

**Re-thinking Penalties for Corporate Environmental Offenders:  
A View of the Law Reform Commission of Canada's  
*Sentencing in Environmental Cases***

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The author critically examines *Sentencing in Environmental Cases*, a Report of the Law Reform Commission of Canada by John Swaigen and Gail Bunt. The Report emphasizes the traditional sanctions for preventing pollution, including fines and incarceration. The author believes, however, that more fundamental reforms are necessary in the area of environmental law — the traditional remedies are inadequate and create problems, especially on a theoretical level, when they are applied to artificial entities such as corporations. More innovative remedies, including divestiture, licence revocation, and probation should be developed. The author advocates decriminalization since civil law remedies would be both more flexible and more effective.

L'auteur fait l'examen critique d'un rapport de la Commission de réforme du droit par John Swaigen et Gail Bunt, intitulé *La détermination de la peine en droit de l'environnement*. Ce rapport met l'accent sur les sanctions traditionnellement destinées à prévenir la pollution, dont les amendes et l'emprisonnement. Toutefois, l'auteur estime qu'une réforme plus fondamentale s'avère nécessaire dans le domaine du droit de l'environnement. Les sanctions traditionnelles sont inadéquates et créent des problèmes, particulièrement au niveau théorique, quand elles sont appliquées à des personnes morales telles les corporations. Des sanctions plus innovatrices comme le désinvestissement, la révocation de permis et la probation devraient être mises de l'avant. L'auteur préconise la décriminalisation car les sanctions civiles seraient à la fois plus flexibles et plus efficaces.

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\*Of the Faculty of Law, University of Windsor. I wish to acknowledge the contribution of Professor Joseph Vining of the University of Michigan Law School. While he did not comment on the paper, his influence is apparent. I would also like to thank Wendy Elliott for commenting on an earlier draft.

## I. Introduction

Environmental offences generally provoke strong reaction. Except for a few industrial groups, everyone abhors pollution, especially in this day of toxic spills and the patriotic protest against acid rain. Beyond this emotionalism is the central issue of how to prevent future pollution. Effective sanctions are one alternative.

It is in this context that the Law Reform Commission has published *Sentencing in Environmental Cases*, authored by John Swaigen and Gail Bunt.<sup>1</sup> The Report presents a useful review of current sentencing principles in environmental cases and argues for reforms that will provide more effective sanctions. The two reforms which have been given the most attention are that fines should be increased for large corporate offenders and that jail should be considered for responsible actors. While I do not doubt that these recommendations will please environmental interest groups, the true effectiveness of these sanctions can be questioned. Indeed, the emphasis on traditional sanctions may be regarded as naive given that a significant number of environmental crimes involve corporations.<sup>2</sup> There are serious doubts whether fines or the threat of incarceration effectively deter these entities.

The failure of the study to adequately discuss the problems inherent in enterprise liability is its major weakness. The recommendation for greater use of incarceration superficially merits praise.<sup>3</sup> However, what becomes

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<sup>1</sup>Law Reform Commission of Canada, *Sentencing in Environmental Cases* (Protection of Life Series: Study Paper) by J. Swaigen & G. Bunt (Ottawa: Law Reform Commission, 1985) [hereinafter the Report].

<sup>2</sup>There does not appear to be a Canadian empirical study establishing the veracity of this statement although it is at least common belief that corporations are predominantly responsible for environmental crime. Although imperfect from a methodological point of view, reference may be made to the citations of cases in the Report itself. Within the definition of corporations in this context, I would include other artificial entities such as cities and ships.

The word "corporate" should be value-neutral but it is not. In this comment the word is used without respect to the size of the entity because the attachment of criminal sanctions does not depend on such a criterion. Thus, no distinction is made between multinationals and "mom and pop" operations. At several points in the Report such a distinction is attempted. Where relevant, I will discuss the authors' point of view.

<sup>3</sup>It may be unfair to emphasize the incarceration recommendation since the authors apparently gave greater weight to the reform of fines. I defend my emphasis by reference to the Press Release which accompanied the issue of the Report: Law Reform Commission of Canada, "Law Reform Commission Releases Study Paper on Sentencing in Environmental Cases" (Communiqué no. 106-85-06) which begins with the sentence: "Some people who deliberately pollute the environment should be sentenced to jail." The Release goes on to point out that this is merely "one of the many recommendations . . .". The Law Reform Commission staff thus emphasized the jail alternatives as did newspapers which reported on the release of the Report. See, e.g., M. Strauss, "Law Reform Study Urges Prison Terms to Stop Polluters" *The [Toronto] Globe and Mail* (26 June 1985) 3.

clear is that the recommendation merely begs further questions. Since a corporation cannot go to jail, who does? The responsible actor may be an obvious response, but, as will be discussed in the body of this comment, identification of such actor may not be so obvious. For this reason, the recommendations may be very difficult to apply in practice.

The same criticism may be made of the recommendation to alter the structure of fines so that they are more meaningful. Increasing fines for large corporations may have appeal, especially when deterrence theories are considered. However, corporations often possess the capacity to pass fines on to others thus muting or even destroying any deterrent effect. As is the case with incarceration, the Report fails to explore this problem in an adequate manner.

In this comment I will discuss some of the problems neglected by the authors.<sup>4</sup> The difficulties of applying the traditional criminal sanctions of fines and incarceration to artificial entities will be briefly explored in the first two sections. In the third section I will deal with more fundamental prospects for reform. In particular, alternative remedies will be discussed and an argument for the decriminalization of environmental infringements presented. Fundamental reforms have vast potential in the environmental area and the Report could have profited from a more in-depth study of these real reform issues.

