provision distorts the untrammelled market activity. It therefore must be evaluated by criteria such as the free interplay of market actors, optimal conditions for efficiency, as well as the political or policy objects of the State. In effect, political decision-making will take place in a setting where cost-benefit analysis will be a major determinant, sometimes explicitly, other times implicitly. The controls imposed on market actors will be perceived as part of an environment in which the adapted ideal of competition is the holy grail. The purpose is to inhibit certain kinds of behaviour, but to do so reluctantly: although they cause more harm than is acceptable, the productive nature of the activities remains, in a general sense, most welcome. Deviation from a norm (which itself is seen as a deviation from the ideal) is not, in this ideological setting, so reprehensible as to warrant being called criminal in the same sense as we think of an activity as unproductive and harmful as, say, sexual assault.

The issue is confounded, however, because the legislative mechanisms used are criminal in form. Their genesis is such that they are a direct intervention by an external force, the State, with the supposedly self-regulating interchanges between autonomous individuals. As the market actors themselves have not agreed to the terms of the imposed intervention, the terms will not be self-enforcing. Therefore, the intervenor, the State, must provide for compliance. Penal sanctions accompany the commands; policing systems have to be set up. In other words, the legislative schemes are, on their face, indistinguishable from the criminal law provisions which govern theft, assault, sexual assault and murder. The only thing which differentiates them is the unseen factor:

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60 This listing of regulated activities is taken from the Economic Council of Canada's Responsible Regulation: An Interim Report (1979).

61 See text accompanying notes 40-43, supra. Thus it is that, when intervening, the regulators will always consult the would-be regulatees. This leads to the lobbying, alliances between regulators and regulatees and all those practices so distasteful to liberals. It is this which makes it unlikely that tough standards will be set, and which maintains the logic of the State having to prove that it has a right to interfere with private ordering.
the purposes at which they aim. Although these provisions can be characterized as having objectives such as deterrence, retribution and denunciation — the same general aims of the criminal system — this is also true of much of the civil law. But, as in the case of civil actions, the major thrust of these regulatory provisions (in contrast with, say, the law relating to murder) is to ensure approximation of the competitive enterprise model and to mediate the harsher effects of the market economy. At the same time as controls are imposed, legitimation is sought for the productive activities which are perceived as the nub of the capitalist relations of production. The purpose is assuredly not to discourage people (especially not corporations who have only capitalist goals) from enterprising freely (with risk and aggression), whereas it is the clear purpose of the law to prevent killing for "unproductive" reasons.

This line of argument goes some way towards explaining the aspects of regulation which the liberal capitalist model finds difficult to rationalize and which particularly trouble the students of corporate crime who are concerned with the apparent lack of evenhandedness in the treatment of deviance. I refer here to the much bemoaned fact that policing of regulatory statutes is lax. The politicians do not provide sufficient funding;\textsuperscript{62} inspectors are amiable conciliators more than they are purposeful enforcers;\textsuperscript{63} the standards to be enforced are set with too much regard for alleged economic efficiency;\textsuperscript{64} the administrative agencies have no clear-cut policies, not knowing whether they should promote capital accumulation (that is, permit profits to be made at some cost to others) or to legitimate political liberalism by showing that they are not willing to trade lives for property (or, at least, not weigh lives very heavily in the scales).\textsuperscript{65} If, as this paper argues, the intention behind floor-type and market-ordering legislation is to mediate market activities, not to attack them, the problems set out above may arise from the indeterminate nature of the compromises made by the legislators: there is no commitment to particular levels of welfare or competition.\textsuperscript{66} The functionaries of the ensuing schemes will have little guid-

\textsuperscript{62} This is all too obvious today when deregulation has become so popular.

\textsuperscript{63} This is an old problem; see Carson, \textit{Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation} (1970), 33 Mod. L. Rev. 396; and his \textit{White Collar Crime and the Enforcement of Factory Legislation} (1970), 10 Br. J. Crim. 383.

\textsuperscript{64} For work emphasizing that it is not real economic efficiency which governs standard-setting, see Kazis & Grossman, \textit{Fear at Work: Job Blackmail, Labor and the Environment} (1982). See also note 42, supra.


\textsuperscript{66} \textit{Id.} See also, supra note 42; note that \textit{The Combines Investigation Act}, R.S.C. 1970, c. C-23, does not permit limits on competition which \textit{unduly} or \textit{unreasonably} restrict competition. The
ance as to how much control they should exercise over market actors, but they will be certain that they should not dismantle the competitive market regime. The form of the regulatory system notwithstanding, the implicit understanding is that the regulatees' behaviour does not obviously violate fundamental social values.

Some commentators see this. The Law Reform Commission of Canada advocated strenuously that certain kinds of behaviour which cause great harm should be subjected to non-criminal regulation. The basic argument was that, whatever the harm, the conduct was not such as to threaten basic social values[^1] that it was *malum prohibitum* rather than *malum in se*. The indeterminance of such classification has already been noted. Bentham, at a much earlier stage, argued that the purpose of defining an act as criminal, to make it a *malum in se* was the unacceptability of the consequences. Similarly, the purpose of forbidding certain kinds of conduct, to declare it a *malum prohibitum*, was the need to avoid certain kinds of harm. He thought the distinction merely one of semantics, if not spurious.[^2] More recently, the Supreme Court of Canada wrote that it did not find the distinction a very meaningful one and, if it had to be made, the Court supposed, in the absence of any useful criteria, it would assume that offences already found in the *Criminal Code* were true crimes or *mala in se*, whereas if they were not, they were offences of a different order, *mala prohibita*.[^3] Again, in *Sault Ste. Marie*,[^4] the same court differentiated between the kinds of intent needed for various species of offences and ranked "offences which are criminal in the true sense" as requiring proof beyond reasonable doubt to be shown by the prosecution of the accused's subjective intent to commit the harm-causing act; "public welfare offences", not being truly criminal, imposed a lesser onus in respect of the intent to be proved. When called upon to distinguish true crimes from public welfare offences in a subsequent case, the Court held that true crimes were those found in the *Criminal Code*, whereas public welfare offences were not.[^5] Now the *Criminal Code* has an enormous range of offences in it, some of which arguably might not be seen as

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[^1]: See note 29, supra and the text preceding it.
proximately related to basic social values (whatever they are). The converse is equally true: some regulatory law offences may be very closely connected to the protection of basic social values (for instance, protection of life). A leader in traditional criminal law scholarship has written:

The so-called quasi-criminal offences are followed by the same procedure for prosecution and kind of punishment as other offences. All offences are, in a sense, public welfare offences, and all result from regulation.

Unsurprisingly, given this quicksand-like basis for the erection of categories, the Law Reform Commission of Canada has changed its research focus and has commissioned a series of studies to assess the value of criminalizing more of what is presently “regulatory”, rather than decriminalizing what is presently “truly criminal”.

While it is clear, then, that the form of regulation does not fool consensus theorists into assuming that, just because an offence takes on a particular form, a “true crime” has been created, it is also true that they cannot be sure that this has not been done. This leads them to search for ways out of their apparent dilemma: why are violators of seemingly similar offences treated differently, given that there is no principled means (from within the traditional framework of reference) by which such offences can be distinguished? That is where we began: the argument that there is such a thing as corporate crime, as identified by Sutherland and his successors, rests on the finding that corporations frequently breach statutory law which is penal in form.

VII. FUDGING THE ISSUE: CONSENSUAL THEORIES AND ARGUMENTS OF INAPPROPRIATENESS AND IMPRACTICALITY

To rationalize away what seems to be distorting leniency when corporate actors breach law which is penal in form and which is hard to classify as non-criminal, consensus theorists adopt a series of devices, none of which are ultimately convincing. The purpose is to explain why it is acceptable not to treat corporate deviance as corporate crime, even when the conduct might be criminal in apparently analagous settings.

