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MORE CRIMINALISATION IN CANADA: MORE OF THE SAME?

HARRY GLASBEEK†

I INTRODUCTION

Let me begin by telling a story of a recent Canadian occupational health and safety tragedy.

A large diffuse corporation, Great Lakes Power Corporation (in turn owned by a blue chip giant Canadian company called Brascan), hired a corporate contractor, Neat Site Vegetation Experts, to fell trees around electricity lines owned by Great Lakes Power. Because of the failure by these companies and their experienced supervisor to abide by their own safety rules, an avoidable set of events led to the terrible burning of young Wheelan, an employee who had been on the job for two days. He was clearing vegetation around power lines when a broken line fell on him. He lost all but one of his limbs and suffered very serious burns to the rest of his body. About two years later, during the North American blackout of 2003, he died in his apartment. He had made great efforts to rehabilitate himself with the help of his activist father. He had reached the stage where he could live by himself, with the part-time aid of an attendant provided through the workers' compensation regime. That day, a very hot one, the attendant had left him in his air-conditioned flat at the usual time. An hour later the electricity went off; so did the cooling system that was essential to his survival, given his condition caused by the extreme burning. He died alone. A few weeks after his death, Neat Site and Great Lakes Power were convicted of the offence of improper instruction of new employees after charges against their senior officers had been dropped. The corporations had pleaded guilty to the health and safety offence. Great Lakes Power Corporation was fined \$260,000. Campbell, Wheelan's direct supervisor, was charged with failing to clear the area when tree-cutting took place and of failing to use guy ropes to control the direction of falling trees. He was convicted. His unchallenged claim that Great Lakes Power and Neat Site had ignored those safety requirements, causing him to ignore them, was not acceptable to the court. But the court did take this argument into account when sentencing Campbell, basically only rapping his knuckles.¹

† Professor Emeritus and Senior Scholar, Osgoode Hall Law School, Toronto. Paper presented by H Glasbeek at Industrial and Corporate Manslaughter Seminar, Flinders University Law School, and Group Research on Employment and Workplace Change, University of South Australia, Adelaide, South Australia, 12 March 2004.

1 The judge did not impose a fine on Campbell, putting him on probation for 18 months, ordering 100 hours of community service and requiring him to write a letter describing what he had

What emerges from this sad tale? Two things.

First, the visceral need of the victim and public to have a senior flesh and blood person held accountable for harm caused by an employer's reckless indifference was left unsatisfied. The regulators' initial attempt to find such a culpable human was given up in return for a guilty plea by their corporate employers. The regulators, eager to show their 'zeal', did pick on a lowly employee. This is not the way to appease the needs of the public, as the judge's sentencing decision made clear. Second, it was a tragedy that is, with some variation in the dramatic details, frequently replicated. When the outcomes are as eye-catching as those in the Wheelan story is, they draw attention to the systemically engineered preferential treatment reserved for some shocking behaviour by certain types of actors, in particular, private wealth owners who are wrapped in a corporate veil.

In this presentation, the focus is on what kinds of political and regulatory responses are elicited by the gravity and the recidivism of, and the prevailing benign approach to, the infliction of harms by for-profit corporations. At this seminar, we are gathered to talk about one major response to this set of problems, namely, the attempts to improve the effectiveness of criminalising corporate activities when they injure and/or kill workers. This response comes onto the political agenda when, in especially egregious and legitimacy-menacing circumstances, corporate actors have been sought to be made criminally responsible and the prosecutions have failed.

In Canada, the particular triggering event was the Westray mine disaster in May 1992. The mine exploded and 26 workers were killed. By that time, in their less than two years of operation, the mine operators had been found to have violated the rather feeble Nova Scotia mine regulations 52 times. The Ministry of Labour had never sought to impose sanctions for these violations. The drama was increased by the fact that famous politicians had been involved in 'sweetheart' deals with the mine operators, giving extremely favourable, uncommercial loans and guarantees to the operators. This fuelled the suspicions of the victims and their neighbours that wealth owners, rather than workers, were to be protected and coddled by the elected government and its appointed regulators. This was exacerbated when prosecutions against the regulators were dropped on the basis that this would facilitate the prosecution of the corporate mine owners and its senior officers but, in the end, both these prosecutions also were dropped. The corporation went into bankruptcy; the senior officers were able to mount a series

learned from the events. He was asked to make a contribution of \$500 to the burn clinic that had treated Wheelan; see Mary Beth Currie, 'Workers: Last Line of Defence' (2004) *OHS Canada* 56. The judge wrote: 'In my reasons for conviction [of Campbell] I indicated the primary cause of this workplace accident was the failure of GLP [Great Lakes Power] to establish a safe workplace culture, wherein the workers would have a safe protocol and structure to follow in their workplace functions', *The Sault Star* 16 March 2004; see also the same paper's issues of 21 and 25 March 2004, for more details of this case. The judge's analysis goes directly to the theme of this paper, in particular, and to the seminar's at which it is presented, in general.

of procedural defences that postponed their trial until a Commission of Inquiry reported.²

This Commission found that systematic indifference to human life characterised the employer's modus operandi. The title of its report, 'Westray: A Predictable Path to Disaster', said it all. In its conclusions, the report opined there had been '[A] complex mosaic of actions, omissions, mistakes, incompetence, apathy, cynicism, stupidity and neglect ... there was a palpable disregard for even the most basic rules of safety'.³ After the publication of this damning report, the prosecution dropped the charges against the flesh and blood senior officers of the Westray mine operators. The prosecutors' argument was that despite or, rather, because of its findings of egregious insouciance, the Commission of Inquiry had found that there was no one specific cause or actor responsible for the explosions. Hence, the prosecutors decided, they would not be able to muster sufficient evidence of mens rea against the individual senior officers they had charged.

