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SOME OBSERVATIONS ON THE USE OF CRIMINAL SANCTIONS IN ENFORCING ECONOMIC REGULATIONS*

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THOSE who have had occasion to look for answers to the problems of the use of sanctions, taken to include the whole range of official modes of securing compliance with norms of conduct, have commonly agreed for some time now that there are few to be found.¹ In view of the antiquity of the legal experience, which for the most part has always entailed the use of sanctions of one kind or another, this is a remarkable verdict. Indeed, works written at the turn of the eighteenth century by Jeremy Bentham² are still the basic works in the area, a sobering observation which could scarcely be made of more than a handful of subjects of inquiry. In this state of affairs it is not surprising that we are largely ignorant of the impact of the penal sanction, which is only one aspect of the larger problem of sanctions; and still less so that we know little about the use of the penal sanction in an area of relatively recent development, economic regulatory legislation. These are only sectors of a much larger unexplored terrain.

Moreover, unnecessary confusion has become an ally of ignorance in impeding understanding of these areas. Because strong ideological differences separate the proponents and opponents of economic regulation, judgments

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¹ See, e.g., *Tiguer v. Texas*, 310 U.S. 141, 148 (1940) (Frankfurter, J.); BENTHAM, *THEORY OF LEGISLATION* 358 (2d ed. 1871); FREUND, *LEGISLATIVE REGULATION* 339 (1932); LANDIS, *THE ADMINISTRATIVE PROCESS* 89-91 (1938); ARENS & LASSWELL, *IN DEFENSE OF PUBLIC ORDER* 3 (1961).

² E.g., BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1st ed. 1789).

about the effect of penal sanctions in achieving compliance tend to turn upon judgments about the merits of the substantive regulation. Liberally oriented social scientists, otherwise critical of the case made for the deterrent and vindicatory uses of punishment of ordinary offenders, may be found supporting stern penal enforcement against economic violators.³ At the same time conservative groups, rarely foes of rigorous punishment for ordinary offenders, appear less sanguine for the criminal prosecution when punishment of business offenders is debated.⁴

This statement of the undeveloped state of the art is by no means designed as an introduction to an ambitious effort to close the ancient gap in understanding. Quite the contrary, it is meant rather to excuse the modest ambit of these observations. What I would like to accomplish is to outline the special characteristics of economic regulatory legislation relevant to the use of the criminal sanction; to indicate what implications they have for effective use of the criminal law; and to suggest relevant concerns in the use of this sanction beyond the goal of enforcing the specific regulatory norm.

I

The kind of economic regulations whose enforcement through the criminal sanction is the subject of this inquiry may be briefly stated: those which impose restrictions upon the conduct of business as part of a considered economic policy. This includes such laws as price control and rationing laws, antitrust laws and other legislation designed to protect or promote competition or prevent unfair competition, export controls, small loan laws, securities regulations, and, perhaps, some tax laws. Put to one side, therefore, are regulations directly affecting business conduct which are founded on interests other than economic ones; for example, laws regulating the conduct of business in the interest of public safety and general physical welfare. Also to one side are laws indirectly affecting business conduct by their general applicability; for example, embezzlement, varieties of fraud and related white-collar offenses.

³ BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 43 (3d ed. 1959); CLINARD, *THE BLACK MARKET* 243 (1952); SHAW, *THE CRIME OF IMPRISONMENT* 34 (1946); SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 40-47 (5th ed. 1955). Feelings sometimes run high. See, e.g., SUTHERLAND, *WHITE COLLAR CRIME* 85 (1949): "This change in the economic system from free competition to private collectivism has been produced largely by the efforts of businessmen. Although they have not acted en masse with a definite intention of undermining the traditional American institutions, their behavior has actually produced this result."

⁴ See the statements submitted by the American Bar Association and the Association of the Bar of the City of New York in *Hearings on S. 996, 2252-2255 before the Subcommittee on Anti-trust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 97, 100* (1962). See also the observations of Senator Hruska during the hearings in disapproval of the proposals to tighten criminal penalties. *Id. passim*. Counsel for the defendants in the Electrical Equipment cases made the interesting observation: "What is to be served by prison sentences? . . . If the Government regards prison sentences as a means of deterring future violations of this type, then it has adopted a penological theory that was discarded 100 years ago." *Wall Street Journal*, Feb. 7, 1961, p. 15, col. 3 (midwest ed.).

The class of regulations so defined possesses several characteristics that have a direct bearing upon the uses and limits of the criminal sanction as a means of achieving compliance. The first is the very feature suggested as the identifying characteristic of such legislation; that is, the nature of the interest protected. Certainly the use of criminal sanctions to protect interests of an economic character is not a contemporary departure. The extension of the classic larceny offense by courts and legislatures to embrace fraud, embezzlement and similar varieties of misappropriation that threatened newly developing ways of transacting business is a well documented chapter in the history of the criminal law.⁵ Indeed the process continues today.⁶ But there is an important difference between the traditional and expanded property offenses and the newer economic regulatory offenses—a difference reflecting the shift from an economic order that rested on maximum freedom for the private entrepreneur to one committed to restraints upon that freedom. The traditional property offenses protect private property interests against the acquisitive behavior of others in the furtherance of free private decision.⁷ The newer offenses, on the other hand, seek to protect the economic order of the community against harmful use by the individual of his property interest. The central purpose, therefore, is to control private choice, rather than to free it. But the control imposed (and this too has significance) is not total, as it would be in a socialistic system. Private economic self-determination has not been abandoned in favor of a wholly state regulated economy. Indeed, the ideal of free enterprise is maintained, the imposed regulations being regarded as necessary to prevent that ideal from consuming itself.⁸ Whether the criminal sanction may safely and effectively be used in the service of implementing the large-scale economic policies underlying regulatory legislation of this kind raises fundamental questions.

A second relevant feature of these laws concerns the nature of the conduct restrained. Since it is not criminal under traditional categories of crime and, apart from the regulatory proscription, closely resembles acceptable aggressive business behavior, the stigma of moral reprehensibility does not naturally

⁵ E.g., HALL, *THEFT, LAW AND SOCIETY* (2d ed. 1952).

⁶ Compare *People v. Ashley*, 42 Cal. 2d 246, 267 P.2d 271 (1954), with *Chaplin v. United States*, 157 F.2d 697 (D.C. Cir. 1946). See MODEL PENAL CODE app. A at 103 (Tent. Draft No. 1, 1953).

⁷ Cf. HURST, *LAW AND THE CONDITIONS OF FREEDOM* 21 (1956): "Characteristically, nineteenth century criminal and tort law involved not only limitations in the interest of free private decision, but also positive regulations looking to that end. Criminal law extended its reach in the eighteenth and nineteenth centuries nowhere more conspicuously than in the law of theft. Growth of the law concerning embezzlement, theft by bailees, and the receipt of stolen goods went along with the expansion of the market economy; increased dealings at a distance, in reliance on others, and in volume created an impersonality of dealing which called for more intervention by law to secure the working minimum of reliable conduct."

⁸ See *id.* ch. III *passim*.

associate itself with the regulated conduct.⁹ Moreover, the conduct is engaged in by persons of relatively high social and economic status; since it is motivated by economic considerations, it is calculated and deliberate rather than reactive; it is usually part of a pattern of business conduct rather than episodic in character; and it often involves group action through the corporate form.

The third noteworthy attribute of this legislation is the role provided for the criminal sanction in the total scheme of enforcement. Typically the criminal penalty is only one of a variety of authorized sanctions which may include monetary settlements, private actions (compensatory or penal), injunctions, inspections, licensing, required reporting or others. Its role, therefore, is largely ancillary and takes either or both of two forms. On the one hand, the criminal penalty may serve as a means to insure the functioning of other sanctions, as, for example, penalties for operating without a license, or without prior registration or reporting. On the other hand, the criminal sanction may serve as a separate and supplementary mode of enforcement by directly prohibiting the conduct sought to be prevented, as in the Sherman Act. Furthermore, implicit in the legislative scheme is the conception of the criminal sanction as a last resort to be used selectively and discriminatingly when other sanctions fail. The array of alternative non-penal sanctions appears unmistakably to carry this message. That this is assumed by enforcement authorities is apparent from the relative infrequency of the use of the criminal as compared to other sanctions,¹⁰ and in the occasional appearance of published criteria of enforcement policy.¹¹ And in some legislation, of course, the message of selective enforcement is explicit in the law.¹² Finally, the responsibility for investigation, detection and initiating prosecution is often vested in a specialized agency or other body rather than left with the usual institutions for policing and prosecuting criminal violations. Moreover, these bodies, such as the Office of Price Administration during the war, or the Securities and Exchange Commission, commonly are not special-

⁹ But see SUTHERLAND, *op. cit. supra* note 3, at 45.

¹⁰ See CLINARD, *op. cit. supra* note 3, at 238; Newman, *White Collar Crime*, 23 LAW & CONTEMP. PROB. 735, 739 (1958). See the data in SUTHERLAND, *op. cit. supra* note 3, at 22, on the relative use of criminal and civil sanctions in his sample of seventy corporations. For an account of the relative use of the criminal prosecution under the antitrust laws, see Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 948 (1961) (appendix).