Initially the argument was made that, if a violation of a regulation

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62 The Law Reform Commission of Canada, supra note 23, argued that offences which did not violate social values should be taken out of the Criminal Code. As examples, they chose placing bets for consideration, having a motor vehicle equipped with a smokescreen and pretending to practice witchcraft. But they were ambivalent on unlawful gaming, acts of indecency, incest, etc.


or statute (penal in form) was to be treated as the commission of a substantive crime, the corporate accused should have all the special protections an accused person is normally accorded. The corporation is, therefore, to be presumed innocent until proven guilty and that guilt required the establishment of a guilty mind. How else could the exercise of State coercive power and the attribution of stigma be justified? This line of reasoning offered a way out — corporations could not be made criminally responsible because they did not act, they did not have a mind capable of guilt. But the concrete use of the corporation as a central economic actor rendered it impossible to maintain this line of argument. While there is still no clear theoretical framework to define and describe the legal personality of a corporation, the need to have corporations which were capable of holding property, of dealing with it, of entering into contracts and so on, soon made it clear that, whether or not a conceptually logical whole could be created, the law had to be able to impose duties and obligations on corporations. In the criminal law field, this led to the development of the notion that the corporation could be held criminally responsible if the conduct complained of was that of its guiding mind and will. This has created a jurisprudential minefield: who, in law, is to be considered the “guiding mind and will” of the corporation for these purposes? The consensus argument quickly alters: given the difficulty of identifying the guiding mind and will, and its relationship to the harm-creating conduct, criminal law remains an unwieldy instrument with which to regulate corporate behaviour. This is not an argument of principle, dependent as it is on definitions which can be tailored at will and on fact-finding which is quite subjective.

Another argument, offered as one of principle, is that it is wrong to punish A to have an effect on B. Apart from the rare occasion where the guiding mind and will is that of directors who are also sole (or main) shareholders, the effect of imposing a fine on the corporation is

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66 Well-known theories include the fiction theory, the concession theory, the bracket theory and the realist theory. Wolff, On the Nature of Legal Persons (1938), 54 L.Q.R. 494, counted sixteen such theories.


to punish "inactive" shareholders. The only purpose of that can be to cause those shareholders to exercise more control over the chief officers of the corporation in the future. In large, diffusely-held corporations, this is likely to be ineffective and, more importantly, it would be wrong to punish persons only indirectly or totally uninvolved with the condemned conduct when the actual perpetrators could be prosecuted directly.68

As I argue below, I agree with the view that the actual wrongdoers should be the ones singled out for penalizing wherever possible, but not because I accept the arguments which such people as Glanville Williams make. Note that that part of the reasoning which purports to be pragmatic — that punishing shareholders will be inefficient because they do not control directors very much in the usual setting — is based on an assumed set of facts. Presumably, each case will involve different circumstances. In fact, as I will show later, in many important cases it is simply not true that shareholders do not have a sufficiently direct link with the guiding mind and will of the corporation.69 As to the second point made, it is simply a farrago to pretend that it is unfair to punish innocent shareholders just because they are connected to the deviant corporate actor. To presume that they are innocent is to put the cart before the horse. Even if some will be innocent (in the sense that they were very distantly connected or had no financial connection with the corporation at the time of the wrongdoing), it is true that consensus theorists do not shy away from imposing punishment on the innocent family members and dependants of wrongdoers who are not corporate actors. Thus, if a truck driver is imprisoned and loses his licence for life, are his dependant's losses a bar to the use of criminal law? Are the potential losses of his creditors — the truck vendor or the mortgagee of his house — seen as barriers to an argument of principle about the inapplicability of criminal sanctions to the truck driver's misconduct? These questions answer themselves. From the consensus theorists' point of view,70 if there is a difference between the corporate wrongdoer and the errant truck driver, it is not one of principle but one of quantum.

This leads to another set of arguments raised by defenders of the status quo. The first is that, even if deviant corporations were to be treated as true criminals, the task of devising appropriate punishment would prove intractable. The idea is that, as a corporation cannot be

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68 Williams, supra note 18, at para. 283.
69 See text accompanying note 118 et seq., infra.
70 As will be shown below, the logic of conflict theory allows differential treatment of the truck driver and his dependents.
incarcerated, or otherwise corporally punished, the only useful tool is a fiscal penalty. At first blush this appeals because a corporation is primarily motivated by monetary incentives, but the achievement of the ordinary goals of punishment will be problematic. This is so because the fine should, at the very least, be enough to deter corporations from engaging in such behaviour. This would require fines of a quantum sufficient to wipe out the potential illegal gain, plus something extra. Moreover, inasmuch as this treats corporations as rational actors, the fine must be increased to account for the likelihood of the wrongdoer being caught. Thus, the expected illegal gain should be multiplied by a factor of ten if the chance of being caught is ten percent, in order to set the right penalty. If used, this calculus would lead to the imposition of enormous penalties, frequently in excess of the assets of the deviant corporation. From here it is but a short step to the argument that fines are an inappropriate sanction, as their proper assessment and levy would result in overkill (with, of course, truly undesirable effects on “innocent” actors). In response, one ingenious proposal has been made to attenuate the direct effect of properly calculated fines by forcing the corporation to issue more shares to raise a capital sum equivalent to the penalty. This equity fine would punish “innocent” shareholders lightly, permit the corporation to function and have a disciplinary effect on managers, as well as creating a pool of funds capable of being used restitutively.71

The reasoning set out in respect of fines is not persuasive if the message is that corporations should not be criminally punished. Firstly, it is mildly ironic. One of the major legal attributes of the corporation is that the investors’ personal liability is limited to the extent of their investment. This notion is relatively recent and, until its rather sudden acceptance, was seen as unpalatable because, if investors ran little risk compared to gains to be made by socially evil conduct, it would encourage irresponsibility. It was described as a “Rogues’ Charter”.72 Limited liability obviously encourages people to invest who do not wish to be directly responsible for the operation of the enterprise, but this development worried managers of the enterprise, lest they bear the full brunt of mishaps of various kinds. The idea that the separate entity, the legal person who benefitted from the managers’ and investors’ activities, should be made liable for harm done makes sense in this context. An argument that the corporation also is the wrong risk bearer,


because the impact of liability would be disproportionate, thus seems somewhat perverse. It suggests that a legal construct created to encourage risk taking (which implies that when risks materialize there will be losses) can only be effective if the true risks are not borne by it.\textsuperscript{73} Not surprisingly, the strongest adherents of individualistic free enterprise do not make these arguments. They must adhere to the view that corporations are the proper bearers of punishment because they are actors representing a number of individuals’ acts and will, if sanctioned, exert pressure on those individuals to behave better in the future.\textsuperscript{74}

It is apposite at this point to note the interplay of these two arguments in practice. It seems to be true that, when fines are imposed on corporations, they seem to be very light.\textsuperscript{75} In part, this is a consequence of low ceilings being imposed by regulators; in part, it is a result of the reasoning of some of the conventional wisdom set out above: fines must not “break” the corporation — a concept accepted by the judiciary.\textsuperscript{76} Given this circumstance, when a corporate deviant and its managers are prosecuted, it becomes rational for the decision makers in the corporation to have the legal entity bear the light brunt of the penalty while the managers (often the rational decision makers) escape scot-free. A frequent occurrence is that there will be a bargain which results in the corporation pleading guilty and the charges against individual

\textsuperscript{73} This is a familiar argument during these recessionary times. Bail-outs for large corporations are necessitated because the cost of letting them and their investors bear the full brunt of their losses is not to be contemplated. Adam Smith warned that irresponsible management would result if the investors were not personally responsible for the materialization of risks, see The Wealth of Nations, (1970) Book III, Ch. 1.