England's Herald of Free Enterprise,⁴ Victoria's Esso Longford⁵ and Canada's Westray mine disaster cases had much in common. In each of them a number of people died as a result of neglect of, or indifference to, dangerous conditions. In each it was hard to pin-point the commission of a specific set of acts done with malevolent intent by anyone who might make the corporation responsible. In each of them it was found that the circumstances that had led to the calamity had been structured into the system of operation of the employing/producing corporation. In each of them, there was an initial unwillingness and, then, perceived inability to apply the criminal law to the corporation or to any of its significant actors. The remedy proffered in all of these jurisdictions was to legislate to overcome the technical problems that were claimed to have led to these politically discomfiting outcomes.

II THE PERCEIVED TECHNICAL DIFFICULTIES

It is hard to apply criminal law concepts based on individual free will to artificial, mindless constructs. In the past, judges, having been largely responsible for bestowing a human-like legal personality on corporations, were forced to pretend that these ethereal beings, to which I like to refer as blobs, were capable of

2 For accounts of the Westray affair, see Shaun Comish, *The Westray Tragedy* (1993); Dean Jobb, *Calculated Risk* (1994); Chris McCormack (ed), *The Westray Chronicles* (1998); Harry Glasbeek and Eric Tucker, 'Death by Consensus: The Westray Story' (1993) *New Solutions* 3, 4.

3 Nova Scotia, Commission of Public Inquiry, *The Westray Story — A Predictable Path to Disaster* (1997).

4 For accounts, see Celia Wells, *Corporations and Criminal Responsibility* (1993); Stewart Field and Nico Jorg, 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' (1991) *Criminal Law Review* 156.

5 For accounts, see Victoria, Royal Commission into *The Esso Longford Gas Plant Accident Report* (1999); *DPP v Esso Australia Pty Ltd* (Unreported, Supreme Court of Victoria, Cummins J, July 2001); Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (2002).

thinking and acting, like you and I. So, they came to attribute thoughts and acts to the corporation by holding the thoughts and acts of senior officers to be those of the corporation. This has made it terribly difficult to hold corporations criminally responsible. The identification of the senior officer who is to be characterised as the guiding mind and will of the corporation is discretionary and fraught with difficulty, especially in large endocratic organisations, even more so when group organisation is used by a corporate enterprise that has compartmentalised its many coordinated and integrated activities. And, when corporations are multi-national, the problems can be overwhelming. This set of problems has unintended and unacceptable flow-on effects. If the person who acts with the appropriate mens rea is acting and intending as if s/he were the corporation, then s/he is not acting and intending as an individual in her/his own right. In those circumstances, the senior officer adjudged to be the guiding mind and will is not to be held criminally responsible. Not only, then, is it difficult to hold a corporation, a blob, criminally responsible, the starting premisses giving rise to this difficulty also make it hard to hold a flesh and blood human being responsible for serious violations of standards that lead to grave harm.⁶

This explains the nature of the novel criminal responsibility schemes being spawned. My first task is to describe the Canadian one. It is entitled 'C-45, An Act to Amend the Criminal Code (criminal liability of organisations)' (2003). It is found in an amendment to the Criminal Code — a statute that is within the federal government's jurisdiction. It is referred-to by its bill name, Bill C-45, or as the Westray Bill. It was first pushed by the electoral party friendly to unions, the New Democratic Party, as a consequence of the clamour by the Steelworkers Union, the union associated with the workers at Westray. It was introduced as a private member's bill. A Senate Committee recommended that the government enact the proposed Bill. In due course, the government produced its own version of this kind of legislation. All this took nearly 12 years to come to fruition, the Bill receiving Royal Assent in November 2003. It was proclaimed on 31 March 2004.

Some of its more salient provisions follow.

6 This is the genesis of the spate of statutory provisions that impose direct duties on directors and officers for failures to abide by statutory requirements imposed on corporations. The illogic of these measures apparently is off-set by the need to hold someone, anyone responsible; see Harry Glasbeek, 'More Direct Director Responsibility: Much Ado About ... What?' (1995) 25 *Canadian Business Law Journal* 416; for my appraisal of the effectiveness of these kinds of provisions, see 'Crime, Health and Safety: Meanings of Victoria's Failed Workplace Deaths and Serious Injuries Bill and its Equivalents Elsewhere' (Working Paper No 29, Centre of Employment and Labour Relations Law, University of Melbourne, 2003).

III THE CANADIAN ENTRY INTO THE CORPORATE CRIMINALITY STAKES

In addition to the old ways in which corporations can be made criminally responsible, that is, via the identification doctrine developed judicially, the legislation imposes new criminal liabilities in respect of workplace safety that are to be founded on a specific set of new legal duties written into the Criminal Code. The new s 217.1 provides '[e]very one who undertakes, or has authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or harm.'