## II. The Argument Regarding Fines

A principal argument of the Report is that present fine structures are not adequately sensitive to the wealth of the offenders.<sup>5</sup> It is thus argued that penalty levels are too high for impoverished offenders and too low for super-rich multinationals. This wealth effect has direct impact on the goals of sentencing.<sup>6</sup>

The focus on wealth is valid, even if it is not the usual legal standard. Common theories of punishment generally require that the penalty fit the crime. This is normally considered as offence-regarding rather than offender-regarding. If two persons commit identical crimes, the penalty should also

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<sup>4</sup>The problems of enterprise liability are complex. In a comment of this length I can only propose to offer an introduction to them.

<sup>5</sup>*Supra*, note 1 at 5-7 and 45.

<sup>6</sup>The conventional goals of sentencing are deterrence, rehabilitation, incapacitation and retribution. See, e.g., K. Mann, S. Wheeler & A. Sarat, "Sentencing the White-Collar Offender" (1980) 17 Am. Crim. L. Rev. 479; H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

be identical. While this approach superficially promotes equality in sentencing, it may not do so because of its failure to account for the marginal disutility of the penalties to the offenders.

Punishment depends on pain. Some unpleasant consequences must be visited upon the offender in order to deter him and others, by means of example, from committing prohibited acts. One view of equality in sentencing is that the amount of pain inflicted on identical offenders should be the same. Accordingly, equality should be offender-regarding. Thus, a wide range of fines must be available since poor people will value marginal dollars much more highly than rich people.<sup>7</sup> As such, equality can be achieved with relatively low fines for poor offenders while a substantial fine will be demanded for the wealthy.

The authors of the Report appreciated this point in their recommendations regarding fines. Throughout the Report the view is taken that higher fines are required for wealthy individuals and corporations while lower penalties should be retained for the less well-endowed.<sup>8</sup> The authors have thus chosen to emphasize penalties which are offender-regarding. If marginal utility analysis and offender-regarding equality are the only criteria to be applied then no issue can be taken with this recommendation. However, the premise may be faulty.

The alternative theory of punishment equality, namely that it should be offence-regarding,<sup>9</sup> also deserves emphasis. This view of punishment has particular application to environmental offences where the primary concern is the fouling of the environment and not the position of the offender. Indeed, I would suspect that the indignation felt against "night-haulers"<sup>10</sup> is considerably greater than that felt for multinationals which commit breaches

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<sup>7</sup>This is merely a corollary of scarcity theory. The scarcer a resource, the more valuable it will be perceived to be; lower values will be ascribed to abundant resources. Behind this economic terminology lies an obvious and simple concept — poor people with their scarce resources will value each dollar more highly than rich people. Therefore, a low fine imposed on a poor person may cause considerable pain whereas a much greater amount may have to be levied on a rich person to achieve the same result. For an article which expresses this view in a different context, see R.A. Posner, "Optimal Sentences for White-Collar Criminals" (1980) 17 Am. Crim. L. Rev. 409. Marginal utility analysis is dealt with in all introductory economics texts.

<sup>8</sup>See, e.g., Report, *supra*, note 1 at 49: "The \$5,000 maximum available in Ontario, Nova Scotia, and Quebec appears to be adequate to reflect the gravity of the average case and the means of most individual persons and many small corporations" and later "[t]hese provisions might include higher fines for larger corporations. . .".

<sup>9</sup>See, e.g., Hart, *supra*, note 6 at 161ff.

<sup>10</sup>"Night-hauling" refers to the dumping of harmful chemicals or waste on roadsides, fields, etc., usually under the cover of darkness. Commonly this is done by independent contractors who assure their customers that the unwanted matter will be dumped legally, then dispose of it in the first convenient place.

in the course of business even though the effect of each activity and the charging section may be the same. In this case, especially due to the obvious existence of intention in the night-hauler, he appears to be more "criminal" and worthy of greater punishment. However, under marginal utility analysis a lower penalty may be levied against the night-hauler as his is likely to be a small business with limited wealth. For this reason, it is doubtful whether a wholesale application of marginal utility analysis would be accepted by the legislatures or the populace generally.<sup>11</sup>

Another method of imposing fines advocated by the authors is the use of the so-called "day-fine". Under such a system, the fine is set at the amount of profit during each day of non-compliance with environmental standards. This alternative possesses attractions but it requires a great deal of fine-tuning to effectively meet the goals of sentencing.

In the example employed in the Report,<sup>12</sup> the fine would equal a day's profits. This, however, may not be adequate to deter the offending conduct, since it is reasonable to assume that most firms profit-maximize.<sup>13</sup> In this context, it must be appreciated that profit need not always be positive to be a maximum. For instance, assume a firm finds itself with an excess of dioxin and wishes to dispose of it. It contacts a disposal firm which, due to the nature of the chemical, quotes an extremely high price for its removal. This figure vastly exceeds the firm's profit for the period which would be forfeited if the firm illegally dumped the dioxin into the sewer system. Setting day-fines at the daily profit rate and applying a cost-benefit analysis, there is little question what an economically rational firm will do: it will dump the chemical and pay society's price for such conduct.<sup>14</sup>

In order to effectively deter the dumping in this hypothetical, the day-fine would have to be fine-tuned to the point where the pain of penalty exceeds the gain from the illegal conduct. According to the hypothetical, setting the fine at the level of daily profits would not be sufficient to deter the offensive conduct. Rather, the fine must be raised to the point where it exceeds the cost of legal disposal in order to prompt the desired outcome.

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<sup>11</sup>It might also be noted that a legislative standard encouraging fines based on wealth arguably offends s. 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>12</sup>*Supra*, note 1 at 54.

<sup>13</sup>There are competing views of firm behaviour, notably one called "satisfying behaviour". According to this view, managers seek satisfactory results rather than optimal ones. While these theories are acknowledged, their premises are not fatal to the argument which follows. Satisfying behaviour, for instance, can also "justify" the dumping of the chemicals. See F.M. Scherer, *Industrial Market Structure and Economic Performance*, 2d ed. (Chicago: Rand McNally, 1980).

<sup>14</sup>I have, of course, ignored the morality of the decision-maker. The example employs only economic criteria with an assumption of profit-maximizing behaviour.