\textsuperscript{74} Posner, Economic Analysis of Law (1977).

\textsuperscript{75} E.g. see figures in note 43, supra; Dershowitz, Note — Increasing Community Control over Corporate Crime — A Problem in the Law of Sanctions (1961), 71 Yale L.J. 280; Stanbury, Penalties and Remedies under the Combinations Investigation Act 1899-1976 (1976), 14 Osgoode Hall L.J. 571.

\textsuperscript{76} In addition, the size of corporate assets may often be incomprehensible to judges used to dealing with mere human beings. Thus, it was recently reported that the $75,000 fine was only the equivalent of two hours’ profit for the corporate organization? See Toronto Star, Apr. 25, 1984, E-1. Similarly, in 1961, General Electric was fined $437,000, which appeared an enormous amount, as did the fine in the Folding Carton industry conspiracy in which each of 23 conspirators were initially fined $50,000 (some fines were later reduced). When these fines are compared with a fine imposed on a person earning $15,000 annually, they worked out to be $12.30 in the G.E. case and from 24 cents to $1.80 in the Folding Carton one. See Box, supra note 13 at 49; Ermann & Lundman, Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society (2nd ed., 1982). This difficulty has led the Law Reform Commission of Canada, Working Papers 5 & 6: Restitution, Compensation, Fines (1974) to recommend the imposition of day-fines, that is, fines standardized by reference to the earnings of the offender.
managers being dropped.\(^7\) No doubt this reinforces those who argue that the imposition of fines is a futile exercise, but this is only true because their notion that fines are to be relatively light is accepted in the first place.\(^8\)

The argument — that the impracticality of levying appropriate fines against corporations makes the use of criminal law a problem — is peculiar when made by those theorists who do not question the separateness of the corporation from its members when it is convenient to do so, namely when it enhances private capital formation and accumulation. More central to the text of this paper, however, is another critique which can be mounted against those who use the impracticality of assessing appropriate fines as a reason for not punishing corporations. Even if it is conceded, for the sake of argument, that the imposition of fines is not a useful way to punish corporations, this does not mean that other criminal sanctions could not be employed successfully and that criminal law ought not to be used as a regulatory device. While corporations cannot be corporally punished, they can be de-licensed. That is, they can be prohibited from engaging in certain, or in all, enterprise.\(^9\)

This raises another series of practical problems, such as the possibility that the same persons could form another corporate person to engage in the prohibited area of activity, but this does not mean that the sanction may not be effective in some cases. Further, the assets of a corporate wrongdoer could be expropriated, perhaps for the use of the victims of deviance, or of the State — something akin to capital punishment. For those who think this too drastic, other forms of sanctions exist. For instance: the use of preventive orders, injunctions, probation orders and the use of publicity.\(^6\) Of course, any or all of these could be combined.

\(^7\) See text at note 107 infra, et seq. and see note 43 supra. For a recent example, see R. v. Simpson-Sears Limited and H. Forth & Co. Ltd., May 13, 1983 (unreported) in which Forth was convicted, but its major shareholder and guiding mind was not, even though there was no doubt of his wrongful conduct. His illness and age were cited as reasons, as well as the fact that punishment of the corporation would punish him. See Kastner, Misleading Advertising (1984) (a paper submitted in partial requirement of the LL.M., available on request). For more spectacular examples, see the descriptions in Fisse & Braithwaite, The Impact of Publicity on Corporate Offenders (1983) at ch. 13 & 14, of the Lockheed and McDonnell Douglas bribery cases in which, in return for dropping charges against major executives directly implicated in wrongdoing, the corporation pleaded guilty.

\(^8\) In absolute terms they may be large, but often even that is not true.

\(^9\) After all, it is a common punishment for human criminals. They are often prohibited from associating with certain persons or frequenting particular places. Where licences are needed, they may be revoked: taxi drivers, alcohol sellers, lawyers, etc. Closer to home, a bankrupt is not allowed to enter business again until creditworthiness is again proven and discharge from bankruptcy is deserved.

\(^6\) For a review of these possible tools, see Fox, Corporate Sanctions: Scope for a new Selectivism (1982), Melsey L. Rev. 26. Fox has written extensively on the use of publicity by a regulating mechanism, the views being summarized and analysed in an empirical setting by Fisse &
Thus, while it is my position that there is, in fact, usually little reward in punishing the corporation itself, I do not rest the argument on the basis of impracticality or unfairness as do those who seek to justify the restricted use of criminal law vis-à-vis corporate deviants.

Another variant of the argument that criminal law is inapposite to corporate wrongdoing is based on organizational theory. The idea is that a corporation is an organization and, like all organizations, it has formal goals. Sociologists argue that the only way to judge an organization, therefore, is by the measure of its success in the establishment of these goals. Inevitably, organizations develop internal monitoring systems to make their personnel conscious of their rate of performance. As the organization gets larger and more complex, sub-goals are established for departments. For those departments' personnel, preoccupied with their own goals, the central goals of the organization may drop from view. Difficulties in attaining their particular goals may lead to aggressive behaviour as the organization's personnel adapt the environment to facilitate the achievement of their tasks.\(^8\) The adaptations sought to be made by corporations often will be legal (for example, planning strategies, devising stratagems to secure sources of supply and the level of demand, political lobbying to get favourable trade conditions and regulatory schemes), but often illegal.\(^8\) Some studies exist which show that violations of a particular kind are probable, given the industrial and financial markets in which a corporation operates. For example, labour law violations are more likely in the service sector than they are in the distribution sector, environmental deviance more probable in manufacturing than in service;\(^8\) comparatively little anti-trust violation is likely to occur in the monopolistic and highly competitive sectors, relatively more in areas conveniently categorized as being in the intermediate range of economic concentration,\(^8\) though distributors and franchisees of monopoly suppliers may be coerced into defrauding

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\(^8\) Clinard & Yeager, *supra* note 13, at 48 et seq.

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This kind of analysis suggests that the fact of organization is a significant reason for deviance. The equivalents of conventional bonds, strain, anomie, labelling and other such theories are thus found. Moreover, given the overall setting which leads to wrongful behaviour, it may be hard to pinpoint actual human wrongdoers. This will be so because work and tasks will be broken down and discretion limited. Refined theories of organization have evolved to show how different organizational forms lead to varying degrees of individual autonomy in decision-making, and how the issue will be complicated because in any one organization diverse kinds of organizational principles may co-exist. All of this becomes fodder for the argument that the imposition of criminal sanctions on the organization's personnel may be impractical, even unfair, and that it would be just as inapposite to apply criminal law to the organization itself, as this would not lead to better behaviour in general, deviance being intrinsic to the organizational form. Hence, another scheme of reform has come to the fore. The best variant is presented by Christopher Stone. His idea is that corporations should be restructured so that particular, identifiable individuals would be responsible for making the corporation socially conscious and responsible. The purpose, of course, is to overcome the innate criminogenic nature of the corporation. There are obvious difficulties with this kind of proposal. For the moment, however, the point is that it arises logically from a theory which justifies treating deviant corporations differently from human deviants, that is, as non-criminals. Is the theory viable?