Section 217.1 has two significant impacts. First, it will impose criminal responsibility for harm done to people outside the workforce. Up to now, unlike the circumstance in Australia, this responsibility to the neighbouring public had only been found in the Nova Scotia occupational health and safety regime. The scope of this new responsibility has been potentially widened by the definition of bodily harm as 'any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature'. That is, bodily harm includes diseases as well as traumatically caused physical harms.⁷

Second, the duty to take care is no longer restricted to managerial level employees. It is imposed on any one who undertakes or has authority to direct others in the performance of their task. This could reach quite low into the hierarchical organisational charts of an organisation. Up to now, only occupational health and safety legislation in Ontario, British Columbia and Manitoba had imposed a legal duty to comply with the statute on employers, directors and supervisors. The new Criminal Code duty is imposed on those people as well as on foremen, lead hands, co-workers, throughout Canada. This is a cause of anxiety for unions who are afraid that it may put their members at greater risk than before. This anxiety is fed in part by the short legislative history of the recent amendments to the Code. In its recommendations to the government, the specially struck Senate Committee to consider the private member's bill had proposed that there be a new crime created to make directors and senior officers criminally responsible. This was not done and the ensuing imposition of a wide-sweeping duty on representatives writ large suggests that the government did not want to single out directors and executives and let 'ordinary' employees off the hook.⁸

7 This has been seen as potentially valuable to anti-tobacco activists who contend that the provisions could be used against workplaces that permit employees to be exposed to second-hand smoke; see Neil Collishaw and Heidi Meldrum, 'Protection from second-hand tobacco smoke' (Press Release, January 2003).

8 *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights — Corporate Liability* <http://www.justice.gc.ca/en/dept/pub/ccl_rpm/hearings.html> at November 2002. Another possible concern, one that might trouble employers, is that the expansion of categories of individuals to whom the duty attaches may lead to a reluctance by low

When an individual inside an organisation burdened with the new legal duty is identified, the prosecution must establish that it was, in fact, breached by that individual. Two important points need to be made. First, the duty is akin to that found in the pertinent regulatory schemes. But, for the Westray Bill it is not enough that there be a breach of the standard set by the relevant occupational health and safety regulation. The breach has to meet the usual criminal standard of recklessness or intent. It will not suffice to establish a lack of due diligence, as it is in prosecutions under the occupational health and safety statutes. The burden of proving the criminal intent infusing the violation of the duty is on the prosecution and it is the criminal onus of proof beyond reasonable doubt. Second, as if to offset these onerous burdens, it is no longer necessary for the prosecution to show that the breach was the result of any one individual's conduct. A number of representatives' acts may, together, constitute the breach that satisfies the first criterion to establish the crime, namely, the violation of a breach of the legal duty.

Once it has been proved that there has been a physical breach of duty for which a representative charged with discharging that duty can be shown to have had an appropriate guilty state of mind when committing the breach, the employing organisation will be held criminally responsible if senior officials with policy-making or important managing authority⁹ either have failed to act to prevent, or have operated in a manner which prevented them from discovering, behaviour that had the potential to lead to breaches of the legal duty by representatives at a lower level. Again, mere negligence will not do: this is a criminal statute and the senior official or executive is to be shown to have departed from the appropriate standard of care of supervision in some gross way. Such gross negligence will exist where the senior official or executive knows that a lower level¹⁰ representative is committing an offence and does nothing about it. Indeed, in those circumstances, not only will the employer be held criminally responsible, but so too will the senior official or executive.

What Canada's Criminal Code amendments do not do is to hinge responsibility on what has come to be called corporate culture. The government thought the concept too vague. It noted that, in Australia, the Crimes Act (Cth)¹¹ had not as yet provided any case law that would clarify what corporate culture

level employees-cum-managers (foremen, lead hands) to undertake responsibility to get necessary work done.

- 9 *Criminal Code Act 1995* (Canada) s 2 defines senior officers in this way. This was done to overcome the difficulties created by the decision in *'Rhone' (The) v 'Peter A B Widener' (The)* [1993] 1 SCR 497 (SCC) where only persons having policy-making powers were said to constitute guiding and directing minds capable of making the corporation criminally responsible.
- 10 *Criminal Code Act 1995* (Canada) s 22.1. These senior officials or executives may also be held personally criminally responsible if they intentionally participated in the commission of the violation or directed its commission. They will be held culpable on traditional criminal grounds. Their employing corporation/organisation also can be held criminally responsible for a crime requiring more subjective fault than a crime of negligence does, say, fraud or murder, if the senior officers were, in part at least, acting for the benefit of the corporation/organisation; s 22.2. This is the expanded version of the identification doctrine espoused in Canada's Bill C-45.
- 11 See above n 8 where the Canadian Justice Committee made this point specifically about *The Criminal Code Act 1995* (Cth), implemented in December, 2001.

might mean. Arguably, however, Canada's criminal law's amendments are not too far away from whatever it might mean. This is because the employer will be criminally responsible whenever violations of a legal duty are due to operational failures and supervision by management, those functionaries who have the capacity to give an employer its cultural character. Moreover, the sanctions that a court may impose upon conviction are to take into account the way that the employer reacted to the wrongdoing. For instance; Did it compensate victims? Did it penalise the responsible representatives, senior officials or executives? Did it institute preventive measures to avert recurrences of the problem? In addition, a court may put the employer on probation, requiring it to make restitution, to establish better policies and to communicate these to workers, the public and a monitoring court. The order also may command the guilty employer to appoint officials with specific duties in respect of the identified problem. Further, publicity may be required, putting pressure on the employer to institute a new cultural approach.¹²

The language of 'employer' has been used because the amendments do not actually speak of corporate criminal responsibility, but of organisational responsibility. It encompasses, therefore, any organisation that indicates to the public that it has set itself up to attain a common purpose. It includes corporations, trade unions, volunteer organisations, partnerships, co-operatives, municipal bodies, etc. It is hard to understand why the government reacted to an occupational health and safety-inspired problem in this way. Two points ought to be made. First, it denotes a departure from the well-established doctrine that a trade union, as such, could not be held criminally responsible because it did not have the required legal personality.¹³ Second, this deliberately chosen approach emphasises the fact that, to the government, the nature of the relationship between employer and employee and the reason for its creation, do not matter. No distinction is drawn between private for-profit activities and public not-for-profit activities. While the dangers created in these two spheres of productive activity sometimes may be the same, their regulation might be dealt with quite differently. By not drawing this distinction, the government indicates that it does not want any weight put on the profit motive that drives market activity. It does not want to countenance the idea that for-profit production puts a particular spin on the structuring of risk. This is so clearly illogical that it betrays the depth of the ideology that governs regulatory theory. I will return to this theme.