¹¹ See, *e.g.*, the provisions of the OPA Manual reproduced in DESSON, *CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER* 198 (1948), entitled, "General Policies and Standards in the Selection of the Criminal Sanction." See also the statement of the Assistant Attorney General in charge of the Antitrust Division in ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 350 (1955).

¹² See, *e.g.*, Federal Food, Drug and Cosmetic Act § 306, 52 Stat. 1045 (1938), 21 U.S.C. § 336 (1961): "Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution . . . minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice or warning."

ized organs of criminal enforcement, but are the agencies broadly charged with administering the legislative scheme.

This statement of the relevant features of the laws under inquiry, in terms of the interest protected, the behavior regulated and the contemplated role of the criminal penalty, is not meant to suggest that these laws are ultimately unique in the problems they raise for criminal enforcement. Apart from the nature of the interest protected, most, if not all, of these characteristics may be found in other areas of the criminal law: upper-class criminality in white-collar crime generally; selectivity in enforcement in the whole range of the criminal law, to a greater or lesser degree; deliberate, patterned conduct for gain engaged in by organizations in many other classes of offenses. And even though the nature of the interest protected is by definition unique, many of the problems it poses, such as making criminal morally neutral behavior, are common to other areas as well. All that is suggested is that if one asks, "What problems are raised for the effective use of the criminal sanction as a mode of achieving compliance in this area?" the beginnings of an answer are to be found in this congeries of characteristics. It remains now to suggest what bearing they have.

II

I propose to deal with the relevance of these characteristics in terms of three major problems: the problem of defining the proscribed conduct, the problem of corporate criminality and the problem of moral neutrality.

A. *The Problem of Defining the Proscribed Conduct*

The fact that the protected interest is the preferred functioning of the economic system, and entails only partial restriction upon the operation of American business, bears directly upon the task of defining the proscribed behavior with sufficient specificity to meet the requirement of fair notice generally applicable to criminal legislation. Where the criminal sanction is used to police other enforcement devices, as for example, when it becomes criminal to market a security issue without registration or to do business without a license, the standard is met without difficulty. But the requirement of specificity is notably difficult of fulfillment where the crime itself purports to define the substantive economic behavior sought to be avoided. A notable example is the Sherman Act's prohibition of "restraint of trade or commerce" and "illegal monopolization."¹³ Only to a small degree, if at all, is the difficulty remediable by better draftsmanship. As Thurman Arnold observed, "antitrust policy touches fields and boundaries which recede as you approach them and disappear each time you try to stake them out."¹⁴ The reason for this arises from several sources. First, the economic policy is itself unclear, constituting

¹³ 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 (1958).

¹⁴ Quoted in Cahill, *Must We Brand American Business by Indictment as Criminal?*, 1952 A.B.A. SECTION ON ANTITRUST LAW, 26, 30 n.5.

largely a vague aspiration for a proper balance among competing economic goals.¹⁵ Second, illegality must turn on judgments that are essentially evaluative in character, rather than upon purely factual determinations. Third, the inevitable development of novel circumstances and arrangements in the dynamic areas under regulation would soon make precise formulations obsolete, even to the limited extent they proved feasible.¹⁶

A key question is whether what would be an intolerable vagueness in conventional crime is less objectionable here in view of the preventive character of these laws. But deferring this question for the moment, are there alternatives for meeting the difficulty short of eschewing criminal sanctions where the conduct cannot be defined with acceptable specificity?

The requirement in an otherwise unconstitutionally vague definition of criminal conduct that the defendant must be shown to have acted willfully or knowingly has sometimes been held to remedy the defect of definition. Thus the Supreme Court found no unfairness in convicting a motor company for failing to reroute their explosive-laden truck "as far as practical, and where feasible" to avoid congested areas, where it was necessary to prove that this was done "knowingly";¹⁷ or in convicting a taxpayer for attempting to evade taxes by making "unreasonable" deductions for commissions paid to stockholders as compensation for service, where the action was taken "willfully."¹⁸ A requirement that the defendant have intentionally committed the act with a full and correct understanding of the factual circumstances is of no help to a defendant faced with an unclear definition of the conduct forbidden. On the other hand, however vague the line between what is permissible and what is criminal, where the actor is aware that his conduct falls squarely within the forbidden zone he is in no position to complain.¹⁹ "A mind intent upon willful evasion is inconsistent with surprised innocence."²⁰ Apparently, therefore, it is scienter in this sense, that is, knowledge by the actor that he is violating the law, which is held in these cases to eliminate the vagueness problem. Yet this premise probably affords defenses to a larger group than intended, since a defendant who knew nothing of the existence of the law would be in as good a position as one who did not know that his action came within its terms.²¹

¹⁵ Jackson & Dumbaud, *Monopolies and the Courts*, 86 U. PA. L. REV. 231, 237 (1938): "[I]t must be confessed that there is no consistent or intelligible policy embodied in our law by which public officials and businessmen may distinguish bona fide pursuit of industrial efficiency from an illicit program of industrial empire building." See *id.* at 232, quoting Senator Wagner: "Half of the laws enacted by Congress represent one school of thought, the other half another. No one can state authoritatively what our national policy is."

¹⁶ MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* 159 (1946).

¹⁷ *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952).

¹⁸ *United States v. Ragen*, 314 U.S. 513 (1942).

¹⁹ See *Screws v. United States*, 325 U.S. 91, 103-04 (1945).

²⁰ *United States v. Ragen*, 314 U.S. 513, 524 (1942).

²¹ *Cf. Boyce Motor Lines v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting).

If the prosecution must prove that the defendant knew his conduct fell within the terms of the law, it could hardly do so without proof as well that he knew of its existence. A legislature, however, could presumably resolve the semantic impasse by making it a defense that the defendant did not know his acts fell within its terms, or perhaps, more narrowly, that he could not reasonably know it, though not a defense simply that he did not know of the law's existence.²²

Another approach to mitigating the difficulties of a vague formulation is through administrative choice of cases to prosecute. If the enforcement agency initiates criminal prosecution solely where the meaning of the statute has become acceptably clear through judicial interpretation, the unfairness of the original unclarity may be thought adequately reduced. An example is the announced policy of the Department of Justice to institute criminal prosecutions for Sherman Act violations only where there is a *per se* violation, such as price fixing, a violation accompanied by a specific intent to restrain competition or monopolize, the use of predatory practices, or where the defendant has before been convicted of a Sherman Act violation.²³ This approach, unlike the legislative requirement of scienter, is of no avail where the vagueness of the statutory formulation renders the law constitutionally unenforceable. It is also dependent upon the existence of means other than criminal prosecutions to develop clarifying interpretation. In the Sherman Act this is provided through the civil suit as a parallel means of enforcing the identical standard of conduct. This, in turn, however, may be a mixed blessing. One of the purposes of looseness and generality in the formulation of the standard is to create a flexibility that will allow judicial interpretation to keep pace with the changes in the character of the area under regulation. Courts may prove understandably reluctant to sustain expansive, although desirable, interpretations where the consequence will be to subject defendants to criminal as well as civil sanctions.

There are several alternatives to civil litigation as a means of producing clarifying interpretation. The most obvious is to delegate to the responsible administrative agency the authority to issue so-called "legislative regulations" in implementation of the statutory scheme.²⁴ Providing criminal penalties for

²² Of course, a legislature might decide as well to require knowledge or reason to know of the law or regulation. The reason would not involve the vagueness of the definition, but rather the failure of the nature of the conduct forbidden to give notice. See text accompanying note 94 *infra*.

²³ Statement of Assistant Attorney General in charge of the Antitrust Division in ATT'Y GEN. NAT'L COMM. ANTI-TRUST REP. 350 (1955).

²⁴ 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958). See *id.* at 358: "A legislative rule is the product of an exercise of legislative power by an agency, pursuant to a grant (whether explicit or not) of legislative power by the legislative body; a court will no more substitute judgment on the content of a valid legislative rule than it will substitute judgment on the content of a valid statute. A legislative rule is valid if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable."

violations of these regulations²⁵ then eliminates the vagueness problem to the extent of the clarity of the regulation.²⁶ There is still, to be sure, a requirement of some specificity in the legislative standard from which the agency derives its authority. But this raises the different, though related, issue of delegation of powers, where requirements of specificity are considerably less than those applicable to criminal statutes.²⁷ The declaratory order, in which the agency renders an advisory judgment on the legality of a contemplated course of action, is another possibility. This has utility both in providing further clarification of the applicability of regulations and in rendering interpretive guidance of the law when it, rather than a regulation, is the direct source of the prohibition. Section 5 of the Administrative Procedure Act²⁸ provides a precedent for such an order, although the use authorized therein is considerably more limited than it might be.²⁹

Still another alternative is flatly to prohibit certain kinds of activity, except where an administrative agency, interpreting and applying general legislative standards, expressly allows it, as by issuing a license. The criminal penalty may then be imposed for the clearly defined offense of engaging in the activity without authorization.³⁰ This, of course, is to use the criminal sanction, as previously suggested, as a means of enforcing another, non-criminal sanction. It is readily usable in such narrow areas as marketing securities, or engaging in other particular types of business. It is impractical where the thrust of the prohibition goes to ways of conducting any and all kinds of business, as in the Sherman Act.