The first point to note is that, in the corporate organizational setting, the theory is over-inclusive. There will be many situations in which individuals can exercise choice. While it is true that in some circumstances it may be difficult to discern who caused the smoking gun to be fired, it will not always be impossible. Moreover, personnel with real discretion might very well be characterized as guiding minds of the corporation. Note that there is some evidence that decision-makers in corporations often become so because they are willing to promote the needs of the corporation, even when this means abandoning

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86 Note, Decisionmaking Models and the Control of Corporate Crime (1976), 85 Yale L. J. 1091.


88 See e.g., R. v. Waterloo Mercury Sales Ltd., supra note 67, and the argument in the text in respect of the scope for judicial discretion in this matter. Refer also to the Lockheed, McDonnell Douglas kinds of situations referred to in note 77, and to the Amway case discussed in the text at note 110, infra.
some of the ideals which they hold as private citizens. Larger corporations, by encouraging conformity and identification with their goals, cause normal community bonds to be loosened. Unswerving loyalty to such goals is rewarded. Moreover, the more ambitious and shrewder persons — who perceive this and are promoted through the ranks to positions of responsibility — are helped in their socialization by initiation processes which weaken their ties with external groups. An “ingroup” atmosphere is created by a variety of carefully designed means: overwork, frequent transfers (which inhibit the development of local community links of lasting nature), internally generated provisions for leisure and recreation, membership in special clubs. This is a self-perpetuating scheme, as those who reach the top of the organizational tree become charged with finding new managers and inexorably select personnel who are best suited to follow the route they themselves took to ascend the ladder. In the end, as Gross argues:

[T]he men at the top of the organizations will tend to be ambitious, shrewd and possessed of a non-demanding moral code . . . being at or near the top, these persons are the most strongly identified with the goals of the organization . . . if the organization must engage in illegal activities to attain its goals, men with a non-demanding moral code will have the least compunctions about engaging in such behaviour.

I would assert that this understanding of managerial development and personality accords much more with popular public perception than does one which purports that managers have no control over their lives, that they do what they must, that they have neither sufficient operational discretion nor independence of mind to be held criminally responsible. Indeed, the Stone-type structural changes, which would superimpose a managerial level of decision-makers unable to pass the buck, are not only a response to the tenets of organizational theory as such, but are also an implicit recognition that senior executive officers are not likely to have the kind of moral sensibilities that would make them responsive to the educative effect of criminal law. There is, arguably, an organizational need for amoral, if not immoral, decision-makers; to overcome this aspect of organizational logic, the appointment of persons who are not corporation types makes sense. Only they are likely to have the right kind of sensitivity for the mores of the external

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community. In sum, it is a little crude to generalize from the sociology of organizational theory and the rich variety of corporate structures to conclude that it is simply too difficult to identify individual deviants in corporations and, in particular, individuals for whose intent and conduct the corporation can be held legally responsible.

More importantly, applying organizational theory arguments to corporations, without more, is itself over-inclusive. To treat corporations as if they were not crucially different from other kinds of organizations is an error. As Burawoy has noted, by doing this:

[T]he distinctiveness of the profit-seeking capitalist enterprise is lost . . . being unreflective about its roots in capitalist society, organization analysis loses this truth by projecting it into general theories that conceal the historical by specific features of capitalist and, in particular, advanced capitalist society.

For the purpose of this paper, the specific differentiating feature of the corporation is that its formal goals — the accumulation of capital, profit making and the need to reproduce the capitalist relations which make these things possible — can be readily identified and remain constant. It is sometimes argued that corporate managers are more interested in stable growth and diversification so that they can increase their own personal empires and prestige, rather than in maximizing profits, but even where this is so, the ultimate objectives remain the accumulation and profit-making functions. In this context deviance, which is said to be caused by attempts to adapt the environment to the needs of the organization, arises from attempts to achieve the formal goals and the associated sub-goals of the corporate organization.

Other kinds of organizations, however, engage in deviance because their real goals can only be achieved by illegal means. For example, the formal goals of a police force — keeping the peace, looking after law and order — can be achieved by lawful means. If deviance is engaged

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91 Thus, 4 of 7 senior managers believed that their cohorts would violate codes (ethical and legal) if they thought they would not be caught (Baumhart, How Ethical are Businessmen? (1961), 39 Harv. Bus. Rev. 6), although most did not think they themselves behaved like that (at 10); on the other hand, Brenner & Molander, Is the Ethics of Business Changing? (1977), 55 Harv. Bus. Rev. 57, reported that 4 of 5 executives knew of the existence of unethical practices. This self-perception speaks volumes about the pressures to ignore external community standards. Stone himself speaks of this phenomenon as the culture of the corporation (supra note 87, at 236-37). It is not difficult, then, to see why he insists on non-corporate types having the obligation to balance profits against such social desiderata as a decent environment, job security, etc. (supra note 87, at 137-38). Corporate loyalists, trained and steeped in the corporate image, are unlikely to meet such challenges. A major flaw in Stone's proposal is that it is hard to see how anyone could, given the inherent conflict between, say, raising prices and causing inflation.

92 Burawoy, Manufacturing Consent; Changes in the Labour Process under Monopoly Capitalism (1969) at 5-6.

93 The chief proponent of this view is Galbraith, The New Industrial State (1969).

94 See Box, supra note 13.
in because of attempts by personnel to meet performance standards generated by those goals, regardless of means, the situation would be like that applicable to the corporate organization. But, if the deviance results because the real goals of the organization have, in fact, become illegal goals, such as the granting of protection to lawbreakers in return for money or political advantage, the wrongdoing comes to be built into the organizational structure for quite different reasons. This substitution of illegal real goals for legitimate formal ones is frequently the deviance problem in non-profit organizations. Inasmuch as there is congruence between such organizational deviance and corporate wrongdoing, it exists because the illicit goals of one organization and its members (say, the police) are the same as the lawful purpose of the corporation and its members — making money. This raises the possibility that the real problem is not the fact of organization but that of organizing for profit purposes. This is an argument which I find empathic, but it certainly is not the argument which organizational theorists want to make. They pin their faith on the notion that organizations, no matter what their goals, are inherently deviant. But any theory which seeks to explain wrongdoing on a structural basis, and formulates proposals for reform on that basis, should take into account the specific position of the organizational structure in the total social context. It is, to say the least, somewhat peculiar to accept that capitalist productive activities are central to the Canadian political economy and then to argue that the most important legal institution created to further such productive activity is, in essence, no different from organizations which exist for relatively peripheral reasons.

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86 This argument arises from the analysis offered by Sherman, "Deviant Organization," in Ermann & Lundman, supra note 76 at ch. 3. Sherman draws a distinction between deviant goals and deviant means as the sources of organizational deviance. This provided the idea of how to distinguish (as Burawoy insists must be done): organizations v. profit-corporate-organizations. The police develop deviant goals because, by doing so, they can sell what a particular clientele wants to buy (e.g. protection). Thus, it is the environment which causes the organization to adapt, rather than the organization manipulating the environment. The latter is the use of deviant means. Typically, this is what corporations do. Other deviant organizations, such as the police, help a sector of the environment break the law, rather than breaking the law at the expense of that sector. This is illustrated neatly by the Knapp Commission, "Police Corruption in New York," in Ermann & Lundman, supra note 76, at ch. 8. When a police department seeks to achieve its formal goals illegally — e.g. by beating suspects to get confessions — it behaves like a corporate deviant. Classically, this is not the organizational deviance seen as inherent. Thus, when there is a real analogy to be made, it is not used to establish the theory.
VIII. CONFLICT THEORY: THE APPARENT LACK OF EVENHANDEDNESS AS AN EXPECTED RESULT; AS AN OBJECTIVE

It may be useful to review the argument made so far because of the rather complicated manner of its presentation.

