THE USE OF PUBLICITY AS A CRIMINAL SANCTION AGAINST BUSINESS CORPORATIONS

By BRENT FISSE*

After noting past instances of judicial and administrative bodies formally publicizing adverse determinations of responsibility, Mr Fisse discusses the theoretical basis for the use of such sanctions against business corporations which breach regulatory statutes, in order to accomplish the major purposes of lowering corporate prestige and inducing government intervention, rather than to inflict a monetary loss. The author then examines the disadvantages involved, and in conclusion evaluates the usefulness of such 'limited formal publicity sanctions'.

Corporate criminal responsibility is at an uncertain stage of development. Extensive academic enquiry in this field during the last decade has produced a number of criticisms and suggestions, many of which involve important or fundamental questions. At the heart of current concern is the effectiveness or otherwise of the fine as a method of deterring business corporations, especially those which are large. In the U.S.A. the fine has been widely criticised on the grounds that fines imposed frequently have been much lower than the profits made by corporations from the commission of offences, and have not been felt by wealthy corporations. The maximum fines under most statutes are low and often the courts have not imposed even the maximum penalty.[1] In Australia fines against corporations have received little criticism. The reasons are not clear. The extent and nature of corporate crime, and the amounts of fines authorised by statute or imposed by courts have yet to be documented. We have no study corresponding to Sutherland's *White Collar Crime* or to the recent American surveys. Yet it is probable that the present debate in the U.S.A. and elsewhere is relevant in Australia, or will become so in the near future.[2]

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[1] Davids, 'Penology and Corporate Crime' (1967) 58 *Journal of Criminal Law, Criminology and Police Science* 524; Dershowitz, 'Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions' (1961) 71 *Yale Law Journal* 280, reprinted in Geis, *White-Collar Criminal* 136.

[2] See Leigh, *The Criminal Liability of Corporations in English Law* ch. 9; Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 *University of Chicago Law Review* 423, reprinted in Geis, *op. cit.* 388.

Academic dissatisfaction with the fine and with entity responsibility has given rise to three different basic suggestions for change. The first is that entity responsibility should be abandoned and a greater attempt should be made to locate and punish guilty individual officers and employees. This approach is scarcely novel but in recent times has found some tenacious and persuasive advocates.[3] Second, there is the possibility of discarding the notion that corporations are to be punished and deterred, and stressing instead the ideal that they should be reformed and rehabilitated. This suggestion has yet to be presented in detailed form but a preventive, behavioural approach has of course been the subject of considerable comment in the context of human offenders.

A third approach is to devise new entity sanctions, or to improve those now in use, so that effective deterrence will be achieved. Thus, many commentators have argued for higher maximum fines and some have suggested fines assessed on the basis of a percentage of corporate turnover or profits so that the monetary loss will be felt by large and wealthy corporations.[4] The hunt for an effective sanction has also led to the suggestion that the powerful force of public opinion be directed as a formal sanction against corporate offenders.[5] This suggestion is based upon the general belief that favourable public opinion is valued highly by business corporations. The methods of utilising public opinion as a formal sanction have yet to be worked out precisely, but mass media advertisements setting out the details of a corporation's criminal conduct, compulsory notification to shareholders and others by means of the annual report, and even a temporary ban on advertising are contemplated.[6] Clearly, these uses of publicity go far beyond the present informal and haphazard processes of news reporting.

This article is concerned with the third approach described above, and examines what publicity has to offer as a formal sanction in comparison to the fine. The scope of discussion is limited in several ways.

It is true that very heavy penalties are possible under revenue laws and have been imposed in several widely publicised cases concerning evasion of customs duties. *E.g. Anderson v. L. Vogel & Son Pty Limited* (1967) 41 A.L.J.R. 264. More recently fines amounting to one million dollars were imposed upon Godfrey Phillips International Pty Ltd, another company, and three company directors.

[3] Notably Leigh, *op. cit.* ch. 9. See also Mueller, '*Mens Rea* and The Corporation' (1957) 19 *University of Pittsburgh Law Review* 21. The substance of much of the literature is covered by Heerey, 'Corporate Criminal Liability — A Reappraisal' (1962) 1 *University of Tasmania Law Review* 677.