B. *The Problem of Corporate Criminality*

Conduct reached by economic regulatory legislation is typically group conduct often engaged in through the corporate form. This raises the formidable issue of corporate criminality. From the legislative viewpoint, the principal questions are twofold. First, what difficulties beset enforcement agencies in affixing criminal liability upon responsible actors where the principal violator is the corporation? Second, in any event, what are the possibilities of effective enforcement through the imposition of criminal penalties upon the corporation itself?

Fixing criminal liability upon the immediate actors within a corporate structure generally poses no special problem.³¹ But the immediate actors may

²⁵ Since *United States v. Grimaud*, 220 U.S. 506 (1911), there has been no doubt of the constitutionality of such provisions.

²⁶ See *United States v. Petrillo*, 332 U.S. 1, 18 (1947) (Reed, J., dissenting).

²⁷ See 1 DAVIS, *op. cit. supra* note 24, § 2.03.

²⁸ 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958).

²⁹ See GELLHORN & BYSE, *ADMINISTRATIVE LAW* 700 (1960).

³⁰ *Cf.* WILLIAMS, *CRIMINAL LAW* 579 (2d ed. 1961).

³¹ *But see* MODEL PENAL CODE § 2.07(5), comment at 155 (Tent. Draft No. 4, 1955), for a discussion of difficulties encountered in some jurisdictions.

be lower echelon officials or employees who are the tools rather than the responsible originators of the violative conduct. Where the corporation is managed by its owners, the task of identifying the policy formulators is not acute. But where the stock of the corporation is widely held, the organization complex and sprawling, and the responsibility spread over a maze of departments and divisions, then, as has recently been shown,³² there may be conspicuous difficulties in pin-pointing responsibility on the higher echelon policy-making officials. The source of the difficulty is the conventional requirement that to hold one person criminally liable for the acts of another he must have participated in the acts of the other in some meaningful way, as by directing or encouraging them, aiding in their commission³³ or permitting them to be done by subordinates whom he has power to control.³⁴ The difficulty is exemplified in the now famous antitrust prosecution of the electrical equipment manufacturers. Here the high policy makers of General Electric and other companies involved escaped personal accountability for a criminal conspiracy of lesser officials that extended over several years to the profit of the corporations, despite the belief of the trial judge and most observers that these higher officials either knew of and condoned these activities or were willfully ignorant of them.³⁵

It cannot be known to what extent this legal obstacle to convicting the policy initiators actually reduces the efficacy of the criminal sanction in achieving compliance. Certainly, it would prove more significant in those areas, like antitrust, where giant corporations are the principal targets of the law, than in areas where they are not. But other factors may be more influential in preventing widescale successful prosecution of individual corporate officials; under the antitrust laws, for example, there have been strikingly few convictions of corporate officials, even of officials of closely held corporations and the lesser officials of large, public corporations.³⁶

At all events, one means of reducing the difficulty would be to alter by statute the basis of accountability of corporate directors, officers or agents. An amendment, for example, of the antitrust law was recently proposed which would have changed the present basis of accountability (that such persons

³² See Whiting, *supra* note 10, at 931; Note, 71 YALE L.J. 280, 291 (1961).

³³ For discussion of the principles of complicity, see MODEL PENAL CODE § 2.04, comment (Tent. Draft No. 1, 1953).

³⁴ WILLIAMS, *op. cit. supra* note 30, at 360.

³⁵ Judge Ganey observed during sentencing: "[O]ne would be most naive indeed to believe that these violations of the law, so long persisted in, affecting so large a segment of the industry and finally, involving so many millions upon millions of dollars, were facts unknown to those responsible for the conduct of the corporation . . ." N.Y. Times, Feb. 7, 1961, p. 26, col. 3. See Watkins, *Electrical Equipment Antitrust Cases—Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97, 106 (1961).

³⁶ See the discussion of the record of convictions in Whiting, *supra* note 10, at 942; Note, 71 YALE L.J. 280, 291 (1961).

“shall have authorized, ordered or done” the acts)³⁷ to make it suffice that the individual had knowledge or reason to know of the corporate violation and failed to exercise his authority to stop or prevent it.³⁸ This falls short of outright vicarious liability since accountability is made to turn on fault in not knowing and acting rather than on a relationship simpliciter. Essentially it makes a negligent omission the basis of accountability. Still a standard of accountability resting on precisely how much of the far-flung operations of a nation-wide corporation an official should reasonably be aware of approaches vicarious liability in its indeterminateness, since neither the common experience of the jury nor even specialized experience affords substantial guidance. In effect, it introduces an element of uncertainty concerning accountability into laws that often, like the Sherman Act, are already marked by uncertainty concerning the conduct forbidden.³⁹

I defer to a later point the issue of whether such scruples are appropriate in business offenses.⁴⁰ To the extent they are, a possible alternative is the legislative formulation of rules and standards of accountability. Where state regulatory laws are involved this might be accomplished through amendment of the corporation laws to fix the lines of accountability in intra-corporate relationships compatibly with the needs of an effective system of regulation. The problem, however, arises principally with national regulatory laws sought to be applied to officials of large interstate corporations. Professor Watkins has long suggested a federal incorporation law to restore responsibility in such corporate structures by eliminating the diverse and confusing lines of accountability under state corporation laws.⁴¹ If, as he suggests, the problem of fixing accountability is due neither to the complexity of business nor to willful attempts to baffle outsiders, but rather to “the absence of uniform standards and rules for delegation of authority in these huge corporations in which nobody appears to know who is responsible for what,”⁴² there may be no just means for meeting the problem short of his proposal. On the other hand, the complexity of the task and the further inroad into an area of traditional local jurisdiction might not be regarded as worth the cost, since the legal standards of accountability may prove to be only one of several factors, and not neces-

³⁷ Clayton Act § 14, 38 Stat. 736 (1914), 15 U.S.C. § 24 (1958).

³⁸ S. 2254, 87th Cong., 1st Sess. (1961).

³⁹ The difficulty is aggravated where, as in the Sherman Act, knowledge of the law is not necessary. See *United States v. Griffith*, 334 U.S. 100, 105 (1948).

⁴⁰ See SUTHERLAND, *op. cit. supra* note 3, at 54: “The customary plea of the executives of the corporation is that they were ignorant of and not responsible for the action of the special department. This plea is akin to the alibi of the ordinary criminal and need not be taken seriously.”

⁴¹ Watkins, *Federal Incorporation*, 17 MICH. L. REV. 64, 145, 238 (1918–19); Watkins, *supra* note 35, at 108–09.

⁴² Watkins, *supra* note 35, at 107–08.

sarily the most crucial, as we will see, militating against enforcement through conviction of corporate officials.

Fixing criminal liability upon the corporation itself has posed fewer legal obstacles in the enforcement of regulatory legislation. The earlier conceptual difficulties of ascribing criminal intent to a fictitious entity have been largely removed by the developing law. And whatever doubt may exist is readily met by expressly providing for corporate liability in the regulatory statute.⁴³ But the problem of corporate accountability—that is, when the entity is liable for conduct of its agents at various levels of responsibility—is analogous to the problem of holding corporate officials accountable for the acts of lesser agents. It has been resolved more sweepingly in the case of the entity. For acts of its high managerial agents it is by definition accountable since a corporation cannot act by itself. For the acts of its lesser agents the tendency has been, at least in the regulatory offenses, to hold the corporation accountable for the acts of employees within the scope of their employment⁴⁴ or while acting as employees.⁴⁵ Whether the consequential imposition of vicarious responsibility upon the corporate entity, as well as upon shareholders, is justified raises the question of the deterrent efficacy of convicting and fining the corporate entity.

The case for corporate criminality rests presumably upon the inadequacy of the threat of personal conviction upon the individual actors. As said earlier, difficulties of proof under legal principles of accountability have interfered with effective prosecution of high corporate officials. And the commonly observed jury behavior of convicting the corporate defendant while acquitting the individual defendants, even where proof is apparently strong, further supports the case for the alternate sanction.⁴⁶ Moreover, “there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain, especially where the penalties threatened are moderate and

⁴³ Sherman Antitrust Act §§ 1, 2, 8, 26 Stat. 209–10 (1890), 15 U.S.C. §§ 1, 2, 7 (1958); Federal Trade Commission Act § 14, added by 52 Stat. 115 (1938), as amended, 15 U.S.C. § 54 (1958); Filled Milk Act § 3, 42 Stat. 1487 (1923), 21 U.S.C. § 63 (1958); Meat Inspection Act, 34 Stat. 1264 (1907), 21 U.S.C. § 88 (1958); Federal Food, Drug and Cosmetic Act §§ 201(e), 303, 52 Stat. 1041, 1043 (1938), 21 U.S.C. §§ 321(e), 333 (1958).