Consensual theorists' reliance upon a shared morality system creates difficulties for them, as the indeterminate nature of the consensus does not adequately explain the failure of the differential application of criminal law. Further, they are obliged to reject economics as a prime determinant of the legal system as this would deny the independence of law and the postulates of inherent human values which transcend the political-economic systems. In addition, the particular idealized economic model to which law may be referable in the liberal legal system is demonstrably non-existent and unbelievable. Finally, when they reach for arguments based on practicality and the sociology of organization, these prove to be unconvincing at best and, on occasion, tendentious. All of this contrasts markedly with the logic of the adherents of conflict theory, in particular the Marxist version of this approach.

There are many varieties of conflict theory. Broadly, they assume that power is pre-eminent as an explanation of criminal law, rather than social, economic, psychological or biological conditions. In the Marxist version, power differentials are seen to be rooted in class divisions. Marxist conflict theory postulates that the major cause of so-called criminal behaviour is class division which leads to class struggle. The State is provided with a coercive power to repress the class struggle in favour of the ruling class. In capitalist economies, criminal law serves the interests of the ruling class by reducing the strains inherent in the capitalist mode of production. Acts are defined as criminal when it suits the ruling class to have them repressed. In a capitalist State, this means that workers and would-be workers are more likely to be labelled criminal; the bourgeoisie's dominant influence within the State leads to an erection of a protective shield which, to a large extent, immunizes it from the force of the criminal law. This does not mean that criminal law cannot be applied against the wealth-owning class's wrongful conduct. On the contrary, one of the strengths of liberal capi-

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90 For a very good account of the various strains of conflict and consensus theories, see McDonald, The Sociology of Law and Order (1976).

91 See Chambliss & Mankoff, Whose Law, What Order? - A Conflict Approach to Criminology (1976), for a straightforward presentation of the basic difference between consensus/functional theories and conflict theories, in particular the two extremes on the spectrum: Durkheim and Marx.
corporate deviance is that it purports to cover every member of society. This is, after all, the genesis of the difficulties discussed in this paper. The class conflict theorists argue that the theoretical universality of a criminal law regime based on notions of a shared consensus is at the centre of the means by which the ruling class seeks to achieve its objective: to reduce the contradictory strains that arise from class struggle. Portraying coercive State law as emanating from a shared consensus, workers and would-be workers are trapped into thinking that their interests and those of the ruling class are the same. It will be necessary occasionally, therefore, to subject members of the ruling class to the force of criminal law.

In his path-breaking work, Foucault contends that criminal law is a system that determines which citizens need to be disciplined so the ruling class can do as the logic of its perpetuation requires. It will be able to count on the criminal law, despite the availability of potentially democratic institutions, so that other sections of the citizenry will accept their subordinate roles in the integrated system which is the power-polarized society. For this reason, some violators of law will be treated harshly, others leniently. The former need to be disciplined, to be warned that they must accept the order of things, whilst the latter need no such education. Melossi and Pavarini have sharpened this argument by adapting it to the industrial context. In their hands, conflict theory clearly becomes an aspect of class struggle, whereas Foucault addresses conflict in any settings where there are differentials of power. They argue that prisons are, in fact, factories in which the product is a disciplined work force which will accommodate itself to the needs of the private sphere of production. Thus, while anyone may be criminally prosecuted for breaking penal law, the fact that punishments can be dovetailed with the criminal’s willingness and capacity to comply with the status quo of productive relations permits dramatic differentiation in treatment of convicted persons. Therefore, while the law can be perceived to apply to one and all, enhancing its claim to universality and mirror-like reflection of a shared consensus, it can be applied with varying force and vigour to different classes in society. My colleague, Michael Mandel, has given this class-based theory empirical support. He has demonstrated that the population of prisons consists overwhelmingly of poor, unemployed or underemployed people. Sentencing and (to a greater extent) the parole system consider seriously

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the convicted person’s prior employment record and future employment prospects. It does not matter how grave the crime is, the sentence will be lighter, the release earlier, if the accused has a stable work record. Wealthy people and, of course, corporations, need the least amount of discipline. Thus, while the criminal law system takes all violations of all rules seriously, it has a need to punish, or to punish severely, only certain classes of people.

This theory explains as rational and as to be expected the very results that appear aberrant and problematic to consensus theorists. Analytically, a theory that actually explains what happens as it happens is far more convincing than one that can only explain by distinguishing between often indistinguishable situations and by appeals to concepts for which there is no empirical or logical foundation. This is done by the consensualists when they assert a shared morality, when they raise technical and procedural barriers as if they were issues of principle, or when they refer to sociological theory without drawing distinctions that beg to be drawn, as is the case when consensus theorists rely on the organizational theories’ arguments set out earlier. Therefore, the conflict approach is, in its class form, the one which I believe to be the most valid. This, of course, answers the questions which I raised at the beginning of this paper: Why is the criminal law so seldom used against corporate wrongdoers and why is there no seeming willingness to so use it in the future? The answer now is that criminal law is not meant to be so used. This poses a new question: Is there any point in urging its use, or should the matter be left as a titillating academic problem for those who seek to justify the existing situation because to them it poses an intractable, even an ugly, problem. I think it valuable to use the application of criminal law to corporate wrongdoing precisely because it is my understanding that it is not intended to be so employed.


101 This, in part, explains the form v. substance problem. Whereas violation of rules must be repressed, where class conflict is not an issue (as in traffic violations), light punishment ensures roughly equal treatment; where one class does the harm (as in, say, occupational health), it is useful to classify the rules as non-criminal in nature; where the other class does most of the harm (as in so-called street crime), it is useful to classify the rules as truly criminal, attracting potentially severe penalties. This explains, at least partially, the fierce resistance to characterizing breaches of occupational health rules as, say, criminal negligence ones, since this would require treating people who do not “need” discipline as severely as if they should be educated in this way.
IX. CRIMINAL PROSECUTION OF CORPORATE WRONGDOING: A CHALLENGE TO CONSENSUAL THEORIES

Rowland and I observed that, technically, criminal law proper could be used in many situations where the only regulatory mechanism thought to be applicable is civil or administrative in nature. We hoped that the use of criminal prosecutions would stigmatize employers' conduct and that this would stimulate them, as well as regulators and politicians, to seek more stringent protection for workers. It is the stigmatization of behaviour that makes it possible to question its general utility and acceptability. In this paper, I have shown that such stigmatization is not likely to occur because it is not meant to occur, but that this is not the way this failure to criminalize corporate behaviour will be explained. Rather, the argument will be that the conduct does not deserve such treatment or that it would serve no practical purpose. If this could be shown to be wrong, failure to prosecute and convict systematically would demonstrate:

i) the deficiency of consensus theories;
ii) the inherent tolerance for harm-causing conduct when it is closely related to private profit-making; and, associatedly,
iii) the willingness of the legal system to permit the relatively powerless to be harmed because of their class position.

Certainly, this would be academically useful. It may even be politically significant. What has to be done is to urge the use of criminal law where there is little question that the conduct of the corporation and its agents was akin to that which we normally agree is immoral, that is, committed with an intent to harm personal integrity or property rights or, at least, with careless disregard and contempt for the physical integrity or property rights of others. Such situations are not hard to find. Consider these examples: harm in the workplace because of knowing non-adherence to established safety standards; deceptive advertising

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102 Supra note 1, at 589 et seq.