[4] See references in n. 1 *supra.*

[5] This view is currently being debated by the framers of the proposed new code of federal criminal law. I am indebted to Professor Louis Schwartz of the University of Pennsylvania Law School, and Director of the National Commission on Reform of Federal Criminal Laws, for indicating to me this future possible use of publicity sanctions and for making available to me the materials upon corporate criminal responsibility.

[6] The former two methods are contemplated in the reform proposals for the federal criminal law. See n. 5 *supra.* For mention of the possibility of an advertising ban, see Davids, *op. cit.* 530, n. 37.

First, the use of publicity as a formal sanction is emphasized. By 'publicity as a formal sanction' I mean publicity which follows upon a determination of responsibility by a court or administrative body, and which is activated for the purpose of imposing a sanction either by the court or administrative body itself, or by some other official agency.[7] An example is an advertisement of a conviction published by order of the court in which the conviction has been recorded. Publicity amounts to what may be described as an informal sanction in situations where charges, hearings, convictions or sentences are reported by the mass media at their own discretion.[8] An informal publicity sanction would also be imposed where warnings about consumer or investor deception are issued by an Attorney-General or by consumer groups and other bodies,[9] or where homilies or criticisms are given by a court at the time of conviction.[10] There are many situations in which publicity can operate as an informal sanction and sometimes it is difficult to say whether a publicity sanction is formal or informal. In placing emphasis upon the formal use of publicity I do not mean to deprecate the impact which informal publicity frequently has. Wherever possible this impact should at least be taken into account in determining the quantum of formal sanctions and restraints upon some forms of informal publicity may well be desirable.[11] Secondly, my focus is upon business corporations, although some points will also be relevant to other entities such as public instrumentalities. Third, no specific distinction is drawn between large and small corporations. However, the need for a sanction against the entity is much greater in the case of a large or 'endocratic' corporation and usually there is no need for publicity or other sanctions to be directed

[7] Where the publicity sanction is imposed by an agency other than that which determines D's responsibility problems of co-ordination in sentencing will usually arise. See text to n. 28 *infra.*

[8] See the discussion in the text to n. 49 *infra.*

[9] *E.g.* Consumers Protection Act 1964, s. 4(1)(a).

[10] *E.g. Houghton v. Trafalgar Insurance Company Ltd* [1953] 2 All E.R. 1409, a case kindly mentioned to me by my colleague Professor A. Rogerson.

Examples of informal publicity sanctions abound. The stigma of indictment or prosecution alone is often important, as indicated in U.S.A., *The Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955) 352-3. For further examples see *Pennsylvania Railroad System v. Pennsylvania Railroad Company* (1924) 267 U.S. 203, 215-7; Clinard, *The Black Market* 79-80; Moberly, *The Ethics of Punishment* 62; Windeyer, *The Law of Wagers Gaming and Lotteries in the Commonwealth of Australia* 142-3; Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225; Comment, 'Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices' (1969) 7 *Duke Law Journal* 1011; Indecent Publications Act 1963 (N.Z.), s. 17; 'Milk', a Victorian Milk Board advertisement in the Melbourne *Age,* 18 July 1970, 6.

[11] University of Adelaide Law School, *Report on The Law relating to Consumer Credit and Moneylending* (1969) 72; *Report to The Standing Committee of Attorneys-General on Special Investigations* (1969) 9-11; Rourke, *Secrecy and Publicity* ch. 7; Lemov, 'Administrative Agency News Releases: Public Information Versus Private Injury' (1968) 37 *George Washington Law Review* 63.

against small corporations.[12] Fourth, this article is aimed at providing some theoretical underpinning upon which future specific applications of publicity sanctions might be based, rather than at giving a treatment specifically related to different types of offences. A wide range of offences, from manslaughter to supplying unclean food or violating the penal provisions of the restrictive trade practices legislation, comes within scan. Finally, there is no consideration of possible problems of constitutional law which might arise from the use of publicity sanctions.[13]

The order of this article is as follows. A brief description of examples where publicity has been used as a sanction introduces a discussion of the targets which may be attacked by publicity for the purpose of achieving deterrence, and the forms of publicity most appropriate for reaching those targets. Then follows an account of the disadvantages suffered by publicity sanctions. The remainder of the article suggests how future publicity sanctions might be most effectively deployed. One terminological point: D stands for a corporation accused of an offence, and, in keeping with the reputed anonymity of those individuals who perform criminal conduct on behalf of large corporations, X represents an employee, at any level,[14] in respect of whose conduct it is sought to hold D responsible.