⁴⁴ See, e.g., *United States v. Union Supply Co.*, 215 U.S. 50, 54–55 (1909); *New York Cent. & H.R.R.R. v. United States*, 212 U.S. 481, 495 (1909); *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946); *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 29–30, 121 N.E. 474, 476 (1918); *State v. Dried Milk Prods. Co-op*, 16 Wis. 2d 357, 114 N.W.2d 412, 414–15 (1962).

⁴⁵ See, e.g., *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243–44 (1938); *United States v. Armour & Co.*, 168 F.2d 342, 343–44 (3d Cir. 1948); *United States v. Thompson-Powell Drilling Co.*, 196 F. Supp. 571, 574 (N.D. Tex. 1961); *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 303–07, 54 N.E.2d 210, 219–20 (1944).

⁴⁶ Though not necessarily, since it can not be known whether juries would have convicted the individuals if they could not have convicted the entity. For a collection of cases in which the individual corporate agents were acquitted but the corporation convicted, see Note, 71 *YALE L.J.* 280, 292 n.50 (1961).

where the offense does not involve behavior condemned as highly immoral by the individual's associates."⁴⁷ Yet the question remains of the effectiveness of corporate criminality as a supplementary deterrent.

The only two practically available modes of imposing criminal sanctions upon the corporate defendant are through the stigma of conviction and the exaction of a fine. The former, classified by Bentham as the "moral or popular" sanction, operates as he suggested through the adverse reactions to the conviction of persons in the community.⁴⁸ Whether there is any substantial moral opprobrium attached to violation of economic regulatory legislation (even where individuals are convicted) I defer until later. Assuming there is, can it be said to have any appreciable significance when directed to a corporate entity? There is no substantial empirical basis for answering this question.⁴⁹ It seems unlikely that whatever moral stigma may attach to a convicted corporation would be felt in any effectual way by the corporate individuals, especially in large corporations where responsibility is diffused.⁵⁰ On the other hand, the point has been made⁵¹ (though denied as well)⁵² that the corporate stigma may operate as a deterrent by impairing the reputation of the corporation in its business operations and hence adversely affecting its economic position. Until there is more to go on one can only guess at the validity of this observation, though there is reason to expect that the impact of the conviction would operate differentially, depending on the size of the corporation, the extent of competition and the dominance of its market position, the degree to which its conviction attracted public notice, and the like.

The exaction of a corporate fine serves in part to give color to the moral stigma of conviction. Insofar as this is its role, its value depends upon the existence and power of the stigma to deter. On the other hand, the use of the corporate fine apart from the stigma of conviction raises no issue peculiar to the criminal sanction, since civil fines afford identical deterrent possibilities. Whether it would prove effective to increase the economic hazard of misconduct by authorizing higher fines than those now commonly authorized⁵³

⁴⁷ MODEL PENAL CODE § 2.07, comment at 148-49 (Tent. Draft No. 4, 1955).

⁴⁸ BENTHAM, *op. cit. supra* note 2, at 25 (Oxford ed. 1907).

⁴⁹ Experience has varied. The OPA apparently doubted the use of corporate convictions. Its Manual stated: "Criminal prosecution against a corporation is rather ineffective unless one or more of the individuals is also proceeded against." See DESSON, *op. cit. supra* note 11, at 200. Until the recent Electrical Equipment cases (which may be in a class by themselves) the Department of Justice appeared for several years to favor a policy of prosecuting corporate defendants alone. See Kramer, *Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy*, 48 GEO. L.J. 530, 539 (1960).

⁵⁰ See ARENS & LASSWELL, *op. cit. supra* note 1, at 121-22; Kramer, *supra* note 49, at 539-40.

⁵¹ See FRIEDMANN, *LAW IN A CHANGING SOCIETY* 196 (1959); WILLIAMS, *op. cit. supra* note 30, at 863-64.

⁵² Note, 71 YALE L.J. 280, 287 n.35 (1961).

⁵³ *Id.* at 285-86.

depends on such considerations as the general ability of the corporation to recoup its losses through its pricing policy⁵⁴ and the likelihood that courts would impose the higher fines.⁵⁵ An alternative recently proposed would substitute for the fine a governmental proceeding designed to compel the corporation to disgorge the profits attributable to its violation.⁵⁶ These alternatives raise substantial questions concerning sanctions, but not the criminal sanction, strictly speaking.

C. *The Problem of Moral Neutrality*

Viewed in the large, the characteristic of the conduct typically proscribed by economic regulatory legislation most relevant for the purposes of criminal enforcement is that it is calculated and deliberative and directed to economic gain.⁵⁷ It would appear, therefore, to constitute a classic case for the operation of the deterrent strategy. Nonetheless, it is a widely shared view that the strategy has not worked out in fact, that the criminal sanction has not proved a major weapon for achieving compliance. Part of the explanation may be attributable to the difficulties of enforcement suggested above, such as the resistance to vaguely defined standards of criminality, the difficulty of fixing culpability upon high corporate officials, and the muffled and absorbable impact of corporate criminal sanctions. But it is likely that other factors play a more dominant role.

A common explanation of the failure of the criminal sanction is simply that the powerful business interests affected do not want these laws enforced and employ their power and position in American life to block vigorous enforcement. Influence is exercised over the legislatures to keep enforcement staffs impoverished and sanctions safely inefficacious. Enforcement officials, as prospective counsel for business interests, and judges as former counsel, identify with these interests and resist criminal enforcement. Moreover, news media, under the control of these same groups, work to create hostility to these laws and their vigorous enforcement and sympathy for the violators. In short, "those who are responsible for the system of criminal justice are afraid to antagonize businessmen The most powerful group in medieval society secured relative immunity from punishment by 'benefit of clergy,' and now our most powerful group secures relative immunity by 'benefit of business.'"⁵⁸

It would be dogmatic to assert that influences of this kind do not exist, but

⁵⁴ Compare WILLIAMS, *op. cit. supra* note 30, at 864, with Note, 71 YALE L.J. 280, 285 n.17 (1961).

⁵⁵ It has been pointed out, for example, in opposition to a move to increase the fine for antitrust violations, that the fines actually imposed tend to be substantially lower than the authorized maximum. See Statement of the Association of the Bar of the City of New York, in *Hearings*, *supra* note 4, at 100.

⁵⁶ Note, 71 YALE L.J. 280, 297 (1961).

⁵⁷ But see Lane, *Why Business Men Violate the Law*, 44 J. CRIM. L., C. & P.S. 151 (1953).

⁵⁸ SUTHERLAND, *WHITE COLLAR CRIME* 46-47 (1949).

it may be doubted that they play a dispositive role. Business surely constitutes a powerful interest group in American life; but the profusion of regulatory legislation over the ardent protests of important economic interests in the past thirty years is some evidence that it is not all-powerful. Opposing forces have been able to marshal considerable public sentiment against a variety of business practices. Moreover, it is perhaps an oversimplification to identify all business as united in monolithic opposition. There is less a single business interest than a substantial variety of business interests. What then, in addition to business propaganda and influence, has accounted for the failure of the criminal sanction? Or, if we must have a villain, how has it been that business, which has not always gotten its way, has been this successful in devitalizing the use of that sanction?

It is a plausible surmise that the explanation is implicated in another feature of the behavior regulated by these laws; namely, that it is not generally regarded as morally reprehensible in the common view, that, indeed, in some measure it is the laws themselves that appear bad, or at least painful necessities, and that the violators by and large turn out to be respectable people in the respectable pursuit of profit. It is not likely that these popular attitudes are wholly products of a public-relations campaign by the affected business community. The springs of the public sentiment reach into the national ethos, producing the values that the man of business himself holds, as well as the attitude of the public toward him and his activities. Typically the conduct prohibited by economic regulatory laws is not immediately distinguishable from modes of business behavior that are not only socially acceptable, but affirmatively desirable in an economy founded upon an ideology (not denied by the regulatory regime itself) of free enterprise and the profit motive. Distinctions there are, of course, between salutary entrepreneurial practices and those which threaten the values of the very regime of economic freedom. And it is possible to reason convincingly that the harms done to the economic order by violations of many of these regulatory laws are of a magnitude that dwarf in significance the lower-class property offenses.⁵⁹ But the point is that these perceptions require distinguishing and reasoning processes that are not the normal governors of the passion of moral disapproval, and are not dramatically obvious to a public long conditioned to responding approvingly to the production of profit through business shrewdness, especially in the absence of live and visible victims. Moreover, in some areas, notably the antitrust laws, it is far from clear that there is consensus even by the authors and enforcers of the regulation—the legislators, courts and administrators—on precisely what should be prohibited and what permitted, and the reasons there-

⁵⁹ *Id.* at 13: "Many of the white collar crimes attack the fundamental principles of the American institutions. Ordinary crimes, on the other hand, produce little effect on social institutions or social organization." See also MANNHEIM, *op. cit. supra* note 16, at 150, 152, 172-73 (1946); Newman, *White Collar Crime*, 23 *LAW & CONTEMP. PROB.* 734, 744 (1958).