103 The best example in recent times is the Ford Pinto case. It was not until Ford was prosecuted criminally that the issue became a serious problem for the corporation and, more importantly, for the public at large. Moreover, it has been shown that when the media began to talk of criminality, public sentiment against the corporation increased and political and regulatory activity heightened. See Swigert & Farrell, Corporate Homicide: Definitional Processes in the Creation of Deviance (1980-81), 15 Law & Soc. Rev. 151. That the corporation saw the stigmatization of a criminal prosecution as serious can be gauged from the massive effort it put into its defence, one which vastly outweighed its legal resistance to civil law suits and regulatory actions. That other corporations saw that criminal conviction could lead the general public, its politicians and regulators, to question their operations can be gauged from the fact that Ford Motor Co. was congratulated publicly by its competitor, General Motors, when it was acquitted. See The Pinto Papers in Fisse & Braithwaite, supra note 77, at ch. 4.
causing prejudicial investments; non-compliance with existing pollution control orders; conscious entry into resale price maintenance agreements or deliberate predatory pricing techniques. All of these are, in conventional moral terms, not to be differentiated from behaviour that consensus theories have no difficulty in calling criminal, such as physical assault, obtaining by false pretences, public nuisance or mischief, fraud and theft. The second step, then, is to make it difficult to mount an argument that, in these cases, criminal prosecution would serve no purpose. What follows is a series of proposals that may help to attain this goal.

1. One of the major arguments against punishing the corporation as such is that fines are usually inadequate to achieve standard criminal law objectives and, if sought to be made, they will break the corporation, negating the purpose of the exercise. I agree that it is not very productive to fine the corporation as such, but, as indicated earlier, not for these so-called pragmatic reasons. A better argument is that the corporation does not exist for its own sake and that it should not be punished unless this makes available the means to get at those who profit directly from its existence — the flesh and blood accumulators and controllers of capital. After all, if the corporation is punished, it does not necessarily follow that those who profited from its wrongful behaviour will be adequately punished or will not err in the future, perhaps even in a new corporate guise. In some situations, there will be this trickle-down effect, but it cannot be counted on. The logic of this argument requires the imposition of punishment which overcomes this practical problem of applying ordinary sanctions. I offer the following.

A corporation should only be convicted and punished if some of its members are also convicted and punished as individuals. This would ensure both that the trickle-down effect could operate by affecting corporate capital (and thus the profits of voting members and officers of the corporation) and by subjugating obviously responsible people directly to the rigours of criminal law. Inasmuch as the latter occurs, Braithwaite and Geis have shown that the educational effect of such punishment is likely to be greater than it is in the case of street criminals. The executive suite criminals have conventional bonds of great importance, prestige to protect and are unlikely to learn bad habits from their peers when languishing in gaol.104

It will have been noted that the suggestion is that there should be no "either/or" premise. It is crucial that the corporation should not be

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prosecuted and convicted if individuals are not. One reason for this has already been given: the mythology of the corporation being an individual in its own right should be attacked. More importantly, as has been pointed out above, it is precisely the combination of relatively low fines and the ineffectuality of the hoped-for trickle-down phenomenon which makes it impractical to use criminal sanctions against corporations. It is routine for corporations to plead guilty in return for clemency for individuals who may have participated in the culpable conduct as corporate members. The recent Amway Corporation case illustrates this point neatly. A fine of $25,000,000 was imposed when the corporation pleaded guilty to having practised a conscious fraud on Canadian customs laws. The two main directors of the corporation were, as a result, not prosecuted. The court, in accepting the plea, left no doubt that it attributed criminal blame to the directors:

The two men involved, Mr. Humphrey has given, as I would expect, his usual very excellent presentation in mitigation, that these are men who are very responsible citizens in the United States. Well they weren't very responsible corporate directors in Canada.

I have some difficulty in accepting that these sophisticated frauds are the responsibility of Mr. Discher or the lawyer who was advising them. The directing minds of these two corporations involved many others in their web of deception: the shell companies, the dummy invoices, the false price lists and the fraudulent oral and written representations and the cross-checking operations, were all part of a modus operandi by which the scheme functioned and could only have led to the corruption of employees who were necessarily implicated in furthering the operation of these frauds.

To further emphasize how important it is not to let the corporate form

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105 In addition to the earlier argument, note that treating the corporation as an individual is one of the mechanisms by which the legal system removes class arguments from the adjudicative system. The wealth of the aggregation which is the corporation is ignored in its contests with individual human beings. More important is the fact that, by reifying the corporation, it is given human rights such as freedom of speech. It permits political participation by economic organizations which have access to much greater funds than do individual political actors; it also enhances anti-democratic practices because the individual corporation represents the views of the minority of its shareholders, as "democracy" in corporations is still of the one dollar-one vote variety.

106 Supra note 76.
107 Supra note 77.
108 Supra note 76.
109 R. v. Amway Corporation and Amway of Canada Ltd. (unreported, Nov. 10, 1983, Ont. S.C.). The accused had been charged with benefiting to the tune of $28 million from their fraud. The fine does not stand alone — the Canadian government will be able to levy the actual duty which should have been paid and could seek to have an administrative fine levied as well. Nonetheless, despite its absolute size, the fine was relatively light. McLeans, Nov. 21, 1983 at 44-45, reported Amway as being a $1.2 billion firm; Time, Nov. 29, 1982, at 54-55, reported that Amway's annual sales were $1.5 billion. Amway's counsel, on learning the amount of the fine, responded: "Thank you, my Lord, I am in a position to pay that to-day." (Judgment transcript at 12).
109 Id. at page 11 of judgment transcript.
obscure the fact that there are real people who act wrongfully and benefit from errant behaviour, note that the two directors concerned were principal owners of the corporation and had built vast fortunes. *Fortune* listed them amongst the four richest Americans, being worth between $300 and $500 million each. So much for the trickle-down effect.\(^{110}\) While this is a dramatic example, the point it permits to be made is of general application.

2. In some situations, however, corporate wrongdoing may not be attributable to what the law characterizes as a guiding mind. Setting aside, for the sake of argument, that that definition is elastic and can be made to fit many more circumstances than it presently does without offending legal principle,\(^ {111}\) it may still be possible to identify some individuals who acted criminally. Every breach of a legal proscription requires the doing of an act by one or more persons. There is no reason that they should not be prosecuted as individuals. This may have the desired effect of deterring them and others. Inasmuch as these miscreants are in inferior positions in the corporate hierarchy, this may be unfortunate. If an argument is raised which suggests this is unfair because the accused may have been coerced into the commission of wrongs, with no hope of personal gain (other than security and advancement in the corporation!), the individual's position is not morally different from that of many people convicted as property offenders. Further, if this is a serious objection, it ought to inspire investigative forces to look thoroughly for decision-makers with discretion, and to lay their prosecutions accordingly. Moreover, if the tenets of deterrence attributed to criminal law make the sense which conventional wisdom assumes, when it becomes known that those who actually commit wrongful acts will be punished, the result will be a lower level of corporate agents having a real stake in setting up lines of communication within the corporation to identify the responsibility for decision-making.\(^ {112}\)

The counter-argument is that this will create corporate scapegoats

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\(^{110}\) As reported in *The Washington Post*, Jan. 22, 1984, at A1, "Cleaning up 'Amway Event' for Reagan." The story concerned a public venture, originally to be run by Amway, but subsequently changed to a public venture organized by local political and business groups so that President Reagan could attend despite Amway's recent conviction. Amway paid the costs of the meeting, and Mr. Reagan was joined on the podium by the two directors who had been castigated but not prosecuted. Amway has since hired General Haig, a former Secretary of State, as consultant; see *Globe & Mail* Dec. 9, 1983. These data were gathered by Hunt, *Amway: A Study In Corporate Criminality and Criminal Justice System Response* (1984), a paper towards the L.L.M. degree in Criminal Law, available on request.