So much for the description of Canada's Criminal Code amendments. In addition to the scope questions adumbrated above, there are potential implementation problems. One is that the width of the duty imposed under s 217.1 may lead to the scapegoating of lower level employees. This is potentially counter-productive. The legitimacy difficulties created by *The Herald of Free Enterprise*, *Esso-Longford* and *Westray* were spawned by the fact that low-level employees

12 For the sentencing powers of the courts under the new provisions, see ss 718.21, 732.1 (3.1).

13 There may be an intriguing constitutional problem here: does the federal government have the jurisdictional power to bestow this kind of legal personality on provincially-created trade unions? This cannot be explored in this presentation.

who technically might be held responsible were, in fact, mere helpless cogs in an enterprise's machinery of operation. They were, in fact, not the responsible agents. Making it easier to convict these rather hapless agents seems a curious choice for a legislature intent on demonstrating that it is sensitive to the underlying problem. Second, a practical difficulty with the application of the new provisions looms. It springs from the fortuity of Canadian constitutional law.

The jurisdiction over criminal law rests with the federal government, that over occupational health and safety with the provincial governments. Criminal acts committed in the provinces are to be prosecuted by provincial attorneys-general. They also are charged with the enforcement of the provincial occupational health and safety statutes. They have been most reluctant to use prosecution as a means to enforce these statutes. They are encouraged to take this anti-prosecution approach by their respect for the conventionally embedded acceptance of the Robens' principles. These emphasise that the so-called workplace partners are in the best position to ensure efficient compliance, because both employers and employees share the same needs and goals in respect of safety and productivity. There is a resultant preference for the internal responsibility system over the use of the external responsibility one, a preference for negotiated settlement of disputes over settlements enforced by the State.¹⁴ This attitude is reflected in the record of occupational health and safety enforcement. A few illustrations should suffice.

Crown officials are reluctant to pursue jail terms and/or probation for occupational health and safety offences when corporate actors are the employers, so much so that the rare resort to these penalties are well-known in Canada. Some of these exceptional events include: *owner* of small company fined \$70,000 and six months jail for fatality; *co-owner* of corporation fined \$10,000 and probation for 18 months, occupational health and safety course to be attended for electrocution of young worker; supervisor — 29 week-ends of jail for fatality because of non-guarding of moving parts; supervisor got 45 days of jail for occupational health and safety violation that led to death of a *passenger* on a train ...¹⁵ That is, the use of jail is seen as draconian and used sparingly and not very stringently.

In our context the question becomes: to what extent will the same local attorneys-general choose to prosecute under the new Criminal Code provisions? On the one hand, there is a clear legislative signal that this could, and, perhaps should, be done when egregious behaviour attracts public attention. On the other hand, even if there is a consequent greater willingness to reach for external

14 Committee on Safety and Health at Work, Parliament of the United Kingdom, Robens Report (1970–1972). This Report's recommended approach is the key to the legislative regimes extant in Australia and Canada; see Commission of Inquiry into Occupational Health and Safety (NSW) ('Williams Report') 1981; Ontario, Royal Commission on the *Health and Safety of Workers in Mines A-G* (1976) ('Ham Report').

15 The details are taken from an article in *OHS Canada*, March 2003, in which the editor noted that provincial prosecutors 'are not going to be pursuing every error, mistake or judgment that somebody has made, only the very special circumstances where people engage in criminal activity', the examples in the text being evidence of how 'tough' prosecutors will get when aroused.

enforcement, it may be tempting to use that furnished by the not-so-stigmatising provincial *Occupational Health and Safety Act*, precisely because it is less stigmatising. The belief that productive actors should not be characterised as criminals is likely to continue to pervade conventional thinking. For another, it is much easier to convict under the occupational health and safety regime than under the new criminal provisions. I have noted the different burdens of proof that apply.¹⁶ This potential unwillingness to reach for the new criminal provisions is bolstered by the fact that the content of the legal duty on which they are based is to be found by reference to the provincially applicable occupational health and safety Act. This will beg the question for inherently conservative attorneys-general: if it is the *Occupational Health and Safety Act* that has been violated, why not resort to the remedies provided by that Act? In sum, it is to be expected that the new criminal law provisions are not likely to lead to a flood of prosecutions.

This should suffice to give an outline of the new Canadian provisions and a feeling for the many questions that are likely to trouble the enforcement agencies and policy-makers. I now return to offer my 'take' on the genesis and nature of schemes like the Canadian one and others of its ilk proposed and enacted elsewhere in our common law jurisdictions.

IV ARE WE CHANGING THE FORM RATHER THAN THE SUBSTANCE?