1. EXAMPLES OF PUBLICITY AS A SANCTION

Since the abolition of the stocks, formal publicity sanctions have been rare. However, a number of statutory provisions have provided for the publication of convictions, although some are no longer in force.

(a) *England*

Several Bread Acts in force in England during the first half of the nineteenth century contained provisions which authorised magistrates and justices to order publication of convictions in the case of persons responsible for adulterating bread. The following provision in section 10 of the Bread Act of 1822 is typical:

> It shall be lawful for the Magistrate or Magistrates, Justice or Justices, before whom any such Offender or Offenders shall be convicted, to cause the Offender's Name, Place of Abode and Offence, to be published in some Newspaper which shall be printed or published in or near the City

[12] Rostow's unhappy term 'endocratic' is used to describe the 'large publicly-held corporation, whose stock is scattered in small fractions among thousands of stockholders'. Dershowitz, *op. cit.* 281, n. 3.

[13] Would there be State power to compel television publicity? Are fines assessed on turnover, duties of excise? Would news media be exposed to liability interstate for defamation?

[14] In some jurisdictions, including those in Australia, a distinction is drawn between primary and vicarious corporate responsibility. Leigh, *op. cit.* ch. 6; Fisse, 'The Distinction Between Primary and Vicarious Corporate Criminal Liability' (1967) 41 *Australian Law Journal* 203.

> of *London* or the Liberty of *Westminster*, and to defray the Expence of publishing the same out of the Money to be forfeited—in case any shall be so forfeited as last mentioned, paid or recovered.[15]

Bentham states that in the case of such offences it was quite common for magistrates to threaten offenders with advertisement upon a second conviction, and that publicity was regarded as being a more severe punishment than the statutory fine.[16] Undoubtedly the intention of the legislature was to warn prospective buyers, but the additional elements of punishment and deterrence must have been contemplated. Adulteration of bread was a significant problem of the time and its comparative importance is shown by the fact that the publicity provisions did not extend to selling bread by short-weight, baking bread on Sunday or other offences.[17]

Publication of offenders' names was also possible under later legislation dealing with the adulteration of other items as well as bread. During the early history of food and drug legislation in the mid-nineteenth century many reformers stressed the value of publicity as a deterrent, and as a method of warning and educating.[18] The Adulteration of Food or Drink Act of 1860 enabled a court to order publication of the offender's name, place of abode and offence on the occasion of a second conviction for knowingly selling adulterated food or drink. Publication was authorised to be 'in such Newspaper or in such other Manner' as seemed desirable to the court and was at the expense of the offender.[19] A similar provision was enacted in the Adulteration Act 1872, an act which applied to drugs as well as to food and drink.[20] Despite widespread advocacy of the need for publicity sanctions, they were not made available in the Sale of Food and Drugs Act 1875.[21] It seems that the change was not due to any doubts about the efficacy of the sanction, but rather to a policy of *laissez-faire*.[22] The use of publicity has not been revived in this area, except that there does exist a provision in the

[15] 3 Geo. IV c. cvi (1822). Similar provisions were: 55 Geo. III c. xcix (1815), s. 3; 6 & 7 Will. IV c. 37 (1836), ss. 8 and 12; 1 & 2 Vict. c. 28 (1838), ss. 7 and 11.

[16] Bowring (ed.), *The Works of Jeremy Bentham* 460. The statement in Leigh, *op. cit.* 159 that power to order publication existed only in the case of a second offence seems wrong.

[17] See 6 & 7 Will. IV c. 37, ss. 6 and 14, and Court, *A Concise Economic History of Britain* ii. 236.