for.⁶⁰ And as Professor Freund observed, "if a law declares a practice to be criminal, and cannot apply its policy with consistency, its moral effect is necessarily weakened."⁶¹

The consequences of the absence of sustained public moral resentment for the effective use of the criminal sanction may be briefly stated. The central distinguishing aspect of the criminal sanction appears to be the stigmatization of the morally culpable.⁶² At least it tends so to be regarded in the community. Without moral culpability there is in a democratic community an explicable and justifiable reluctance to affix the stigma of blame.⁶³ This perhaps is the basic explanation, rather than the selfish machinations of business interests, for the reluctance of administrators and prosecutors to invoke the criminal sanction, the reluctance of jurors to find guilt and the reluctance of judges to impose strong penalties.⁶⁴ And beyond its effect on enforcement, the absence of moral opprobrium interferes in another more subtle way with achieving compliance. Fear of being caught and punished does not exhaust the deterrent mechanism of the criminal law. It is supplemented by the personal disinclination to act in violation of the law's commands, apart from immediate fear of being punished.⁶⁵ One would suppose that especially in the case of those who normally regard themselves as respectable, proper and law-abiding the appeal to act in accordance with conscience is relatively great. But where the violation is not generally regarded as ethically reprehensible, either by the community at large or by the class of businessmen itself, the private appeal to conscience is at its minimum and being convicted and fined may have little more impact than a bad selling season.⁶⁶

⁶⁰ See note 15 *supra*. See also MANNHEIM, *op. cit. supra* note 16, at 168.

⁶¹ FREUND, LEGISLATIVE REGULATION 253 (1932).

⁶² See Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 404 (1958).

⁶³ MANNHEIM, *op. cit. supra* note 16, at 167-68 (1946): "Emile Durkheim has pointed out that 'the only common characteristic of all crimes is that they consist . . . in acts universally disapproved of by members of each society . . . crime shocks sentiments which, for a given social system, are found in all healthy consciences.' Although this requirement of universal disapproval may appear somewhat exaggerated, there can be no doubt that without the backing of at least the major part of the community criminal legislation, in a democracy, must fail."

⁶⁴ *Id.* at 5.

⁶⁵ Fuller, *Morals and the Criminal Law*, 32 J. Crim. L. & Crim. 624, 629-30 (1942): "Ultimately the problem is one of supplementing the political sanctions of the law, which operate through threat of punishment more or less externally on individuals, with spontaneous moral sanctions which operate on the habits, attitudes, and consciences of individuals." See Andrenas, *General Prevention—Illusion or Reality*, 43 J. CRIM. L., C. & P.S. 176, 179 (1952); Sellin, *Culture Conflict and Crime*, 44 AM. J. OF SOCIOLOGY 97 (1938).

⁶⁶ In his study of OPA regulation Clinard concluded that punishment was largely ineffective beyond causing businessmen to adopt shrewd manipulative evasions. He concluded that control required "the voluntary compliance with the regulations of society by the vast majority of the citizens." CLINARD, *THE BLACK MARKET* 261 (1952). See VOLD, *THEORETICAL CRIMINOLOGY* 257 (1958).

Are there modes of dealing with these consequences of making morally neutral behavior criminal? A commonly suggested remedy for inadequate enforcement is a campaign of strict enforcement aided by strengthened prosecution staffs, and perhaps more severe penalties.⁶⁷ But to the extent that the deficiency in enforcement is attributable to the moral inoffensiveness of the behavior, the major limitation of such a call to arms is that it is addressed to the symptom rather than the cause. How will legislatures be convinced to expend substantial sums for criminal enforcement, or prosecutors to go for the jugular, or courts or juries to cooperate in the face of a fundamental lack of sympathy for the criminal penalty in this area? Enlarged resources for prosecution may well afford staff enthusiasts an opportunity for more vigorous enforcement, but one may doubt that it can achieve more than a minor flurry of enforcement.⁶⁸

An attack on the cause, insofar as moral neutrality is the cause, would presumably require a two-pronged program: one directed at the obstacle of popular nullification; the other at inculcating the sentiment of moral disapproval in the community.⁶⁹ Each, of course, would inevitably have an effect upon the other. The former might proceed, not simply by allocating greater enforcement resources, but by arrangements that would reduce the traditional discretionary authority of the various bodies involved in criminal law enforcement. For example, the decision to prosecute might be exclusively centered in the agency responsible for the whole regulatory program; conservative legal interpretation might be dealt with by authorizing agency interpretative regulations which are made relevant in criminal prosecutions;⁷⁰ the temporizing of juries might be avoided by eliminating, where possible, jury trials; the judge's sentencing discretion might be curtailed by mandatory minimum penalties.⁷¹ There is, of course, the substantial task of persuading legislatures to abjure the traditional mediating institutions of the criminal law in an area where, the moral factor being largely absent, they might be thought to have their historic and most useful function to perform. But if enacted, one might reasonably suppose that such legal arrangements could result in a somewhat more frequent and rigorous use of the criminal sanction and a heightening of the deterrent effect of the law.

⁶⁷ See note 3 *supra*.

⁶⁸ The short lived Thurman Arnold era of vigorous criminal antitrust enforcement is a case in point. See Arnold, *Antitrust Law Enforcement, Past and Future*, 7 LAW & CONTEMP. PROB. 5 (1940). "[T]he record of enforcement shows that the high water mark for criminal antitrust suits occurred during the 1938-1944 period when, of a total of 385 suits brought by the Department, 251 or over two-thirds, were criminal prosecutions." Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 940 n.43 (1961).

⁶⁹ See Fuller, *supra* note 65, at 624.

⁷⁰ See text accompanying notes 24-29 *supra*.

⁷¹ A bill was introduced to amend the Sherman Act so to provide in certain situations. S. 2253, 87th Cong., 1st Sess. (1961).

The other prong of the program, the cultivation of the sentiment of moral disapproval, is perhaps closer to the heart of the matter. To some extent the more frequent enforcement and the more stringent punishment of violators may tend to serve this objective as well as its more direct in terrorem purposes, especially where cases are selected for enforcement with this end in view.⁷² Whether a governmentally mounted campaign should be employed as well to give widespread publicity to successful convictions and to shape the public conscience in other ways may be questioned from various viewpoints, but it surely would be consistent with the basic strategy of using criminal sanctions in these areas.

How effective a campaign of selected prosecutions and attendant publicity would prove in creating a changed moral climate is problematical. Certainly one can not confidently deny that the spectacle of frequent conviction and severe punishment may play a role in molding the community's attitudes toward the conduct in question. Experience offers uncertain guidance. Tax evasion has a history that provides some support. We have come a considerable distance, though not all the way,⁷³ from the day when an English judge could observe from the bench, "there is not behind taxing laws, as there is behind laws against crime, an independent moral obligation."⁷⁴ The change was accompanied in this country by a gradual tightening of the criminal sanction. In 1924 tax evasion was upgraded from a misdemeanor to a felony and maximum imprisonment raised from one to five years;⁷⁵ reforms in 1952 converted the criminal prosecution from a tax recovery device and weapon against the professional racketeer to a means of general deterrence of tax evasion by widespread and selected enforcement against all levels of violators.⁷⁶ While the tax evasion prosecution is still something of a special case, the record of successful prosecution has become genuinely impressive and the

⁷² Cf. OPA Manual, quoted by DESSON, *CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER* 200 (1948): "One of the most difficult problems in this field is to combat the attitude, so prevalent in this country, that the criminal laws are made for the criminal classes and do not apply to respectable people. This attitude is clearly incompatible with enforcing general compliance on the part of the consumers. Meeting it calls for the judicious and telling selection of violations by average people in the various economic and social strata of society."

⁷³ Congressman Thomas J. Lane of Massachusetts was convicted and imprisoned for tax evasion. He was renominated and re-elected to the House the next fall. *N.Y. Times*, Oct. 17, 1962, p. 23, col. 5. But having regard to Mayor Curley's experiences, Massachusetts may be a rather special case.

⁷⁴ See MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* 146 (1946).

⁷⁵ Revenue Act of 1924, ch. 234, § 1017, 43 Stat. 343-44.