In some cases, including this hypothetical, the required level of fine is not difficult to determine but other cases may not be so simple. For instance, if the issue is the installation of a chimney-scrubber,<sup>15</sup> the court would need to know the cost of acquisition, operating costs, depreciation and other tax-related matters in order to determine the optimal day-fine. The problems of dealing with these issues are not insurmountable,<sup>16</sup> but they are nonetheless difficult, especially in the context of a trial.

There is a more general problem with the imposition of monetary penalties in environmental cases. The majority of prosecuted environmental offences are committed by artificial entities. Business corporations are usually involved, but municipalities and ships are also frequently offenders. These entities are mere constructs with no existence beyond what they represent. For this reason serious questions arise as to whether punishment by fine has any effect on the entities themselves. Consequently, there is doubt whether any of the objectives of sentencing are met by fining these entities.<sup>17</sup>

The dominant objective in sentencing corporations is deterrence, both specific and general.<sup>18</sup> The other objectives of sentencing, such as rehabilitation, are not generally applicable.<sup>19</sup> However, owing to the structure of corporations and markets, fines are inadequate in deterring corporate criminal conduct, since most corporations have the capacity to pass fines on to their owners or customers without significant harm to themselves.

The incidence of the fine, whether upon owners or customers, depends upon the market power possessed by the corporation. If the firm possesses such power, the customer will pay; if it does not, the owners will pay.

For a corporation without market power a fine represents a diminution of assets and thus reduces shareholder equity. The corporation itself suffers

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<sup>15</sup>This is a device for removing harmful emissions from smokestacks.

<sup>16</sup>For an argument that pollution can be adequately priced, see L.E. Ruff, "The Economic Common Sense of Pollution" (1970) 19 *Pub. Interest* 69. For a more sceptical view, see M. Sagoff, "Economic Theory and Environmental Law" (1981) 79 *Mich. L. Rev.* 1393. The "pricing" of pollution is at the core of the argument. If Ruff is right and pollution can be fairly easily priced, then setting optimal fines would consequently be relatively unproblematic.

<sup>17</sup>In order to avoid cumbersome language, I will generally only refer to business corporations. Similar or identical arguments will normally apply to other artificial entities.

<sup>18</sup>Specific deterrence refers to the offender. General deterrence refers to the effect on other potential offenders who, due to the example of the punishment of the actual offender, may legitimize their conduct. See F. Zimring & G. Hawkins, *Deterrence: The Legal Threat in Crime Control* (Chicago: University of Chicago Press, 1973).

<sup>19</sup>If we consider the entity itself, rehabilitation is not a true option. Individual actors might be rehabilitated but not the thing that is the corporation. Incapacitation may apply but not through the usual method of incarceration; rather, court orders must be used. Retribution might apply, but as argued below, it will often be futile given the entity's ability to pass its penalties on.

nothing since it is a mere fiction representing the interests of its owners. It cannot feel pain or remorse over an alteration in its balance sheet. It either goes on as usual or is dissolved, in which case the shareholders truly feel the loss. As the corporation is fictional, it can have none of the reactions we might associate with deterrence.<sup>20</sup>

There are counter-arguments to this view. One such argument is that since shareholders possess voting power, their loss of equity will encourage them, through the exercise of that power, to force the corporation into compliance with the law. However, the interests of individual shareholders are likely to be so diffuse that the fines levied in environmental cases would not provoke them to action. Furthermore, the common attitude of shareholders in all but very closely-held corporations is one of passivity. As long as dividends are paid and there is reasonable expectation of appreciation, the shareholders will be satisfied notwithstanding a few criminal convictions. Thus, the argument is not convincing.

Before leaving this issue, a brief point about municipal corporations might be made. Municipalities possess the ultimate power to pass fines on to their owners — they merely raise taxes to cover the penalties or cut back on services which are offered. In either case the taxpayer pays for the sins of the entity. On the other hand, governments are generally more accountable than business corporations. Given the public's abhorrence of pollution, the executive of a municipality which ignores environmental laws faces a much greater chance of dismissal than does its counterpart in a business corporation.

The alternative to passing the fine on to shareholders is to pass it on to customers. In order to do this, it is necessary that the firm possess market power. Unfortunately, this attribute is all too common in the Canadian economy. Possessed of market power, a fined firm need only include the penalty in its cost of production with the result that prices are raised to the degree necessary to cover the loss. Consequently, the entity loses very little and consumers bear the burden. As such, the deterrent effect on the corporation is minimal or non-existent.

The most cogent criticism of this argument is that the fine and consequent increase in price will nonetheless reduce total profit and thus the entity will suffer either directly through this loss of profit or indirectly through the protests of shareholders. While this argument is valid, it is not absolutely correct. The firm will still be making the maximum profit available under the altered conditions caused by the fine. Once the fine is amortized, the

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<sup>20</sup>See, e.g., J.C. Coffee Jr, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich. L. Rev. 386.

firm will be able to return to its original profit-maximizing position. For most firms with market power, the temporary movement away from the maximizing position will be a mere blip in a history of high profitability. The view that shareholders will intervene has already been discussed. As long as the firm remains profitable and pays reasonable dividends, shareholder intervention is regarded as a remote possibility.

We therefore reach a nihilistic conclusion. If the offender possesses market power, increasing fines will be futile in deterring the entity from violating environmental laws as the effect of those fines will be passed on to customers. If this market condition does not exist a different group of innocents, the equity holders, will pay. Again, the entity will not be deterred. Possible exceptions to these pessimistic conclusions include the very closely-held powerless corporation and the imposition of exceedingly high penalties on other corporations. If shareholders are actually hurt by the loss of equity, they may be inspired to act. Similarly, if the temporary diminution of maximum profit earned by the firm with market power is really severe, the firm might react. Perhaps unfortunately, implementation of this latter method is unlikely. In all cases deterrence is only a marginal possibility.