My starting point is that the impulse behind this current tendency to pass laws such as the Canadian amendments discussed and the just-enacted Australian Capital Territory legislation,¹⁷ as well as the proposed (and abandoned) Victorian¹⁸ and Queensland¹⁹ statutes, and also the contested, but still on the table, English draft,²⁰ arises from the fact that some conventional assumptions underpinning the legal regulation of social relations and activities have come under closer scrutiny

16 A related point ought to be noted. Under Canada's Charter of Rights and Freedoms, corporations have successfully argued that, if an inspector has reason to believe that his/her investigation may lead to a prosecution, the corporation is entitled to have him/her to get a warrant to search for, and to seize, evidence; see *R v Inco Ltd* (2001) 155 CCC (3d) 383 (Ont CA). This raises questions about whether evidence gathered by occupational health and safety inspectors without a warrant can be adduced into evidence in any subsequent criminal trial. While these difficulties are not insuperable — especially if some of the evidence is 'real' evidence — they will likely work to make provincial prosecutors think even more carefully before they initiate prosecutions under the Westray Bill.

17 *Crimes (Industrial Manslaughter) Amendment Act 2002* (ACT).

18 *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* (Vic).

19 Queensland, *Dangerous Industrial Conduct*, Department of Justice and Attorney-General, Discussion Paper (2000).

20 See, Law Commission of England and Wales, *Legislating the Criminal Code: Industrial Manslaughter Reforming the Law on Involuntary Manslaughter: The Government Proposals* (1996), The Home Office, <<http://www.homeoffice.gov.uk/consult/invmans.htm>>.

than usual in recent times. The assumptions I speak of are those structuring (i) the criminal law, (ii) the facilitating legal devices designed to promote market activities and actors, here corporate law and (iii) the welfare laws that regulate productive activities, here those concerned with occupational health and safety. When an event, like a Westray, a Herald of Free Enterprise or an Esso/Longford occurs, it is likely that more members of the public will see that criminal law is not evenhandedly, neutrally applied — as it is supposed to be. Moreover, it becomes more evident than usual that facilitating, supposedly neutral, interventions such as corporate law and corporations, are anything but mere facilitative, neutral institutions. And, simultaneously, regulatory law that supposedly is designed to allow for acceptable compromises in respect of risks and standards of behaviour, is more likely to be perceived as being weighted to favour some, here the incorporated employers, at the expense of others, here the workers. There is a sudden realisation that nothing is as it should be. The legitimacy of all our claims and tools are put in issue. This creates pressure on the dominant political forces that want to remain dominant to restore confidence in the system. In the context of occupational health and safety it becomes crucial to bolster the public's confidence that it is right to continue to believe: that criminal law will be applied to all who violate laws in analogous fashions; that laws designed to facilitate commerce and market activities are to be just that and not lead to built-in advantages for some, ie corporate actors, over other commercial and market actors and that regulatory laws will be redesigned to produce truly consensually reached compromises about risks and standards in the workplace. In short, these moments dictate that, to retain hegemony, it is necessary to enact legislative reforms.

The new statutory instruments which are being examined at this seminar are designed to attain these hegemony-maintaining goals but they do this primarily by aiming themselves at solving the criminal law problem. The focus is to overcome the legitimacy problem created by criminal law's apparent non-application (or, at best, its uneven application) when it comes to corporate productive activities. In essence, the reforms suggest that the reason for the less than vigorous application of criminal law to corporations is to be found in the technical difficulties associated with the identification doctrine. This doctrine, though well-meaning, is accepted as inapposite for complex organisational structures. What is needed then, the reformers believe, is to re-model the established doctrine. This has led Professor Gobert to argue (rightly) that the reforms produced proffer nothing more than a set of variants of the identification doctrine. Elaborate as they are and innovative as they seem, they still make it necessary to find one or more individuals who have committed a true criminal offence and these people must be of the right status (albeit one that can be defined differently than it is presently) to make it sensible to hold the corporation — the complex organisation — responsible.²¹ Two points need to be made.

21 James Gobert 'Corporate Criminality: New Crimes for the Times' (1994) *Criminal Law Review* 722.

First, the nature of these responses is instinctive: legislators are not serious thinkers. They respond to immediate political problems. In the occupational health and safety field these include: how are they to deal with their agencies'/prosecutors' apparent incompetence/unwillingness/ inability to enforce the laws? As politicians, they expressly or impliedly promise the public that democratically enacted laws will be enforced without fear or favour. How are they to deflect attention away from their own complicity in the catastrophic events, if any, as in the Westray saga that drew the public's attention to the enforcement deficit? How are they to defend the general political economic entente that might be threatened if people came to question its very underpinnings and accompanying institutions, such as corporate law and the market machinery it and the occupational health and safety regulatory scheme are designed to serve? As they wrestle with these issues, it is important to remember that politicians are not pre-occupied with satisfying scholars who are interested in the accurate description and treatment of organisations, such as corporations. If their proposals meet such scholarly concerns it will be a happy coincidence rather than a planned outcome. This is why serious, radical, thinkers like Gobert are less than impressed by the measures on offer thus far. Not only are they just band-aid solutions, it is likely that, as in the Canadian case, they will only deal with technical, not structural, problems.