[18] See Stieb, *Drug Adulteration* 136-8, where numerous useful references are collected.

[19] 23 & 24 Vict. c. 84 (1860), s. 1. Stieb, *op. cit.* 288 n. 16, errs in stating that '[t]he clause providing for publication of names disappeared from the final 1860 Act'.

[20] 35 & 36 Vict. c. 74 (1872), s. 2. See also 32 & 33 Vict. c. 112 (1869), s. 3.

[21] Stieb, *op. cit.* 141. However, note the publicity sanction under 54 & 55 Vict. c. 76 (1891), s. 47(4) relating to sale of unfit meat.

[22] Stieb, *op. cit.* 141.

Weights and Measures Acts of 1889 and 1936 which enables a court to have the conviction of any offender published in such a manner as it considers desirable.[23]

(b) *Australia and New Zealand*

In Australia and New Zealand publicity sanctions have rarely been adopted in weights and measures legislation,[24] but are very common in food and drugs laws.[25] The publicity sanctions relating to food and drugs differ in several respects.[26] The provisions in South Australia, Queensland, New South Wales and Tasmania, unlike those in New Zealand and Victoria, require a second conviction, although not necessarily for exactly the same offence. In South Australia publication is ordered by the court, which has a free hand as to the method of publication. In New Zealand, the court also orders publication, but the only method of publication is by newspaper. Under the Victorian legislation publication in respect of a first offence requires a court order, and the Government Gazette is the only medium possible. In the case of a subsequent offence, the administrative body responsible for the operation of the food and drugs legislation automatically inserts a notice in the gazette, and publication in a newspaper is also possible where a court so directs. Publication in Tasmania and New South Wales is at the discretion of the relevant administrative authority and publication is to be in the gazette, or in newspapers as well. The same is true of Queensland except that the notice in the gazette may also be posted up outside the offender's place of business.[27] An important feature peculiar to the provisions in Queensland, Tasmania and New South Wales is that the court does not have control over the use of publicity. Consequently problems of co-ordination in sentencing may arise.[28]

[23] Weights and Measures Act 1889 (Eng.), s. 14; Weights and Measures Act 1936 (Eng.), s. 8(1). Note also the survival of the publicity sanction provided under 32 & 33 Vict. c. 112 (1869), s. 3.

[24] Only New Zealand has such a provision: Weights and Measures Act 1925, s. 37.

[25] Pure Food Act 1908 (N.S.W.), s. 3; Health Act 1937 (Qld), s. 151; Health Act 1958, s. 294; Food and Drugs Act 1947 (N.Z.), s. 28; Food and Drugs Act 1910 (Tas.), s. 58; Food and Drugs Act 1908-1962 (S.A.), s. 48. For earlier examples see Adulteration of Food or Drugs Act 1880 (N.Z.), s. 40; Licensing Act 1908 (N.Z.), s. 236. Early Bread Acts in Australia apparently did not follow the English practice. See Bread Act 1835 (N.S.W.); Bread Act 1845 (S.A.); and Bakers and Millers Act 1865.

[26] The only feature common to all the provisions is that the penalty imposed upon D must be mentioned. In this respect they differ from s. 10 of the Bread Act 1822, which required publication of D's *offence* and not necessarily the penalty. See text to n. 69 *infra*.

A difference between the various provisions which is not mentioned in the text is that in New South Wales, Queensland and Victoria, publication is possible where only D's servant or agent has been convicted, and it does not appear necessary that the relevant conduct be within the scope of employment.

[27] Also, in Queensland, milk vendors can receive further exposure. The notice in the gazette may be posted upon any vehicle used in connection with the sale or distribution of milk.