Notwithstanding the views of the public and a small number of courts to the contrary,<sup>21</sup> most judges regard pollution as a regulatory offence. Being considered *mala prohibita*, there is a reluctance to impose large penalties.<sup>22</sup> Even when high maximum fines are legislated judicial nullification of those penalties is a distinct possibility.<sup>23</sup> Compounding this problem is the fact

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<sup>21</sup>See, e.g., *R. v. United Keno Hill Mines Ltd* (1980), 10 C.E.L.R. 43 at 47 (Y.T. Terr. Ct) where Stuart J. stated that "pollution is a crime". See also the Report, *supra*, note 1 at 2ff.

<sup>22</sup>See Report, *ibid.* at 49 where it is argued that a \$5,000 maximum is probably adequate.

<sup>23</sup>Nullification is an extreme problem in these areas. The judge, having formed a subjective opinion that the conduct subject to prosecution is not morally blameworthy, either acquits or imposes negligible penalties notwithstanding high statutory maxima. The problem is particularly evident in corporate crime. See L. Orlando, "Reflections on Corporate Crime: Law in Search of Theory and Scholarship" (1980) 17 Am. Crim. L. Rev. 501 at 511:

[M]any judges perceive corporate crime as victimless, as morally neutral, and as undeserving of condemnation, let alone of harsh criminal sanction. Corporate crime is seen as nothing more than aggressive capitalism — a virtue, not a vice, in a capitalistic system which espouses profit maximization as morally sound.

For empirical studies on lower penalties for white-collar offenders, see Mann, Wheeler & Sarat, *supra*, note 5; J.L. Hagen & I.H. Nagel, "White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York" (1982) 20 Am. Crim. L. Rev. 259. See also Comment, "The Criminal Responsibility of Corporate Officials for Pollution of the Environment" (1972) 37 Alb. L. Rev. 61 at 69; A.S. Pelaez, "Of Crime and Punishment: Sentencing the White-Collar Criminal" (1980) 18 Duq. L. Rev. 823 at 836.



that many environmental offences are strict liability and such offences, by their nature, are not consistent with excessive penalties.<sup>24</sup>

We thus come to a rather negative view of the effectiveness of fines as a sanction for environmental offences. It would appear that the only way for monetary penalties to have significant deterrent effect is for them to be extremely high, but such high fines are likely to be nullified. When fines are lower, artificial entities will be able to pass them on to shareholders or customers with impunity. In the result, there is little deterrence and the objectives of sentencing are thwarted.

### III. The Argument Regarding Incarceration

Despite the public relations emphasis on incarceration,<sup>25</sup> the Report in fact gives this alternative little attention.<sup>26</sup> Although they recommend imprisonment, the authors take a very narrow view of when it should be applied. According to the Report, jail should be used when a fine is not appropriate given the offensiveness of the conduct leading to prosecution or would be oppressive given the limited wealth of the offender.<sup>27</sup> Jail is thus seen principally as an alternative to fines.

Acceptance of the argument in favour of imprisonment<sup>28</sup> also leads to problems of implementation. Only individuals may be jailed, but corporations are common offenders in environmental cases. It thus becomes necessary to find the responsible individual within the corporation. Yet even if that person is found, and this may be difficult, the fact that he suffers the penalty may mean that the entity itself is not punished and therefore not deterred.

The problem of identifying a responsible actor is a real one. The common law tradition demands that in order for societal punishment to be

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<sup>24</sup>See *R. v. Sault Ste Marie* (1978), [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161; *R. v. Chapin* (1979), [1979] 2 S.C.R. 121, 95 D.L.R. (3d) 13; *Pennsylvania v. Koczwara*, 155 A.2d 825 (Pa S.C. 1959); G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens, 1983) at 948ff. and 952.

<sup>25</sup>See *supra*, note 3.

<sup>26</sup>The Report devotes only two pages of text to the option of incarceration, *supra*, note 1 at 58-60.

<sup>27</sup>*Ibid.* at 59.

<sup>28</sup>For a contrary argument, see Posner, *supra*, note 7. Posner employs a social utility analysis to argue that white-collar criminals should always be given an option to pay a fine rather than go to jail. The argument is that it is always less expensive for society to fine rather than to incarcerate. See also J.C. Coffee Jr, "Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions" (1980) 17 Am. Crim. L. Rev. 419. Coffee also has doubts about the efficacy of incarceration but relies more on criminology and the problems of enterprise liability than on economics.

justified, it is necessary to insure that the offender is guilty.<sup>29</sup> In the vast majority of criminal cases the necessary inquiry will not be overly complicated because in most cases courts can adequately deal with the problems of finding *actus reus* and *mens rea*. In a fringe of cases the inquiry becomes more difficult, for instance, in the inchoate offences. The height of complexity is reached in cases involving corporate defendants.

Since incarceration is a personal sanction, it is necessary to ensure that the accused bears personal responsibility. The corporate structure, however, may obscure this inquiry. Most corporations are bureaucratic and therefore responsibility may not reside in a single office. This results in pragmatic problems in locating the person deemed worthy of incarceration.

An illustration may elucidate this point.<sup>30</sup> In the course of the construction of a petro-chemical plant, it is discovered that because of soil conditions, shifting and sinkage is highly probable. This could lead to the rupture of holding tanks and piping with the resulting discharge of toxic chemicals into the environment. Despite this knowledge, the plant is built and indeed a spill does occur. The responsible corporation is prosecuted and the Crown seeks jail as a penalty. To accomplish this it is of course necessary to locate an appropriate individual for incarceration. A first reaction may be that the engineer who was alerted to the soil problem is responsible. On further inquiry, it is found that a team worked on the design and all shared responsibility. The facts so far could justify charging all of them. In an interview with one of the engineers, it is learned that they sought the advice of their corporate superior, the Director of Engineering, on the potential danger. The Director in turn went to the executive vice-president who indicated that he had neither the time nor the inclination to study engineering reports and the only important thing was that the plant be completed on time and under budget. The engineers, informed of these directives, determined that curing the underground defects would be too expensive. Fearing for their future promotability, they left the design as it was.