⁷⁶ See Murphy, *Criminal Income Tax Evasion*, 48 NW. U.L. REV. 317 (1953), for a description of the reforms. As to the effects of the reforms, see Department of Justice News Release, Jan. 4, 1960, as reported in 6 CCH 1960 STAND. FED. TAX REP. ¶ 8784; Schmidt, *Current Department of Justice Criminal Income Tax Policies*, 38 TAXES 293, 299 (1960).

tax evasion conviction a sanction of some consequence.⁷⁷ Experience such as this, however, gives little more than support for the plainly plausible assumption that criminal enforcement may play some part. One can not be sure of the extent to which other factors, not necessarily present in areas other than tax, created the conditions for optimum use of the criminal sanction as a moralizing weapon, or indeed, of the extent to which other influences rather than, or in addition to, the criminal sanction, produced the changed climate. The caution is further indicated (though, of course, not demonstrated) by less successful experiences in attempting to deal through the criminal law with behavior that did not attract any substantial degree of reprobatory unanimity, such as prohibition or gambling. At all events, Mannheim's caveat is a useful one: "It is only in a Soviet state and through a legal system on the lines of the Soviet penal code, which deliberately uses the political weapon of criminal prosecution to shape the economic system according to its ideology, that old traditions of such strength can be comparatively quickly destroyed."⁷⁸

III

I have reserved for last those issues and concerns that arise out of goals other than the effectiveness of the criminal sanction in achieving compliance. Those which most prominently compete for consideration are: first, the sentiment of fundamental fairness—justice, in a word; and second, the retention of the vitality of the criminal law in its traditional sphere of application. They come into play in connection with two aspects of the use of the criminal law to enforce economic regulatory laws; namely, the loosening of minimum requirements for culpability in the cause of enforcement efficiency, and the criminalizing and punishing of behavior that does not generally attract the sentiment of moral reprobation.

A. Requirements of Culpability

At several points attention has been called to the obstacles to effective prosecution created by certain conventional requirements of the criminal law; for example, the requirement of specificity in defining the prohibited conduct and the requirement of minimum conditions of accountability in holding per-

⁷⁷ See Department of Justice News Release, *supra* note 76, in which it is stated that "in the first 20 years of the [Tax] Division's existence (1933 to 1952), the Division prosecuted successfully 2,900 persons. In the past seven years (1953 to 1959) the Division convicted 4,344 persons for tax fraud. . . ."

"[O]f the 541 cases disposed of by trial or plea, 497, or 92%, resulted in convictions. [And] . . . 36% of all persons convicted of income tax fraud in fiscal 1959 received prison sentences. The average sentence was approximately fifteen months per person. In fiscal 1958, 31% of those convicted received jail terms which averaged approximately twelve months per person. Total fines . . . were also more substantial in fiscal 1959, amounting to about \$2.2 million as against \$2.0 million in fiscal 1958 and \$1.5 million in fiscal 1957."

⁷⁸ MANNHEIM, *op. cit. supra* note 74, at 166.

sons responsible for the acts of others. Whatever basis these requirements have in the area of traditional crime, may they properly be diluted or dispensed with in the area of economic regulatory crime? The issue is fundamentally the same as that posed by the use of strict criminal liability, though, interestingly enough, this appears to have been much less commonly employed in economic regulation than in those controls on business directed to public health and safety.

The case for the irrelevance of these traditional requirements is reflected in the observation of a trust-buster of an earlier generation: "The rights of the accused which are of the utmost importance where liberty of an individual is in jeopardy, are irrelevant symbols when the real issue is the arrangement under which corporations in industry compete."⁷⁹ In essence the concept is that the purpose behind the criminal sanction in this area is not penalization, but regulation. Unlike the area of conventional crime against person and property where criminalization serves to reassure the community, to express condemnation and to set in motion a corrective or restraining regime, as well as to deter proscribed behavior, here the concern is solely with this last factor. "[T]he problem of responsibility is not the general social phenomenon of moral delinquency and guilt, but the practical problem of dealing with physical conditions and social or economic practices that are to be controlled."⁸⁰

A countervailing consideration commonly adduced in discussions of strict liability is equally applicable where culpability requirements are otherwise withdrawn by statutes that do not adequately announce what is prohibited or that impose varieties of vicarious responsibility. Absent these requirements, it cannot be said, except in a strictly formal sense, that the actor made a choice to commit the acts prohibited. Hence, it is said that the law has no deterrent function to perform, offering no lesson to the actor or to other persons, beyond the Pickwickian instruction that even if he does the best he can, or anyone could, to comply with the law he may nonetheless be punished.⁸¹ Yet the argument does not quite persuade. For it may as plausibly be argued that the consequence of dispensing with the requirement of proof of culpability eases the task of the enforcing authorities, rendering successful prosecution more likely and, through discouraging insistence on trial and simplifying the issues when trials are held, enhances the efficiency of prosecution. In a word, certainty of conviction is increased. This may readily exert an added deterrent force upon the actor faced with a choice, since the chances of escaping punish-

⁷⁹ Assistant Attorney General Berge, quoted in ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 353 (1955).

⁸⁰ FREUND, *op. cit. supra* note 61, at 302. See FRIEDMANN, *op. cit. supra* note 51, at 198.

⁸¹ See MODEL PENAL CODE § 2.05, comment at 140 (Tent. Draft No. 4, 1955): "In the absence of minimum culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform." Hart, *supra* note 62, at 422.

ment for a culpable choice, intentional or negligent, are decreased.⁸² And even where there is no immediate choice, the effect could sometimes be to influence persons to arrange their affairs to reduce to a minimum the possibilities of accidental violation; in short, to exercise extraordinary care. Further, the persistent use of such laws by legislatures and their strong support by persons charged with their enforcement makes it dogmatic to insist they can not deter in these ways.

Closer, perhaps, to the core of the opposition to dispensing with culpability is the principle that it is morally improper and ultimately unsound and self-defeating to employ penal sanctions with respect to conduct that does not warrant the moral condemnation that is implicit, or that should be implicit, in the concept of a crime.⁸³ The issue is whether these considerations are adequately dealt with by the contention that laws dispensing with culpability are directed to regulation rather than penalization.

The contention plainly proves too much. If the sole concern is a non-reprobativ deterrent threat, then it follows that the sanction should be drastic and certain enough to overcome the motive of economic gain, and not necessarily that the sanction should be criminal. Civil fines, punitive damages, injunctions, profit divestiture programs or other varieties of non-criminal sanctions would thus appear to offer equivalent possibilities of enforcing the regulatory scheme. Indeed, these alternatives might enhance the possibilities, since proof and evidentiary requirements are more onerous in criminal prosecutions than in civil suits. The conclusion appears difficult to resist that insistence on the criminal penalty is attributable to a desire to make use of the unique deterrent mode of the criminal sanction, the stigma of moral blame that it carries. If so, the argument of regulation rather than penalization turns out in the end to be only a temporary diversion that does not escape the need to confront the basic issue: the justice and wisdom of imposing a stigma of moral blame in the absence of blameworthiness in the actor.

So far as the issue of justice is concerned, once having put the moral question the footing becomes unsteady. Is the moral difficulty inconsequential, requiring simply the side-stepping of an otherwise useful symbol that happens to stand in the way of attaining immediately desirable goals?⁸⁴ Does it yield

⁸² Cf. H. L. A. HART, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U.L. REV. 433, 451 (1957): "[Bentham] claims to show that punishment of such persons as we excuse on such grounds [i.e., those who have committed a crime owing to their mental condition either temporary (mistake, accident, duress, etc.) or relatively enduring (insanity, infancy)] would be wrong because it would be socially useless ('inefficacious') whereas he only shows that the threat of punishment would be ineffective so far as such persons are concerned. Their actual punishment might well be 'useful' in Benthamite terms because, if we admit such excuses, crime may be committed in the hope (surely sometimes realized) that a false plea of mistake, accident, or mental aberration might succeed." (Emphasis in original.)

⁸³ MODEL PENAL CODE § 1.04, comment at 8 (Proposed Official Draft, 1962).

⁸⁴ See ARNOLD, *SYMBOLS OF GOVERNMENT passim* (1935).

to a pragmatic evaluation in terms of an estimate of the soundness of departing from principle to some degree in particular cases in order to attain goals of greater consequence?⁸⁵ Does it present an insuperable objection entailing commitment to values of such profundity that compromise is unthinkable?⁸⁶ For present purposes it is perhaps enough to put the questions, though three points may be suggested. First, the starkness of the moral issue is to some degree assuaged by regarding laws dispensing with culpability as empowering enforcement officials to use their discretion to select for prosecution those who have in their judgment acted culpably. Plainly, however, the issue is not escaped since it remains to justify dispensing with the safeguards of trial on this single and crucial issue.⁸⁷ Second, the recognition of the moral impasse does not necessarily require agreement that the criminal law *should* use its weapons for the purpose of fixing moral obloquy upon transgressors. It is sufficient that it is broadly characteristic of the way criminal conviction operates in our society. Third, and in consequence, the moral difficulty exists only so long as and to the extent that criminal conviction retains its aura of moral condemnation. The impasse lessens to the extent that the element of blame and punishment is replaced by a conception of the criminal process as a means of social improvement through a program of morally neutral rehabilitation and regulation.⁸⁸ (Though such a development has important implications which I mean to return to shortly.)

Concerning the issue of ultimate wisdom, the point frequently made respecting strict liability is equally applicable to the dilution of these aspects of culpability typically at issue in economic regulatory legislation. The dilution is not readily confined within the narrow area for which it was designed, but tends to overflow into the main body of conventional crimes. The distinction between offenses that regulate and those that penalize in the traditional sense proves inadequate to divide the waters. For example, traditional concepts of liability in the main body of criminal law tend to receive a new and diluted

⁸⁵ Holmes believed that the objective standard of criminal liability which disregards the personal peculiarities of the actor demonstrates that the existence of moral wrong is not a condition of punishment. HOLMES, *THE COMMON LAW* 45 (1923). He found support for this in the proposition that, "no society has ever admitted that it could not sacrifice individual welfare to its own existence." *Id.* at 43. *Cf.* Wasserstrom, *Strict Liability in the Criminal Law*, 12 *STAN. L. REV.* 731, 739 (1960).