\(^{111}\) See notes 67 and 90, *supra*.

\(^{112}\) This is the trickle-up theory — one way to tackle the need to restructure the corporation so that decision makers become visible.
and that middle management and subordinate personnel will be victimized, while senior officers will be blithely permitted to go on as before, enlarging the coffers of the corporation with ill-gotten gains. This is not a contention which should defeat the proposal. It signifies merely that, in some cases, an additional mechanism must be found to bring the right people to account. Certainly, there are many large corporations which have senior executive officers who can be identified as the actual wrongdoers, as in the Amway case. In any event, the corporate world is made up not only of giants. There is an enormous number of middle-sized and truly small corporations in which the senior officers and active personnel are very closely connected — indeed, they are often the same persons. The suggested approach should be fully effective in these situations.

3. Even in those circumstances where the senior officers of the corporation are truly removed from the departments and the many subdepartments which commit wrongful acts while pursuing relatively narrow and immediate goals, there is a plausible line of reasoning which would permit the prosecution and conviction of such senior officers for wrongful conduct. This arises from the recent revelations of the earnings of some chief executive officers in those very kinds of corporations. The general public has been agog at the numbers, ranging as they do from salaries of one half to thirteen million dollars per year. The business community takes a more matter-of-fact approach: the dollar amounts by themselves mean little. Rather, the issue is whether or not the rate of increase or decrease bears any relation to the economic performance, particularly the market-share performance, of the corporation. Now, if chief executive officers are permitted to claim that they contribute to the overall performance of the corporation because they control its operations, there is no obvious reason why they should not be held responsible for its daily operations.

I concede that contributing through policy development is not the same as supervising ongoing function and, therefore, the step in the argument may be too big to take, but this is an empirical question. For instance, if a large portion of profits is derived from wrongful conduct, or if the corporation is a frequent violator of legal standards,

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113 See R. v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 516 (Ont. C.A.), and cases like the bribery ones, supra note 77.


115 Business Week, id.

116 As in Amway, supra note 108, or in McNamara, supra note 113, or any case where hoped-for profits from wrongdoing were large (e.g. R. v. Canadian Professional Golfers' Associa-
why should a chief executive officer who is credited (with money as well as prestige) for being prescient, be presumed unaware of this propensity of the organization for deviance? Thus, while the argument is not automatically applicable, there are no impenetrable legal or moral obstacles to its use. Where it is so used, it should most ably meet the needs of standard criminal law precepts, as well as attract attention to the fact that the corporation is a device which is used by individuals for their advantage, not the reverse.

4. More directly, where a corporation is truly large, differentiated in functions and segmented in its division of labour, there may be sense in the argument that it is inconceivable for senior officers to be deemed to have had the necessary criminal intent and that it would be pointless to punish mere replaceable cogs in the ever-spinning corporate wheel. However, there is another way to get at major, individual actors. Important shareholders could be, and should be, held personally responsible for corporate wrongdoing. This suggestion directly confronts the proposition that, because some shareholders may be innocent, none should be prosecuted. Shareholders benefit from unredressed corporate wrongdoing, whether or not they took an active part, whether or not they were conscious of the illicit behaviour. But this is not the basis of the proposition. A narrower group of shareholders may be isolated: those who have a controlling interest in the affairs of the corporation.

The idea that controlling shareholders should be identified does not present legal or conceptual problems. It is done every day when protection is sought for the investor class. Thus, the purpose of the Securities Acts is to ensure that shareholders with more clout than others will not use their holdings and any associated knowledge to their own advantage and to the detriment of the corporation and other sharehold-
ers. Insider trading is regulated by subjecting persons with a prescribed amount of equity to certain rules. Similarly, the buying and selling of shares by shareholders is of no particular interest until a major shareholder does it, and then the distribution of shares is subjected to controls, since a danger to be contained may arise when the person making the trade owns a certain amount of the corporation's equity. Shareholders' interests are to be protected when takeovers and mergers occur; the protective measures come into action when it becomes clear that a bidder will own a proportion of shares which will give that bidder control. Similarly, as for the purposes of securities' regulation it is necessary to discern corporate affiliations and relationships (such as parent/subsidiary, beneficial ownership) there is recourse to the notion of equity ownership. For example, when X owns Y% of another corporation, they shall be considered affiliates.\(^9\)

The lesson is clear — in all these situations it is assumed that, where one shareholder has a certain amount of equity ownership (never all, and not necessarily half) that shareholder has sufficient power to control the affairs of the corporation and is subjected to certain restrictions on that control. If that assumption can be made in the sphere of regulation, why can it not be made in relation to corporate criminality? One argument might be that to have potential control is not the same as exercising that control, but this is not overly persuasive. Securities (and foreign investment) regulations assume that potential control is likely to be exercised. Controlling shareholders are given an opportunity to explain their conduct to the regulators. If it is considered benign, it will be permitted.\(^11\) In the same way, the fact of control ought to permit the argument that shareholders who can have managers and policies changed (hence the need to regulate their power) are to be held accountable for the corporation's wrongdoing unless they can show that they were uninformed about, and gave no approval to, the wrongful actors.

This raises a potential counter-argument. It is that shareholding is often a passive matter, something which gives the owner the right not to take an active interest.\(^12\) This begs the question. The reason the controlling shareholders feel comfortable about leaving such issues to the managers is precisely because, fines being light, they can be confi-

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\(^9\) *E.g.* The Securities Act, R.S.O. 1980, c. 466, ss. 1(1)(17)(iii), 1(1)(11)(iii), 8(1)(b), 1(2), 1(3), 1(4), 1(5), 1(6). For similar provisions defining controlling interests, other than by more than 50% equity ownership, see Foreign Investment Review Act, R.S.C. 1980, c. 46, e.g. s. 3(2).

\(^11\) *E.g.* s. 118, *The Securities Act*.

\(^12\) This accords with notions inherent in the absoluteness of private property ownership.
dent that managerial wrongdoing is unlikely to impinge on them severely. As well, if any individuals are prosecuted, it will be employees rather than owners. Compare this argument about the assumed lassitude and apathy of major shareholders in respect of corporate affairs with the assumption of controlling shareholders' keenness to be informed when "their" corporation is being bid for, or its management seeks to buy into a totally different market. Would securities regulators, potential investors, newspaper reporters, politicians, et al. doubt that the major shareholders will be put on full alert? Indeed, as the argument is the essentially legal one which prides itself on understanding and propagating the distinction between ownership and management, will it not be a priority for those controlling shareholders' and the corporation's lawyers to investigate and advise their clients about such impending action? Thus, the assumption that controlling equity ownership is a passive thing, unless proved otherwise, turns the issue on its head. Ownership is always active in that it seeks to protect itself and to further its profitability. If the starting position is that it makes deliberate decisions about how capital is to be deployed, it is logical that it should be held responsible for any consequences. This is the argument which is used to protect the investor classes by means of the Securities Acts, and it is an argument which thus can be used to protect the public at large, if this is a serious social objective.