The hypothetical illustrates the problem of locating responsibility in bureaucracies, but if a jail term is to be imposed, this is a necessary inquiry. Arguments may be made for the imprisonment of all the actors, but it is very important that the concept of criminal responsibility be kept in mind.<sup>31</sup> Conventional analysis can support the punishment of the engineers since

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<sup>29</sup>While the whole of Hart's treatise, *supra*, note 6, advances this theory, see, specifically, references at 12, 18ff. and 160.

<sup>30</sup>For an analogous fact situation, see J. Warren & B.J. Kelly, "Inside the Pinto Trial" (1980) 2 Am. Law. 28.

<sup>31</sup>See Hart, *supra*, note 6 at 220-21.

*mens rea* and *actus reus* are arguably present, but given the directive they received, can it truly be said they were responsible? The Director of Engineering might also be culpable, yet he too can argue that the statements of the executive vice-president relieve him of guilt. This leaves the senior bureaucrat whose defence is obvious. Due to the pressures of office and the need to delegate, there was no knowledge of the impending offence. In summary, because of the very nature of corporate hierarchy, good arguments may be made that no one other than the corporation itself is responsible. Acceptance of this argument results in the conclusion that incarceration is not a justifiable alternative.

There are a number of potential solutions to this theoretical problem. One is to admit the doctrine of vicarious responsibility into the criminal law. In a way this has already been done in acknowledging corporate criminal liability.<sup>32</sup> It is a relatively small step to apply the doctrine to natural persons.<sup>33</sup> However, it is a step with potentially great cost to the integrity of criminal justice because it separates punishment from actual, proven responsibility.

While vicarious criminal responsibility may be attractive to some, problems of criminal theory remain. Primarily, it should be realized that vicarious liability changes the nature of the offence. The offending conduct is no longer causing death or causing pollution, but rather the failure to adequately supervise so as to prevent those offences. By extension of reasoning, the offence becomes one of holding office.<sup>34</sup> Such characterization results in problems not the least of which is the divergence between responsibility and punishment. Another problem is that of certainty. What standard of supervision is required? What offices will be subject to the imputation of responsibility?<sup>35</sup>

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<sup>32</sup>Since a corporation can neither think nor act, it may attract criminal liability only vicariously. There are some examples in the present law of personal vicarious liability but these are generally limited to absolute liability and status offences. See *R. v. Pierce Fisheries Ltd* (1969), [1971] S.C.R. 5, [1969] 4 C.C.C. 163; *R. v. Larssonneur* (1933), 149 L.T. 542, 24 Cr. App. Rcp. 74 (Ct. Crim. App.); Williams, *supra*, note 24 at 157ff.

In order to avoid misunderstanding, the term vicarious liability should be employed only when personal guilt is not an element. Thus the phrase is improperly applied to strict liability offences where some evidence of fault is required even if this is a minimal failure to exercise due diligence.

<sup>33</sup>For a case which arguably does this, see *United States v. Park*, 421 U.S. 658 (1975).

<sup>34</sup>See Comment, *supra*, note 23 at 72 citing *United States v. Dotterweich*, 320 U.S. 277 (1943).

<sup>35</sup>For the purposes of a comment of this length, I will leave these questions as rhetorical ones. Inquisitive readers may wish to refer to a number of analogous sources which might assist in reaching answers. Obviously, the duty to supervise relates closely to the due diligence defence. See *R. v. Sault Ste Marie*, *supra*, note 24. Analogies to the identification of responsible offices may be made to the American law of corporate attorney-client privilege, military law and admiralty. See *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D.

Imputation of responsibility also results in problems in applying deterrence theory. Even if personal liability can be justified on theories of actual or vicarious responsibility, doubt remains as to whether deterrence will result.

The case of actual responsibility may appear to be the simplest. If the responsible person can be identified in the corporation, then deterrence theories appear to apply. Through punishment the offender and other similarly situated persons may be convinced that commission of the offence is unprofitable. Such a view, however, may be overly simplistic. Bureaucracies often create their own internal pressures; members are expected to perform according to standards and failure to meet those standards may result in unemployment. This has an impact on deterrence. Refer to the example of the petro-chemical plant noted earlier.<sup>36</sup> In that hypothetical the pressure was to construct the plant on time and under budget. This pressure is real and immediately felt. On the other hand, the risk of criminal prosecution is, by comparison, rather remote. Thus, the primary pressure is to perform even at the risk of committing an offence.<sup>37</sup> As such, the deterrent effect is muted by the very fact that the individual is operating within a corporate bureaucracy.

Another aspect of organizational crime is that even if a personal penalty is imposed the bureaucracy may nurture the offender. This may not totally relieve the pain felt by the punished individual.<sup>38</sup> Nonetheless, there may be a significant effect on general deterrence. Others, not appreciating the humiliation of spending time in jail, may perceive only that upon release the offender was re-hired and promoted. The phenomenon of nurturing and even rewarding corporate criminals is not rare,<sup>39</sup> and others may feel an offence was "worth it", thus frustrating the goal of general deterrence. We therefore again reach a nihilistic result. While the incarceration of environmental offenders can be justified, given that such crimes are commonly committed by corporations, implementation is difficult. Often identification

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Pa 1962); *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968); *United States v. Upjohn*, 449 U.S. 383 (1981); J.D. Wilson, "The Attorney-Client Privilege in a Corporate Context" (1985) 9 Can.-U.S. L.J. 59; *Re Yamashita*, 327 U.S. 1 (1946); *The President Coolidge*, 101 F.2d 638 (9th Cir. 1939).

<sup>36</sup>See, *supra*, note 30 and accompanying text.

<sup>37</sup>See Coffee, *supra*, note 20 at 409ff.