⁸⁶ Hart, *supra* note 62, at 424: "In its conventional and traditional applications, a criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt. Society makes an essentially parasitic, and hence illegitimate, use of this instrument when it uses it as a means of deterrence (or compulsion) of conduct which is morally neutral."

⁸⁷ *Ibid.*

⁸⁸ "As the concept of punishment wanes in importance, the sphere of offenses not requiring the criminal intent will widen." Million, *Limitations on the Enforceability of Criminal Sanctions*, 28 *GEO. L.J.* 620, 627 (1940).

form when construed as part of a regulatory statute.⁸⁹ Moreover, the habituation of courts and legislatures to crimes dispensing with culpability in the regulatory area may readily dull legislative and judicial sensitivity to the departures from minimum culpability requirements already fixed in the main body of the criminal law.⁹⁰ This expansion of criminality without culpability in statutory offenses and convictions, and its spread and solidification in the general criminal law heightens the moral difficulty. As the area expands and deepens it becomes necessary at some point to face the issue as entailing a judgment on the abandonment of principle rather than one on the wisdom of utilitarian compromise for a larger good. Moreover, the risks entailed in depreciating the impact of condemnation in a criminal conviction become greater to the extent that conviction without culpability becomes more common and pervasive. To the extent that the crucial distinguishing factor of the criminal sanction is "the judgment of community condemnation which accompanies and justifies its imposition,"⁹¹ and to the extent that this characteristic contributes substantially to its effectiveness in influencing compliance with proscribed norms, the proliferation of convictions without grounds for condemnation tends in the long run to impair the identity of the criminal sanction and its ultimate effectiveness as a preventive sanction, both in the area of economic crimes and in the areas of its traditional application.⁹²

B. *The Criminalization of Morally Neutral Conduct*

But let it be assumed that the traditional grounds of culpability have been adhered to so that the defendant can fairly be held accountable for a choice to violate the economic prohibition. May there be costs, even so, in terms of principle and other goals, in employing the criminal sanction where the viola-

⁸⁹ Consider, for example, the dilution of the requirement of an agreement in conspiracies under the antitrust law, in which such evidence of agreement as conscious parallelism is sometimes made substantively sufficient. See Dunn, *Conscious Parallelism Re-examined*, 35 B.U.L. REV. 225 (1955). See also *Developments in the Law, Criminal Conspiracy*, 72 HARV. L. REV. 922, 934 (1959): "[T]ending to undermine the strict rule that agreement must be proved is the existence of what are perhaps more liberal requirements in antitrust cases, which, although they may be justified in that area, are ever likely to be extended to the general law of conspiracy." A similar dilution attributable as well, at least in part, to Sherman Act cases, has occurred in connection with the requirement in conspiracy of a specific intent to violate the law. Compare *United States v. Patten*, 226 U.S. 525 (1913), with *Hamburg-American Steam Packet Co. v. United States*, 250 Fed. 747 (2d Cir. 1918), cert. denied, 246 U.S. 662 (1918), and *State v. Kemp*, 126 Conn. 60, 9 A.2d 63 (1939). See Note, 62 HARV. L. REV. 276, 281-82 (1948).

⁹⁰ For example, the felony-murder rule, the rule with respect to aggressive behavior justified on grounds of the defense of another, bigamy and statutory rape. See Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 140.

⁹¹ Hart, *supra* note 62, at 404.

⁹² Cf. WILLIAMS, CRIMINAL LAW 259 (2d ed. 1961): "To make a practice of branding people as criminals who are without moral fault tends to weaken respect for the law and the social condemnation of those who break it. 'When it becomes respectable to be convicted, the vitality of the criminal law has been sapped.'"

tive behavior does not attract in the community the moral disapprobation associated with a criminal conviction? How different and how similar are the considerations involved in dispensing with culpability? The question is the obverse of an aspect of the relation between criminal law and morals which has been much considered—the use of the criminal law to prohibit and condemn behavior that is widely (either actually or formally) viewed as morally reprehensible, where secular interests, in the sense of concerns beyond the immorality of individuals, do not exist.⁹³ Here the issue is the use of the criminal sanction to prohibit and condemn behavior that threatens secular interests, but that is not regarded as fundamentally and inherently wrong.

The central consequence of diluting or eliminating requirements of culpability is, as suggested, the criminalization and punishment of persons who cannot be said to warrant the condemnation thereby imported. It is this consequence that gives rise to the hard question of principle and practical consequences. In a sense a similar consequence follows from punishing conduct that is not itself blameworthy, even when culpably engaged in: Persons are stigmatized with conviction for conduct not regarded as deserving the moral stigma. The problem of principle, however, is of considerably smaller dimension, since the choice to act in defiance of the criminal prohibition may be regarded as in some measure furnishing an independently adequate ground for condemnation. (Yet it is necessary to add that the ground exists only in cases where the culpability requirements are extended to include knowledge or culpable disregard of the existence of the prohibition, an extension only occasionally made in regulatory legislation.⁹⁴)

The danger of debilitating the moral impact of the criminal conviction and hence decreasing the overall effectiveness of the criminal law can not as readily be put aside. As Professor Henry Hart has noted, “the criminal law always loses face if things are declared to be crimes which people believe they ought to be free to do, even wilfully.”⁹⁵ It may be mitigated to a degree by maintaining a proper proportion in the punishment authorized for various offenses in accordance with the moral culpability of the behavior. The limitations of such a strategy are, first, that there is always a strong pressure to raise authorized penalties when violations become widespread or conspicuous, and second, that there is an irreducible minimum in the moral condemnation comported

⁹³ See the debate between Lord Devlin and Professor H. L. A. Hart in DEVLIN, *THE ENFORCEMENT OF MORALS* (1959) and HART, *LAW, LIBERTY AND MORALITY* (1963).

⁹⁴ See Hart, *supra* note 62, at 418. Precisely such a requirement has been incorporated into a variety of German regulatory laws. See *Wirtschaftsstrafgesetz* (Code of Economic Crimes) of 1954 § 6. Section 6(1) reads: “A person who in non-culpable error about the existence or the applicability of a statutory provision believed his conduct was lawful may not be punished.” Section 6(2) states: “Where the person’s error is a culpable one, the punishment may be mitigated.” Similar provisions appear in § 12 of the *Ordnungswidrigkeitgesetz* (Code of Regulatory Violations) of 1952.

⁹⁵ *Supra* note 62, at 418 n.42.

by conviction of crime. Such considerations have led one observer to "decry the trend toward an increasingly indiscriminating employment of this branch of the law, and to repudiate the suggestion that criminal law should be applied more extensively in the areas of ordinary economic relationships."⁹⁶

It may of course be answered that the conviction of violators of laws of this character serves as a means of moral instruction to the community; in short, that the onus of conviction is transferred to the behavior prohibited. That there will be a transference would appear quite likely. But that it should necessarily or generally be expected to involve imparting moral onus to the behavior rather than moral indifference to the conviction is considerably less so. The more widely the criminal conviction is used for this purpose, and the less clear the immorality of the behavior so sanctioned, the more likely would it appear that the criminal conviction will not only fail to attain the immediate purpose of its use but will degenerate in effectiveness for other purposes as well.

There is another cost not paralleled in the dilution of culpability requirements. The behavior under discussion involves restraints upon the free operation of business without at the same time denying commitment to a free enterprise system. The demarcation of the line between the legitimate, indeed the affirmatively desirable, and the illegitimate in business conduct is continually in flux and subject to wide controversy in the community. To say there is no complete consensus on what business decisions should be regulated and what left free of regulation is to say what is minimally true. It would not follow from this that a legislature should abstain from enacting such controls as command a majority. But the appropriateness of the criminal sanction as a means of enforcing the imposed control is another matter. I have already suggested that the criminal remedy in this situation tends to be ineffective and destructive of its overall utility as a sanctioning device. Here the point is different. To the extent it is effective in generating strong moral commitments to the regulatory regime it supports it has the dangerous potential of introducing a rigidification of values too soon, of cutting off the debate, or at least restricting the ease of movement to new positions and a new consensus.⁹⁷ This seems to me the wisdom of Professor Allen's caveat that "the function of the criminal

⁹⁶ TAPPAN, *CRIME, JUSTICE AND CORRECTION* 15-16 (1960). For a suggestive discussion of alternative ways of achieving favorable business sentiment, see LANE, *THE REGULATION OF BUSINESSMEN* 118-30 (1954).