[28] See n. 7 *supra*. The position would be different if gazette notices were required *automatically* upon conviction in a court, as in the case of the gazette notice which

Another example of publicity as a sanction is to be found in the income tax laws. In Australia the Commissioner of Taxation is required to furnish, for presentation to Parliament, an annual report in which he must 'draw attention to any breaches or evasions . . . which have come under his notice'.[29] The 1969 report[30] contains only bare details of criminal prosecutions without any reference to the names of tax offenders,[31] but much fuller particulars, including names, are supplied in respect of cases where income has been understated but no prosecution has been launched.[32] This current interpretation of the report requirement indicates that publication is regarded as unnecessary where tax evaders are prosecuted. Apart from a desire to keep the administration of revenue laws open to parliamentary and public scrutiny,[33] publication is used to achieve deterrence without the expense and inconvenience of criminal prosecution.[34] The New Zealand income tax legislation requires the commissioner to publish in the gazette the names of tax defaulters and other specified particulars.[35] This information is laid before Parliament, as in Australia. Full particulars are required in respect of cases resulting in conviction as well as cases dealt with solely by the taxation department.[36] Thus, unlike the position in Australia, adverse publicity is regarded as a sanction which should accompany a fine or gaol sentence imposed by a court.

the Victorian food and drugs agency is required to insert automatically upon a second conviction. However, compare the position in Victoria in the case of a first offence. Under the Health Act 1958, s. 294(1) a conviction 'may' be published by the administrative authority 'if the court so directs'.

[29] Income Tax Assessment Act 1936-1969 (Cth), s. 14. Similar provisions appear in the statutes relating to sales tax, pay-roll tax, estate duty, gift duty, and the stevedoring industry charge. See also Customs Act 1901-1968 (Cth), s. 265; Trade Practices Act 1965 (Cth), s. 105.

It may be wondered why this type of publicity sanction is classified as 'formal' when the report to Parliament made by the Victorian Consumers Protection Council is not. The tax provisions more clearly relate to an administrative body charged with determining D's responsibility, a point evident from the provision made for appeals. The main functions of the Consumers Protection Council are to provide information and to warn. See also n. 50 *infra*.

[30] *Forty-eighth Report of the Commissioner of Taxation* 1968-69, (1969) Parliamentary Paper No. 53.

[31] In this respect, contrast the views of Latham C.J. in *Jackson v. Magrath* (1947) 75 C.L.R. 293, 304: '[a] description of a breach of the Act which does not identify the offender is a very imperfect description'. *Ibid.* 314, *per* Dixon J.

[32] The particulars given are name and address, occupation, financial year of evasion, amount of understated tax, increase in assessed tax, and additional tax charged. Details relating to corporate offenders are set out separately.

[33] Letter to author from Mr P. J. Lanigan, Second Commissioner of Taxation, Canberra. See also *Jackson* v. *Magrath* (1947) 75 C.L.R. 293, 312, *per* Dixon J.

[34] *Ibid.* 295; and see Lee, 'The Enforcement Provisions of the Food, Drug and Cosmetic Act' (1939) 6 *Law and Contemporary Problems* 70, 90.

[35] Land and Income Tax Act 1954, s. 238. The particulars required are the name, address, occupation of the defaulter, such particulars of the offence or evasion as the commissioner thinks fit, year of evasion or offence, amount of tax evaded and penalty.

[36] *Ibid.* s. 238(1)(a).

A final example is the use made of publicity in Australia under the Black Marketing Act 1942 (Cth), a statute in force until shortly after the end of the war. This legislation, which was passed in order to strengthen the sanctions available to enforce the prices regulations made under the National Security Act 1939,[37] contained a number of sections designed to make extensive use of adverse publicity. Details of convictions for the offence of black marketing were required to be published in the Commonwealth Gazette.[38] At the time of conviction the court was required to order a notice or several notices of the conviction to be displayed at the offender's place of business continuously for not less than three months.[39] The court was also required to decide the size, lettering, position, and content of such notices.[40] Every notice was to be headed in bold letters 'Black Marketing Act 1942', and the entire notice was to be easily legible to prospective buyers or other persons conducting business at the offender's place of business.[41] If such a notice would not effectively draw the conviction to the attention of persons dealing with the offender, a court could direct that a similar notice be displayed for three months on all business invoices, accounts, and letterheads.[42] In addition, the Attorney-General was authorised to direct newspaper publication or radio broadcasts of particulars relating to any black marketing offence.[43]

Although it is highly doubtful whether newspaper or radio publicity was used often,[44] all cases prosecuted under the Act were intended to be publicised by notices and description in the gazette.[45] Even this limited form of publicity may not have been used extensively. Despite the government's belief that profiteering was a grave offence,[46] it is likely that the Black Marketing Act was aimed at only the more serious breaches. The vast majority of cases were almost certainly dealt with under the National Security Act, which did not make available any

[37] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 24 September 1942 863, *per* Dr Evatt. These provisions seem to have been peculiar to Australia. In the U.S.A. the OPA used publicity extensively but the methods were informal, and in the main were confined to newspaper reports of court actions. Clinard, *op. cit.* 79-80; Redford, *Administration of National Economic Control* 172.