The statutes passed and those on offer continue to assume that corporations are just market facilitating tools and that the regulatory regimes, such as the occupational health and safety ones, are posited on the right assumptions, those which underlie the Robens values. These are that there is a shared set of interests between employers and employees, that the risks their joint activities throw up are causes for joint concern and that the materialisation of these risks are regrettable outcomes that ought to be eliminated. This is best done by learning from experience and then by setting standards that are malleable. The parties to the risk-creating activity should work together to identify risks and to devise means to eliminate them. The State should only be there to guide them and formalise their decisions and to hold recalcitrant actors to account. What is assumed is that the parties are virtuous in their participation in a virtuous system of production, one regulated by market dictates.²²

Policy analysts who share the assumptions of virtuous actors and activities assumed by the Robens-based schema and who acknowledge that the regime can be and should be perfected, will be more contented than others will by the

22 The point about the assumption of virtuous actors and activities is insightfully made by Haines and Sutton in their discussion of the pyramid modellers (see below); Fiona Haines and Adam Sutton, 'The Engineer's Dilemma: A Sociological Perspective on Juridification and Regulation' (2003) 39 *Crime, Law and Social Change* 1–22. The logic of the critical work of W G (Kit) Carson and his co-workers also identifies the assumption of virtue as the basis of much of the standard regulatory analysis; Kit Carson, 'The Institutionalization of Ambiguity: The Case of the Early British Factory Acts' in Gilbert Geis and Ezra Stotland (eds), *White Collar Crime: Theory and Research* (1980); Kit Carson and C Heneberg, 'Social Justice in the Workplace: The Political Economy of Health and Safety Laws' (1989) 16 *Social Justice* 124; Kit Carson and Richard Johnstone, 'The Dupes of Hazard: Occupational Health and Safety and the Victorian Sanctions Debate' *Australian and New Zealand Journal of Sociology* (1990) vol 26, 1.

statutory reforms on offer. To them they may be seen as co-optable and thereby to come to dovetail with their preferred approach. For pyramid modellers such as Braithwaite/Ayers/Fisse et al²³ the developing measures may be relatively welcome because they emphasise efficient self-regulation and a willingness to impose compliance systems on the more recalcitrant of corporate actors, just what these scholars advocate in their modelling. I do not align myself with this impressive school of scholars and policy-makers. Despite having argued for some time that criminal law ought to be applied more liberally to corporate actors,²⁴ I do not feel very happy about the legislative efforts to make it easier to criminalise *corporate* behaviour. I feel uneasy because these efforts appear to embed the very premisses that, in my view, give rise to the dreadful injury and death toll in the workplace.

I do not like the fact that there is a continued assumption that productive activities are neutral. That is, I am uncomfortable with the Robens assumption that no matter who the actors are, what their relationships are, what the purpose of production is, risks are created. This suggests that whether production is undertaken to satisfy wants as opposed to needs does not matter; it suggests that whether the producers are co-operators/partners/public servants as opposed to employers/employees/private actors does not matter; it suggests that whether or not the relationship is inherently coercive (rather than truly voluntary) does not matter; it suggests that whether production is undertaken to produce a good or service for its own sake or for profit does not matter. These assumptions and their implicit messages are illogical. If, say, needs, rather than profits, or public, rather than private, accumulation were the *raison d'être* of productive activities, the balance between worthwhile risk and the desirability of the outcomes of production would be differently calculated by very different processes. Consequently, indeed inevitably, the standards produced and the methods and eagerness to enforce them would be different. This is so obvious that it is almost trite to make the point. But, despite its manifest logic, it is assumed away by the premisses underlying the regulatory scheme we favour. Undaunted by plausible alternative arguments, the Robens system's premisses are that market capitalism is (a) the norm and (b) natural. If these assumptions are wrong and it is because of their assumptions that we cannot stem the slaughter in the workplace (and for

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- 23 Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (1992); John Braithwaite and Tony Makkai, 'Trust and Compliance' (1994) 4 *Policing and Society* 1; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993); Chris Dellitt and Brent Fisse, *Civil and Criminal Liability Under Australian Securities Regulation: The Possibility of Strategic Enforcement* (1994) in their *Securities Regulation in Australia and New Zealand* (1994). The central idea is that voluntary compliance should be encouraged and assisted by the use of the carrot. The stick of civil and criminal sanctions is to complement and to make more effective the carrot approach. This is an appropriate approach if the regulatees are seen as being integral to worthwhile economic and social activities.
- 24 Harry Glasbeek and Susan Rowland, 'Are Injuring and Killing at Work Crimes?' (1979) 17 *Osgoode Hall Law Journal* 506; Harry Glasbeek, 'Why Corporate Deviance is not Treated as Crime — The Need to Make "Profits" a Dirty Word' (1984) 22 *Osgoode Hall Law Journal* 393; Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (2002).

those interested in words, note that these manslaughter provisions acknowledge, ever so faintly, that this is what may be happening, unwanted slaughter) will continue and new legitimacy problems will arise despite the passage of the reforming legislation.

Further, a corollary assumption is that the tenets of market capitalism furnish the substratum of the legislative innovation, the corporation for-profit. That is, it is assumed that the corporation is a market actor, one that fits the Robens' model's starting assumptions about the political economy. But, if it is a market actor in any sense at all, it is one that distorts the operation of the idealised market, that is, of the model that provides the justification for the Robens scheme (because of its normalcy, because of its naturalness).