<sup>38</sup>Jail is generally regarded as causing greater suffering to the middle-class and white-collar criminals than to street criminals. See Pelaez, *supra*, note 23 at 832; H. Pollack & A.B. Smith, "White-Collar v. Street Crime Sentencing Disparity: How Judges See the Problem" (1983) 67 *Judicature* 174.

<sup>39</sup>See W. Robertson, "The Directors Woke Up Too Late at Gulf" *Fortune* (June 1976) 121; R. Loving, "How Bob Rowan Served His Time" *Fortune* (August 1979) 42. Both of these sources are cited and discussed by Coffee, *supra*, note 20 at 434.

of a responsible actor will not be possible and even if this hurdle is crossed, there are cogent arguments that deterrence may not result in a meaningful way.

#### IV. Fundamental Reform

Law Reform Commissions have the luxury of engaging in radical rethinking of legal problems. Unfortunately, this Report spends little time on a fundamental examination of sentencing. To be fair, this may not be the fault of the authors. I do not have access to their terms of reference which may have emphasized conventional analysis. Whatever the reason, the Report does not adequately explore true alternatives to the present system.

In this section of the comment I will discuss two areas where fundamental reform should be considered. The first, which is dealt with in the Report, is the need for innovative sanctions. The second is a suggestion that decriminalization might solve some of the problems of environmental sentencing. While this second argument is noted in the Report, it is not really analyzed.

##### 1. *Innovative Remedies*

In earlier sections of this comment some of the problems of fines and incarceration in environmental cases were discussed. Both of these sanctions are inadequate in dealing with such offences. In order to achieve societal goals with respect to the environment, it is necessary to adopt innovative approaches to sentencing. In this regard, the greatest potential lies in what may be broadly termed "structural remedies". Under such an approach an attempt is made to restructure the offender or the market to prevent the repetition of the offence. This may be done through actual restructuring, such as divestiture, or through the channelling of behaviour by means of sanctions, such as probation.

Divestiture is an extreme sanction, but there are, nonetheless, circumstances when its use can be justified in environmental cases. In particular, divestiture should be considered for repeat offenders which show little likelihood of future compliance. Normally this will occur when the "benefit" to the firm of dumping is greater than the cost of consequent penalties.<sup>40</sup> It is possible that divestment could change the economics so that dumping

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<sup>40</sup>See "The Enforcer" *Newsweek* (18 October 1971) 101. Standard Oil of California had been convicted of spilling oil into San Francisco Bay and probation was ordered. The probation officer reported that the company had been repeating the offence with alarming regularity. The maximum fine was \$1,000. I would suspect that the cost of total compliance exceeded this by a staggering amount. Thus, in the context of profit maximization, continuing the offences was rational behaviour.

would no longer be rational because, in the hands of another firm, the incentives to dump may be reduced or eliminated.

This argument is tricky since it relies on speculative economic theories. There is no assurance that the forced sale of all or part of an offender's business will alter the economics in any significant way. Furthermore, determining the economics in a judicial context will be extremely difficult and time consuming.<sup>41</sup> Divestiture can also be criticized as it may bankrupt the firm, thus punishing innocents such as shareholders and employees.<sup>42</sup> This latter argument is weak despite its truth. Every criminal sanction harms a group wider than the offender. The incarceration of a bank robber hurts his family and it is the taxpayer who must undertake his upkeep. However, if we begin to emphasize these "ripple-effects" of sentencing over its primary goals then the process may become intractable. This is not to argue that social cost should not be considered. Rather, it should be stressed that social cost is merely one of a number of values inherent in the sentencing process.<sup>43</sup>

Despite the problems with the argument for divestiture, there may be cases where its use is justified. An example may be when a firm involved in the same business has an excellent environmental compliance record and is interested in the purchase of the divested business.

A remedy which is more tractable than divestiture, although in some ways similar to it, is the revocation of licences.<sup>44</sup> A wide range of polluting activities are conducted under licences or quasi-licences. For instance, a night-hauler can only operate if he has plates on his truck. If convicted night-haulers were required to surrender all licences relevant to the operation of their trucks, the incidence of these offences might be expected to drop significantly. Another example is allowable emission levels. I regard these as quasi-licences since pollution up to the allowable limit is permitted by government. When a firm repeatedly exceeds those levels, a possible penalty is to reduce that firm's allowable limit to zero.

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<sup>41</sup>Divestiture requires an intensive and often speculative inquiry into the economics of the firm and the market to determine whether the remedy is justified. In fact, the complexity of divestiture often causes extreme reluctance to apply the remedy. See, e.g., K.G. Elzinga, "The Antimerger Law: Pyrrhic Victories?" (1969) 12 J.L. & Econ. 43.

<sup>42</sup>See Report, *supra*, note 1 at 57.

<sup>43</sup>But see Posner, *supra*, note 7, who takes a different view of the importance of social cost.

<sup>44</sup>See M. Sheils, L. Howard & E.B. Washington, "The FCC's Toughest Crackdown" *Newsweek* (4 February 1980) 65. The Federal Communications Commission revoked three television licences held by R.K.O. General Inc. R.K.O. and its parent, General Tire, were found to have pressured General Tire's customers into advertising on R.K.O. stations. It was estimated that the revoked licences represented a loss to General Tire of U.S.\$400 million or 25 per cent of total assets.

Licence revocation is a remedy with great potential. From a pragmatic point of view it is easily justified. The right underlying the licence is given by the good grace of government and should that right be abused its loss is justified. In many cases, because the offender is incapacitated, the sanction will also be efficient in stopping pollution. An argument against licence revocation is that it can be draconian and may cause bankruptcy but, as noted above, I think this argument is weak.