Even if some shareholders have controlling power, it may be argued, they cannot be expected to exercise it to supervise the daily operations of the corporation. This contention is one which is often used to protect chief executive officers and (through them) the corporation from criminalization. In part, the answer must be as before: it is an empirical question. While often (perhaps, even, very often) the deviant conduct is the result of aberrant, peripheral actors, sometimes it is not. If, as is often true, the wrongdoing is alleged and publicized for a long time before it is finally legally proved, then the claim to ignorance, or the continued willingness to believe in the uprightness of management, is far from convincing. In part, the answer is that it would serve a valid purpose to prosecute and convict controlling shareholders, even for so-called peripheral behaviour. The reason that they do not involve themselves in routine operations of the corporations is because they are permitted to be exactly that: routine. Profit-making activity goes on and there is no concern with the actual processes. Attention is paid, and regulations imposed where necessary, when the

181 See supra note 116.
182 See supra note 117.
business at hand is not routine, when it is likely to affect the controlling owners of the corporation or members of their class. The whole object of criminalizing corporate wrongdoing is to bring home the point that profit making cannot be insulated from restrictions imposed to protect the public from violations of morally important rights, in particular the right to physical integrity of self and property. The means of making profit must therefore be weighed directly against this goal. Making controlling shareholders responsible for what presently are seen as local, unauthorized peccadilloes would emphasize the fact that, if shareholders are willing to take the profit made on their investment, they are accountable for the method used in its generation.

Lest the last point be seen as too far-fetched, note that the centre of the argument is that all shareholders benefit from the illicit behaviour, whether or not it is subsequently described as unwise, peripheral, aberrant or unauthorized. That is, shareholders are in possession of property (usually in converted form) which has been obtained by the commission of an unlawful act. This will be so whether profits have been made by means of savings earned by not putting in required quality controls, pollution-saving devices or by not controlling contaminants, or by the use of deceptive practices in the market, or by obtaining sales by kick-backs. Being in possession of property (or its proceeds) obtained by a breach of law is often treated as a crime when it is the end-product of a street crime (such as breaking and entering, or theft of an automobile). The crime is completed when the possessor knows that the property was illegally obtained. Because such knowledge is difficult to prove, it is presumed that, if the property has been obtained after the commission of a recent crime, that knowledge exists. It is possible for an accused to rebut the effect of the presumption by adducing contrary evidence which may be true. The requirement of recent commission of the crime is a safeguard for accused persons. The idea is that the presumption arises from the common assumption that persons who have something in their possession know of its origins and that it is sensible and convenient to ask them to explain that possession. The requirement of recency relieves the hardship which would be created where unsophisticated lay persons come into posses-

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123 Section 312, The Criminal Code, R.S.C. 1970, c. C-34. Note that the offence allows for the possession of property which has been converted into another form and which is held on behalf of the accused; ss. 2, 3(4).

124 This is an old common law doctrine, internalized in the offence created by the Criminal Code, even though the Code does not refer to it; see, e.g. R. v. Graham, [1974] S.C.R. 206, 26 D.L.R. (3d) 579, and see generally McWilliams, Canadian Criminal Evidence (2nd ed., 1984) at 81 et seq.
sion of goods illegally obtained but which, over time, have gone through many hands.\textsuperscript{125}

In this context, there is nothing unusual about arguing that illegally obtained profits, being in the possession of the shareholders, should raise a rebuttable presumption of criminal participation by those shareholders who could have exercised control over corporate activities. The argument that it is sensible and convenient to ask possessors of illegally obtained corporate property to explain away that possession is analogous to that discussed above. Inasmuch as the requirement of recency will be hard to meet, it can be seen that this safeguard is not needed. This is so because, unlike the usual recipient of criminally obtained property, the controlling shareholder is in a position to monitor the conduct which led to the acquisition of the property.\textsuperscript{126} It will be noted that, if this line of reasoning is accepted, the use of criminal law would have a beneficial effect, one which consensus theorists and reformers seek to achieve. Arguably, controlling shareholders will have a vested interest in creating a system of reporting which will include an accounting of compliance by the corporation with existing legal requirements other than corporate and securities regulatory provisions. A reporting scheme which details the manner of profit-making will ensue.\textsuperscript{127}

Finally, it is conceded that there may well be a great number of situations in these large diffuse corporate organizations in which there are no controlling shareholders, at least to the extent that it would make sense to hold them responsible. Again, this is an empirical issue. What is certain is that the conventional wisdom that the equity in major corporations is widely-held and that, therefore, ownership and man-

\textsuperscript{125} For a good discussion of the need for a safeguard, see \textit{R. v. Boyle} (1983), 35 C.R. (3d) 34 (Ont. C.A.).

\textsuperscript{126} One of the differences between this and the defined offence is that, in the corporate situation, no tangible property may have been illegally obtained. The distinction between tangible and intangible property is, of course, one which helps capitalists generally. For instance, it enables the appropriation of surplus labour by dint of the exchange known as the wage contract. The wage earner sells something intangible — labour power — which becomes the property of the employer to do with as preferred. Intangible though this may be, it is the source of the employer's profit and wealth. The analogy is offered to show that, if an adjustment to the definition of property is necessary to make it fit the special facts of the corporate deviance, the adjustment required does not invalidate the logic of the law.

\textsuperscript{127} Stone's structural remedy, as noted, will pose serious difficulties. Interestingly, Stone, \textit{supra} note 87, at 243-45, rejects the social audit, that is a reporting system detailing non-bottom line activities of the corporation as an unlikely mechanism of reform because of both practical difficulties and the inherent conflict between the predominance of profit-orientation and social conscience. Nonetheless, he thought the social audit a good idea. The mechanism offered here would give this type system a real chance. If prosecution of controlling shareholders is rejected as an idea, it can be cogently argued that this is an indication that consensus theory, despite its protestations, is not serious about the universality of criminal law.
agement are quite separate\textsuperscript{128} (which would make the argument in this section of theoretical interest only) is not borne out in Canada by the available data. Of the four hundred largest Canadian companies outside the financial sector, the equity of only twenty-two public corporations is widely-held. Another seventeen were held by other corporations and twenty-nine by the Government. The remaining 332 were controlled by one major shareholder.\textsuperscript{129}

\section*{X. SUMMATION}

There are no serious legal or conceptual barriers to bringing home corporate wrongdoing to appropriate actors. Most of the practical barriers are of the objectors' own making. In particular, isolation of the corporation as \textit{the} actor, perception of the corporation as just another organization, the assumption that corporate structure is often too complex and denies discretion to individuals, are all unnecessary and misplaced assumptions. Further, there are no good reasons why individuals, who benefit from corporate wrongdoing (whether in terms of profit or sharing in the spoils by career advancement), should not be treated as responsible for the consequences of corporate wrongdoing. The adjustment required to do so does not necessitate radical departures from existing principles. They are just that: adjustments. A willingness to make them would indicate that the legal system treats all crime, no matter who commits it, equally. A lack of willingness to do so, which I expect to be manifested, would prove the class conflict theorists right: criminal law exists to subordinate certain classes so that the ruling class can rule. The ruling class would be seen as no longer constituted by kings and despots — who were beyond the reach of the law for all practical purposes — but rather as members of a class which can rule at one remove through the agency of the corporate structure, largely immunized from the application of liberal, democratic law.

\textsuperscript{128} The \textit{locus classicus} is Berle & Means, \textit{The Modern Corporation and Private Property} (1932).

\textsuperscript{129} \textit{Financial Post 1980: Annual Reports} as offered in evidence by Pierre Lortie, President of the Montreal Stock Exchange, before the Standing Senate Committee on Legal and Constitutional Affairs, Nov. 30, 1982, Hearings on Bill S-31, \textit{An Act to Limit Shareholding in Certain Corporations}. Similar figures are to be found in Toronto, Montreal and Vancouver Stock Exchanges and the Investment Dealers' Association, \textit{The Regulation of Take-over Bids in Canada} — \textit{Report of the Securities Industry Committee on Take-Over Bids}, (1983). To be sure, often the controlling shareholder is another corporation which, if it is American, may be diffusely held, but it is clear that, in Canada, to begin with the Berle & Means argument is to begin from a totally wrong perspective.