Functionally, the corporation is an aggregate of capitals and people (workers and investors of capital), not a site where individual marketeers come together to contract and remain discrete actors. I will not engage the extensive efforts by law and economics scholars to prove the opposite here; I have made my riposte to these scholars elsewhere.²⁵ My thesis is based on the legally established on-the-ground fact that the corporate vehicle is designed to provide limited liability for shareholders, that is, it bestows fiscally limited responsibility on risk-creating actors. Prima facie, this constitutes a contradiction of the market's personal responsibility system. Corporate law goes further: it provides legal immunity for shareholders, a repudiation both of market principles and of the *liberal law ones on which criminal law is posited, namely that individuals are responsible for their conduct*. It provides this immunity because, upon the act of incorporation, the contributed capitals become the property of the newly created corporation, a separate legal person. The deployment of that property to yield a stream of income for the investing shareholders is to be done by the corporation. Because it is a blob and not a person, it does so through its management team, boards of directors (appointed by the shareholders) who, in turn, appoint executive officers. That is, any deployment of property that inflicts harms or leaves debts, is not the result of the shareholders' conduct, even though it was done to enure to their benefit. These would-be beneficiaries, therefore, cannot be held to account for the wrongful conduct of the blob acting through its human agents, the management. This line of logic, one that arises from the legal architecture of the corporation, provides, as previously noted, analogous legal immunity for managerial functionaries because, when they act and think, they do so as the corporation and not as *market individuals or sovereign liberal individuals*. While some of these aspects, as previously noted, have been mediated by the direct imposition of personal responsibility on managers²⁶ and by some aspects of the new provisions under examination, the starting point to determine who is responsible for corporate wrongdoing essentially still is what it was.

25 Glasbeek, *Wealth by Stealth*, *ibid*; 'Preliminary Observations on Strains of, and Strains in, Corporate Law Scholarship' in Frank Pearce and Laureen Snider (eds), *Corporate Crime: Contemporary Debates* (1995) 111.

26 Glasbeek, above n 6 and see other references there.

The corporation is a site where legally irresponsible people have incentives to have profits pursued at any cost, even unlawfully if need be.

This leads to pressures on corporate management teams to maximise profits in any way possible. It makes sense, therefore, for these managers to use their capital and ideological clout to mould the legal environment in which corporations are to operate so as to facilitate, improve and enlarge profit-making opportunities. And, whatever successes they have in this regard, they also will be tempted to violate laws that impede profit-maximisation. In respect of the first strategy, the corporate sectors have enjoyed a great deal of success of late. The pace of privatisation and deregulation is increasing markedly. Standards are being diluted; not only are regulations and their enforcement under daily attack, but the acceptability of the logic of privatisation feeds (and is fed by) the appetite of contemporary governments to leave it to market actors to regulate themselves.²⁷ As to the second strategy, the pursuit of profits continues to use illegal means, much as it always has.²⁸

In this context, the current movement towards the criminalisation of corporate behaviour might become a useful counterweight. But it will only become so if it rejects the very assumptions and premisses that are underpinning this erosion of public responsibility promoted by, and that enure to the benefit of, private actors garbed in corporate clothing. There are good reasons to fear that this negation of these basic assumptions is not about to take place. If this is true, the new criminal provisions may work in a counterproductive way. Herein lies the reason for my unease.

The new criminal law provisions set out to make it easier to convict corporations, to remedy what are seen to be the technical problems arising from the identification doctrine. The remedies provided implicitly acknowledge that corporations have a distinct life as organisations, that is, there is an acceptance that the corporation is more than the sum of its component parts. The premiss is that the legal personality bestowed by law that analogises the corporation to an individual human being permits the corporation to flourish in the legal world, but does not describe reality in any useful way and, therefore, leads to tensions and dysfunctionalities. This dovetails with the line taken by an important theoretical school. Its proponents have argued for a recognition of the corporation as a dynamic unit, one capable of the development and maintenance of a culture

27 Laureen Snider is a scholar who has done much to explain the advent and maturation of welfare regulatory schemes; see 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1987) *Law and Policy* 37; 'The Regulatory Dance: Understanding Reform Processes in Corporate Crime' (1991) 19 *International Journal of the Sociology of Law* 209. In her more recent works, she has documented the extent to which the legitimisation portion of the legitimisation and accumulation processes she had described, have given way to the accumulation imperative. She shows that, empirically, the amount of regulation and the strictness of its enforcement have sharply diminished; see "'But They Are Not Really Criminals": Downsizing Corporate Crime' in Bernard Schissel and Carolyn Brooks (eds), *Marginality and Condemnation: An Introduction to Critical Criminology* (2001); 'The Sociology of Corporate Crime: An Obituary' (2000) 4 *Theoretical Criminology* 169; 'Researching Corporate Crime' in Steve Tombs and David Whyte (eds), *Unmasking Crimes of the Powerful: Scrutinizing States and Corporations* (2004).

28 For my recital of the evidence, see Glasbeek, *Wealth by Stealth*, above n 24.

distinct from that of its constituent members and one for which special criminal law ought to be devised.²⁹ The new statutes go some way towards the attainment of this intellectually appealing characterisation of the complex organisations we call corporations. In so doing, however, they support an idea that would give the corporation a political/social essence that the fiction theory of legal personality does not. These legislative reforms are helping to transform the apolitical, amoral blob into a social and cultural being.

Under the aegis of the identification doctrine, the corporation was characterised as an individual, as a unit that could not be further divided. This had bestowed an enormous convenience: for legal purposes, the corporation could be treated as being technically analogous to a human being. But, only for those purposes. There was no convincing suggestion that a corporation had become the real equivalent of a human being in biological, emotional and social terms. Vincent emphasised the remaining distinction between sentient beings and legal creatures,³⁰ one which always causes anxiety when corporations demand to be treated as if they should be entitled to all human privileges. That is, this distinction is politically significant and, should it fade, it will give corporations even more sway than they already have. Arguably, the Westray Bill and its equivalents may have this kind of effect. They may boost to the status of the corporation by making it more likely that it will be perceived as a quasi-governmental entity. Let me sketch this speculative, alarmist, argument.