A more immediate problem with licence revocation is its availability under current law. Many environmental agencies have the power to revoke, suspend or alter licences,<sup>45</sup> but this is normally done in an administrative context. It is not clear at the present time whether a criminal court can impose the penalty without statutory authorization. Some statutes contain such authorization.<sup>46</sup> However, under the *Criminal Code*, the better view is that licence revocation is not currently available; the most relevant statement is in paragraph 663(2)(h) which provides that the accused may be ordered to

comply with such reasonable conditions ... desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.<sup>47</sup>

While an argument can be made that this section permits licence revocation, it would strain the language. A licence or emission standard sets a threshold for legal conduct. Conduct below this threshold thus does not entail repetition of the offence. Therefore, it appears that at most a court could order the accused to remain within the legal limits of the licence but could not totally revoke the right.

On the other hand, I believe there is at least one instance when paragraph 663(2)(h) can support revocation; that is, when the relevant licence is not directly related to the polluting conduct. An example is the night-hauler's trucking licence. That licence gives no level of immunity from prosecution for pollution and when a truck has been used in the commission of more than one offence a good argument can be made that forfeiture of the licence is a reasonable condition for preventing repetition.

In summary, licence revocation is easily justified and efficacious and is a penalty which should be more commonly applied in environmental

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<sup>45</sup>See the Report, *supra*, note 1 at 57ff.

<sup>46</sup>See, e.g., the Ontario *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 70(2)(a) which allows for the revocation of drivers' licences. See the Report, *supra*, note 1 at 58.

<sup>47</sup>R.S.C. 1970, c. C-34.

cases.<sup>48</sup> Enabling legislation should be considered by relevant levels of government.

Another structural remedy which may be used to advantage in environmental cases is probation.<sup>49</sup> The principal attraction of this sanction is that it permits rectification of the offending conduct without the imposition of undue punishment which might be passed on to shareholders or customers. A few comments on the federal probation provisions may illustrate the usefulness of the sanction.<sup>50</sup>

Under subsection 663(2) the sentencing court may impose conditions on the accused, including reporting to a person designated by the court<sup>51</sup> and making restitution.<sup>52</sup> The court may also impose other conditions for securing the good conduct of the accused and for preventing repetition of the offence.<sup>53</sup>

These powers can be exceedingly useful in environmental cases. A major problem in the enforcement of the law is detection. This problem might be partially solved by requiring offenders to report extensively on their operations resulting in pollution. Problems with the technical nature of these reports<sup>54</sup> could be solved by the court designating an appropriate environmental protection agency.

An order for restitution is of obvious attraction in environmental cases. Not only might this permit restoration of spoiled natural resources but may also allow the imposition of a meaningful penalty when statutory maxima are relatively low.

Conditions for securing good conduct and for preventing the repetition of offences are also applicable to cases involving the environment. For instance, when pollution is technically avoidable but such avoidance is uneconomic, the court could order compliance. Consider a firm which continually exceeds air pollution emission standards. Appropriate chimney-scrubbers

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<sup>48</sup>It would appear that a due process argument can be made against this recommendation. The present administrative process for depriving someone of a previously held right is cumbersome and usually subject to review. An accused could argue that the same amount of procedural fairness is required in a criminal court. The argument is a good one. However, I believe that the sentencing hearing could be structured to meet the procedural concerns. In addition, significant appeal rights could be given in lieu of judicial review.

<sup>49</sup>Report, *supra*, note 1 at 60ff. The probation provisions of the Ontario *Provincial Offences Act*, *supra*, note 46, are reviewed in the Report, *supra* at 61. As noted in the Report at 62, some other provinces have enacted the *Criminal Code* provisions for provincial offences.

<sup>50</sup>*Criminal Code*, *supra*, note 47, s. 663.

<sup>51</sup>*Ibid.*, s. 663(2)(a).

<sup>52</sup>*Ibid.*, s. 663(2)(e).

<sup>53</sup>*Ibid.*, s. 663(2)(h), quoted in the text at note 47.

<sup>54</sup>See "The Enforcer", *supra*, note 40.



are available but have been deemed too expensive by the company. Under paragraph 663(2)(h), it appears that a court could order purchase of the scrubbers. The counter-argument to this position is that such an order would be unreasonable or punitive.<sup>55</sup> The first aspect of the argument would be that since installation is uneconomic, an order to do so is unreasonable, but this argument is not a strong one. Reasonableness should be read as relating to the prevention of offensive conduct, not to the economic rationality of compliance. The punitive argument is similar. Forcing a firm to undertake uneconomic programmes could be argued to be punitive, but the argument is weak. Provisions directed towards law-abiding conduct cannot be so regarded. Indeed, an opposite conclusion would lead to some interesting theories of social obligation.

There is some argument about whether a corporation can be made subject to a probation order. Notwithstanding authority to the contrary,<sup>56</sup> I agree with the argument in the Report<sup>57</sup> that the better view is that section 663 of the *Criminal Code* does apply to business corporations.

While a number of other structural sanctions could be discussed,<sup>58</sup> to do so would be repetitive as they are similar to those already dealt with. When compared to the traditional sanctions of fine and incarceration, structural remedies offer much greater potential for encouraging compliance with environmental laws. They are especially efficacious with respect to specific deterrence as the court can correct the practices which lead to the commission of the offence. In addition, since the business community is likely to regard the remedies as radical, general deterrence should also result.

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<sup>55</sup>An order may not be punitive: *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.).

<sup>56</sup>*R. v. Algoma Steel Corp.* (1977), 1 W.C.B. 118 (Ont. Prov. Ct.).

<sup>57</sup>*Supra*, note 1 at 63ff.

<sup>58</sup>Among other possible sanctions are reparations, changes in the composition of the Board of Directors and orders directed at specific individuals within the corporation. I do not think it necessary to discuss reparations.

Changes in the Board composition may be effective where there has been lax management or where there are "bad apples in the barrel". See "Mattel Told to Put Outsiders in Majority of Board Seats, Undergo Special Audit" *The Wall Street Journal* (3 October 1974) 4.