⁹⁷ The danger of the use of the criminal law to destroy a repugnant philosophy is exemplified in the revealing observation of BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 49 (3d ed. 1959): "White collar crime flows from a competitive economy and philosophy that reveres success based almost exclusively on money. The job of the courts of justice, legislators, and a regenerated public is to wipe out this insidious philosophy before it is too late." Cf. HOLMES, *SPEECHES* 101 (1913): "As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there is still doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field."

law in these areas is not to anticipate but to reflect and implement the consensus already achieved in the community."⁹⁸

A word in conclusion on lines of legislative action. The widescale abandonment of the criminal sanction in those areas where its cost is excessive is as unlikely as it is desirable. Legislative habit and the simple logic of here and now expediency have a compulsion not to be denied by contemplation of long range consequences in areas removed from the immediate target of legislative concern. A more acceptable and hence more fruitful course is the development of means of reducing the costs of the use of the criminal sanction in economic regulations, which do not demand that it be abandoned altogether. If such means exist one would expect they would be found in ways of dealing with the central fact principally responsible for the predicament, the irreducible core of condemnation in a criminal conviction. One possible approach is to institutionalize a system of gradation of convictions, just as systems of grading punishment have long been a part of the law. There is no adequate basis for accomplishing this under present law. The distinction between offenses *mala prohibita* and *mala in se* carries something of the flavor, but it is an informal rather than an institutionalized distinction and lacks any clear meaning.⁹⁹ The felony-misdemeanor distinction has an established statutory basis. However, the categories have largely lost significance in distinguishing degrees of blameworthiness, some misdemeanors embracing crimes of serious moral import, and some felonies embracing relatively minor transgressions. Moreover, there is need for a category of offense carrying considerably less weight than a misdemeanor. The petty offense category which appears in many statutes is essentially a petty misdemeanor, retaining its label as a crime and being punishable with imprisonment.¹⁰⁰ In those cases in which the label has been removed, the substance (that is, provision for imprisonment) has not.¹⁰¹ The Model Penal Code has attempted to meet the inadequacies of existing law by adding to its three categories of crime (felonies, misdemeanors and petty misdemeanors) a separate non-criminal category designated a "violation"¹⁰² which is punishable only by a sentence of fine (under 500 dollars or any higher amount equal to double the pecuniary gain made by the offender)¹⁰³ or civil penalty,¹⁰⁴ and which does not "give rise to any disability or legal disadvantage based on conviction of a criminal offense."¹⁰⁵ The design of

⁹⁸ Allen, *Offenses Against Property*, 339 *Annals* 57, 76 (1962).

⁹⁹ See *Morrisette v. United States*, 342 U.S. 246, 260 (1952); Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832 (1952).

¹⁰⁰ See, e.g., *Crimes and Criminal Procedure*, 18 U.S.C. § 1 (1958).

¹⁰¹ See MODEL PENAL CODE § 1.05, comment at 8 (Tent. Draft No. 2, 1954).

¹⁰² MODEL PENAL CODE § 1.04 (Proposed Official Draft, 1962).

¹⁰³ MODEL PENAL CODE § 6.03(4), (5) (Proposed Official Draft, 1962).

¹⁰⁴ MODEL PENAL CODE § 6.02(4), (5) (Proposed Official Draft, 1962).

¹⁰⁵ MODEL PENAL CODE § 1.04(5) (Proposed Official Draft, 1962).

this proposal "reflects the purpose of the Code to employ penal sanctions only with respect to conduct warranting the moral condemnation implicit in the concept of a crime."¹⁰⁶ Since strict liability even for crimes properly so regarded presents the same problem, the same solution is applied by treating crimes committed without culpability as "violations."¹⁰⁷

While novel in American law, the German law has for some years adopted an approach quite similar to that proposed by the Model Penal Code.¹⁰⁸ Separate from a three level classification of crimes, properly so called (*Straftat*),¹⁰⁹ is another category of offense, the "regulatory violation" (*Ordnungswidrigkeit*).¹¹⁰ These regulatory violations are not punishable by imprisonment. A fine is the sole available sanction, indeed a fine which bears a special designation (*Geldbusse*, literally "monetary repentance") as opposed to the penal fine (*Geldstrafe*, literally "monetary punishment").¹¹¹ These fines are not registered in the punishment registry¹¹² and are imposed at the first instance by the responsible administrative agency¹¹³ subject to the right of the violator to object and to be tried in the courts.¹¹⁴

The feasibility of using the category of regulatory violation for sanctioning economic regulation is, of course, the principal issue. Here the German experience may offer some evidence for decision. Unfortunately there appear to be no empirical studies of the relative effectiveness of its use in Germany. But to judge from the statute books it is the typical non-civil sanction for economic misconduct. All antitrust violations,¹¹⁵ for example, are regulatory violations, as are violations of other restrictions upon economic behavior such as certain behavior prohibited by the foreign trade law,¹¹⁶ laws governing the operation of loan banks,¹¹⁷ laws governing the closing of shops,¹¹⁸ transportation rate laws,¹¹⁹ and other laws. Particularly suggestive is the strategy used in con-

¹⁰⁶ MODEL PENAL CODE § 1.04, comment at 8 (Proposed Official Draft, 1962).

¹⁰⁷ MODEL PENAL CODE § 2.05 (Proposed Official Draft, 1962).

¹⁰⁸ I am indebted to Mr. Kurt G. Siehr, graduate student at The University of Michigan Law School, for providing indispensable help with the German law.

¹⁰⁹ GERMAN PENAL CODE § 1. The classifications are *Verbrechen* (Felony), *Vergehen* (High Misdemeanor) and *Übertretung* (Petty Misdemeanor).

¹¹⁰ Gesetz über Ordnungswidrigkeiten of 1952 (*Bundesgesetzblatt* 1952, Part I, p. 177).

¹¹¹ *Id.* § 1(1).

¹¹² Rotberg, Gesetz über Ordnungswidrigkeiten 26, 44 (1952).

¹¹³ Gesetz über Ordnungswidrigkeiten of 1952 (*Bundesgesetzblatt* 1952, Part I, p. 177) § 48.

¹¹⁴ *Id.* § 54.

¹¹⁵ Gesetz gegen Wettbewerbsbeschränkungen of 1957 (*Bundesgesetzblatt* 1957, Part I, p. 1081) §§ 38-41.

¹¹⁶ Aussenwirtschaftsgesetz of 1961 (*Bundesgesetzblatt* 1961, Part I, p. 481) § 33.

¹¹⁷ Gesetz über das Kreditwesen of 1961 (*Bundesgesetzblatt* 1961, Part I, p. 881) §§ 56-59.

¹¹⁸ Gesetz über den Ladenschluss of 1956 (*Bundesgesetzblatt* 1956, Part I, p. 875) § 25.

¹¹⁹ Personenbeförderungsgesetz of 1961 (*Bundesgesetzblatt* 1961, Part I, p. 241) § 61(1)(c).

nection with certain kinds of economic offenses as a means of individualizing the determination of whether a defendant's behavior is to be treated as a crime or a regulatory violation. For violations of certain price control laws, import restrictions and unlawful overcharging,¹²⁰ a legislative determination of the appropriate category of the offense is withheld in favor of a judicial determination in each case. The law requires an offense under these laws to be dealt with as a regulatory violation unless the nature either of the conduct or of the defendant warrants dealing with it as a crime. It is a crime when the conduct "by virtue of its scope or consequences is likely to prejudice the goals of the economic system, especially those of market or price regulations"; or when the defendant is a "repeated or professional violator or acts in culpable selfishness or otherwise irresponsibly, and by his conduct shows that he lacks respect for the public interest in the protection of the economic system, especially of the market or price regulations."¹²¹ With all their vagueness these provisions suggest a need in any system that employs a non-criminal category of violation and uses it to deal with economic violations, for a flexible device whereby violations may, with changed public sentiment and in consideration of the extremity of the circumstances, be raised to the category of crime.

One can hardly say that this approach through a *tertium quid* is the clear answer to the problems of using criminal sanctions to enforce economic restrictions. There are many imponderables with respect to its effectiveness both as a preventive and as a means of reducing the costs of an indiscriminate use of the criminal sanction. On the side of preventive effectiveness, is the reprobative association of a genuine criminal conviction a needed weapon of enforcement? Would the semi-criminal category of offense convey enough of a sense of wrongness to perform its tasks? Can these laws be enforced efficiently enough without such associations? Is the loss of the power to imprison a substantial loss? Does what is left of the criminal process still provide efficiencies not available in the pure civil remedy? Will the regulatory offense prove politically acceptable to legislators and administrators as an alternative to outright criminalization? On the side of reducing costs, how much will it help that a new label has been created so long as the criminal process is used, or that imprisonment is not available as a sanction, when in fact it is rarely used anyway? And finally, is whatever is lost in effectiveness worth what is gained in other respects? One cannot be dogmatic in answering these questions. But one can, I think, insist that these are the kinds of questions which must be asked about this alternative as well as others if we are to escape the limited options inherited from different days in the use of the criminal sanction.

¹²⁰ *Wirtschaftsstrafgesetz* of 1954 (*Bundesgesetzblatt* 1954, Part I, p. 175), as amended 1958 (*Bundesgesetzblatt* 1958, Part I, p. 949) §§ 1, 2, 2a.

¹²¹ *Id.* § 3.