In concrete terms, the large publicly-traded corporation already wields enormous political power. The capacity to make the threat of a capital strike more effectively than ever has been improved by the hugely increased amounts of aggregated capitals in relatively fewer and fewer entities. The deepening pervasiveness of consumerism and the commodification of everything, the revolving door schemes for functionaries who, first, serve government agencies and then the corporations they regulated (or vice-versa), the already-noted tide of privatisation and deregulation,³¹ all signify that corporate capitalism has put itself on a very good bargaining footing vis-a-vis our elected governments that supposedly represent the interests of all citizens. The resulting context is one in which corporations are increasingly looked-to for help by governments when they are regulating. That is, corporations participate in the setting of standards that they are increasingly going to be asked to administer on behalf of hands-off governments. Making them criminally responsible in the way the current wave of

29 Wells, above n 4; Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for a Bureaucratic Society* (1986); Peter French, *Collective and Corporate Responsibility* (1984); Field and Jorg, above n 4; Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468; John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1993).

30 Andrew Vincent, 'Can Groups be Persons?' (1989), 42 *Review of Metaphysics* 687; for a longer development of the argument made here, see Glasbeek, 'Crime, Health and Safety ...' above n 6.

31 All of this is part of the conventional wisdom spruiked about our contemporary political economy. For my own detailing of these phenomena, see Glasbeek, *Wealth by Stealth*, above n 24.

legislative reform is doing intensifies these tendencies. As I noted in my sketch of the Canadian provisions, the statutes (even more so where they try to hold corporations responsible for their 'culture', as the Canadian one does not do explicitly) posit that individual corporations, as such, are to be responsible for the specific manner in which they will respond to the regulatory schemes they have helped establish in the first place. These statutory schemes envisage that the criminalisation processes are there to aid governments obtain compliance by having to intervene less with corporate structure and operational organisation, rather than more. These statutes implicitly treat corporations as regulatory agencies. The statutes may be exemplars of what Garland has called the movement towards responsibilisation. He writes that

there has developed a new mode of governing crime which I would characterize as a responsibilization strategy. This involves the central government seeking to act upon crime not in a direct fashion through state agencies (police, courts, prisons, social work, etc) but instead by acting indirectly, seeking to activate private action on the part of non-state agencies and organizations ... Its primary concern is to devolve responsibility for crime prevention on to agencies, organizations and individuals which are quite outside the state and to persuade them to act appropriately.³²

While this may appeal to the pyramid modellers, to someone like me who sees the drive to maximise profits as one that must be curbed to protect the public good, this potential of the Westray Bill and its equivalents elsewhere is to be feared because it may enhance the movement to put the corporate fox even more firmly in charge of the public in the chicken coop. If we are to use criminal law to ensure corporate responsibility, we may have to look for a different kind of legislative tool.

What, then, would I want?

I argue that what ought to be done is to make the beneficiaries of anti-social behaviour, those who profit without risk from diluted and violated standards of behaviour, to be made personally responsible. That is, I would make the so-far legally immune major shareholders in large, publicly-traded corporations criminally responsible. I have made the argument before.³³ As far as I can tell, the only pressing argument against this suggestion is that shareholders are innocent and passive coupon holders. But, they are passive only because we say that we will not hold them responsible if they leave the corporation and its management to their own devices when their conduct is likely to impact the non-shareholding public. They certainly are not passive when it comes to protecting their shareholder interests. Indeed, when the investing public is shocked by the egregious behaviour of corporate managers and their professional advisors, they are publicly urged to take charge and to act as the functional (albeit not legal) self-serving owners they are. Note here the oft-heard contention that they should

32 David Garland, 'The Limits of State Sovereignty: Strategies of Crime Control in Contemporary Society' (1996) 36 *British Journal of Criminology* 452; see also his *The Culture of Control* (2001).

33 Glasbeek, 'Why Corporate Deviance is not Treated as Crime ...' above n 24 and for an updated version, see Glasbeek, *Wealth by Stealth*, above n 24.

be involved in setting board policies and exercise control over greedy executives. Similarly, when a takeover or merger takes place, it is clear to the business press and to its readership whose ox is about to be gored and who is the person to get on side if one's interest is to be safeguarded. That is, in a concentrated capital market like Australia's (or Canada's) there is no mystery about the fact that some easily-identifiable shareholders have more clout than others over the affairs of a corporation and that they can be expected to take action for and against the corporation and its management. More, our statutes provide that markets need to be notified when major shareholders do things, eg, sell, purchase, nominate someone on a board, sell or buy things from the corporation. For capital market purposes, we are more than willing to treat identifiable shareholders as activists, or people who should be activists, within the corporation. I don't think it technically would be any harder to do so when it comes to the violation of our established legal rules designed to protect the public, violations from which they stand to profit. We can demand that they monitor and set standards of corporate behaviour lest they be held responsible for their wrongful conduct as if they were receivers of stolen goods.

It is not legal or economic logic that stands in the way, but a lack of political willingness to change our regulatory mindset. Only if we do change this mindset and force those who profit from corporate wrongdoing and skullduggery to face the consequences will questions be raised about the appropriateness of certain productive practices, about the desirability of risk-creation for the sake of profit. It is these questions that are not confronted when our regulatory schemes are devised on the basis that these issues are best left to formal and informal bargaining on a very uneven playing field.