Orders against individuals are of particular interest. Such orders could be mandatory or prohibitory. A mandatory order could affix positive duties to prevent future offences on an appropriate corporate officer. Prohibitory orders may be criticized since they merely impose an obligation to obey the law. They can be useful, however, in imposing conditions and may contain terms for monitoring compliance. An extreme form of prohibition order is one which bars a given individual from involvement in an area of production or with the entity as a whole. Such an order may be appropriate when a responsible actor is identified and repetition is likely. See *Hoffa v. Saxbe*, 378 F.Supp. 1221 (D.D.C. 1974). In Canada, it would appear that such orders are only available if the individual is charged and convicted. See *Criminal Code*, *supra*, note 47, s. 663.

A great deal more thought must be given to the implementation of these sanctions. In particular, extensive analysis should be undertaken to fit the most appropriate sanction to specific environmental offences. Nonetheless, structural remedies are the best reaction to such crimes. While the authors of the Report did not disagree with this conclusion,<sup>59</sup> they could have advanced the further research required had they been more devoted to fundamental reform than to conventional analysis.

## 2. Decriminalization

As is apparent, one of the biggest problems in environmental law is the design of effective remedies for non-compliance. This problem is compounded by the fact that we are dealing with criminal and quasi-criminal law. For this reason, the essential search for remedial measures must take place in the context of finding guilt, protecting the accused and the goals of criminal sentencing. When the complexities of the environment are considered, these otherwise *bona fide* values may serve only to deter the design of remedies which accomplish what we intend them to.

A movement away from the criminal law could result in substantial improvement in the ability to react positively to pollution. Once guilt is no longer relevant, the emphasis would shift from punishment to compensation or correction. The tortuous arguments required to justify the use of the criminal law would be avoided and simultaneously the flexibility of the remedies would be increased.

This alternative view of environmental law regards breaches as torts committed either against specific individuals or the public. The difficulties of criminal sentencing could thus be avoided and the tort principles substituted. Also, forward-looking remedies would be more readily available. While such remedies are available in criminal law, for instance, probation, the civil law injunction is both more applicable and more flexible.

Decriminalization, nevertheless, presents some theoretical and practical difficulties. A majority of the population regards pollution as criminal and thus, on a political level, legislative change may not be viable. A theoretical argument against decriminalization is that it merely avoids rather than solves the problems of sanctioning artificial entities. For the profit-maximizing firm a loss of money is the same whether it is called a fine or damages. In addition, changing the name has no effect on the firm's ability to pass the loss on to shareholders or customers. Similarly, the problems of applying forward-looking orders to bureaucratic entities are not solved by decriminalization

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<sup>59</sup>*Supra*, note 1 at 72.

alone. These arguments are valid. They do not, however, totally destroy the decriminalization argument.

With respect to the argument that tort awards may also be passed on to innocent shareholders and customers in the same manner as are fines, the key difference in civil law is that innocence, or guilt for that matter, becomes irrelevant. Rather, the emphasis is on compensation for injuries inflicted. Shareholders expect that firms will incur civil liabilities and thus a damage award against a corporation cannot be considered unfair to its owners.<sup>60</sup>

The argument with respect to customers is more difficult to rebut. The firm with market power can raise prices with the result that customers pay for the wrong-doing. While this imposition on customers may not be justified,<sup>61</sup> it may nonetheless be rationalized. Civil liabilities generally may be insured against. The premiums are a cost of doing business and may fairly be passed on to consumers. On the other hand, it is not normally possible to insure against truly criminal penalties. This is due to the theory that the offender should suffer the consequences of his conduct personally. Decriminalization thus makes the passing-on of civil penalties acceptable even if it does not do so in a completely satisfactory manner.

While forward-looking remedies are always problematic when applied to corporations, it should nonetheless be easier to design appropriate remedies under the civil law. Criminal law sanctions must find their authority in a strictly construed statute. On the other hand, injunctions have generally been permitted to develop as judge-made law.<sup>62</sup> In practice this permits a great deal of flexibility in terms of drafting the original order and subsequent review. For this reason alone, the civil remedy should provide greater potential for effectiveness.

There is one further problem with decriminalization which should be noted. The power of the federal government to legislate with respect to civil law is limited. The removal of this level of government from involvement in environmental law may be a source of concern. However, the problem

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<sup>60</sup>For an argument that shareholders also expect firms to commit crimes, see C. Kennedy, "Criminal Sentences for Corporations: Alternative Fining Mechanisms" (1985) 73 Calif. L. Rev. 443 at 452ff.

<sup>61</sup>In class I present an argument that consumers are responsible for corporate crimes because it is their choices in the marketplace which dictate the behaviour of firms. At the risk of losing a good teaching tool, I do not believe the argument under prevalent market conditions. The argument was, however, attempted in the Pinto trial, see *supra*, note 30, and may have contributed to the jury's acquittal of Ford. The argument appears mainly in the transcripts, particularly in the closing submissions of Ford's counsel.

<sup>62</sup>The equity power comes from statute but it is very wide, permitting the Courts to develop the law. See *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 109.

is probably not a major one. Full legislative authority would remain in Parliament in areas such as oceans and international waterways, as it would with respect to federal undertakings.

## V. Conclusion

In this comment I have attempted a general review of some of the proposals put forth in the Law Reform Commission of Canada's *Sentencing in Environmental Cases*. I have also discussed some alternative approaches to reform of the law.

In my view, the Report places too much emphasis on the adjustment of fines as a sanction, but neither this recommendation, nor that dealing with incarceration, is adequately dealt with on a theoretical level. In particular, the Report fails to deal sufficiently with the problem of applying these sanctions to artificial entities.

In the area of environmental law, greater progress could be made through innovative thinking about sanctions. More thought must be given to remedies which account for the bureaucratic nature of offenders and more closely attack aberrant behaviour. Perhaps more fundamentally, the costs and benefits of decriminalization should be analyzed. The Law Reform Commission Report may be criticized for its failure to tackle these issues.

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