[38] Black Marketing Act 1942, s. 14 (1).

[39] *Ibid.* s. 12 (1). See also s. 12 (2).

[40] *Ibid.* s. 12 (1).

[41] *Ibid.* s. 12 (4).

[42] *Ibid.* s. 12 (5).

[43] *Ibid.* s. 14 (2) (newspaper); s. 13 (1) (a) & (b) (radio).

[44] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 25 September 1942 1000, *per* Dr Evatt.

[45] But see n. 48 *infra.*

[46] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 25 September 1942, 975 ff. For Dr Evatt black marketing was 'little short of treason'.

formal publicity sanction.[47] The precise number and the nature of the cases prosecuted under the Black Marketing Act are unknown, but probably the main targets were corporations, against which fines alone were considered by the framers of the legislation to be inadequate.[48]

(c) *U.S.A.*

Recent suggestions that publicity be used as a formal sanction have been made in the U.S.A. but past experience in that country has for the most part been confined to informal publicity sanctions. This experience is considerable.[49] Publicity has often been used by administrative agencies for the purpose of warning the general public.[50] The Securities and Exchange Commission frequently issues news releases relating to stop-order proceedings and other matters, and news releases containing details of charges and proceedings are commonly issued by other agencies, particularly the Federal Trade Commission and the Food and Drug

[47] This is indicated by the Black Marketing Act 1942, s. 4 (4) which required the written consent of the Attorney-General to proceedings under the Act. Also required were reports from the Minister responsible and a special committee constituted under s. 4(4). See also Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 24 September 1942 865, *per* Evatt. *Ibid.* 25 September 1942 993, *per* Calwell.

Two cases reported are *Fraser Henleins Pty Ltd v. Cody* (1945) 19 A.L.J. 84 and *All Cars Ltd v. McCann* (1945) 19 A.L.J. 129. The order made by the magistrate in the *All Cars* case recited that D should 'exhibit outside its place of business at 28 Grote Street, Adelaide, alongside the main entrance door and also inside the same premises alongside the door of the office of Louis Bernard Steinke at the said premises the following notice:—

"BLACK MARKETING ACT, 1942.

On the 15th day of March, 1945, in the Adelaide Police Court All Cars Limited was convicted with others of the offence of black marketing, in that it sold a second-hand motor car at a price which exceeded the maximum price fixed by the National Security (Prices) Regulations by the sum of £76.8s.11d." and to keep them so exhibited continuously for a period of six months from this date, the heading "Black Marketing Act, 1942", of the notice to be in two inch type, and the lettering of the body of the notice to be of a size equal to the capital lettering of the type of a typewriter similar to the Remington in use in the number 2 Courtroom, Adelaide Police Court.'

Transcript in the High Court of Australia, South Australian Registry, No. 1 of 1945, 66. I am indebted to Bruce Roberts Esq., an Adelaide solicitor, for making a copy of this transcript available to me.

[48] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 24 September 1942 866, *per* Evatt. *Ibid.* 1 October 1942 1177, *per* Cameron. The cases reported in the Commonwealth Gazette concerned only individual offenders ((1943) 2219-20; (1945) 165), but I think it would be unwise to assume that all cases were published in the gazette. For example, I found no trace of the two cases concerning corporations cited in n. 47 *supra.*

[49] But consider Theodore Roosevelt's Bureau of Corporations. See n. 85 *infra.*

[50] Davis, *Administrative Law Treatise* i. 234, 250; *Ibid.* iii. 317; Rourke, *op. cit.* 13, 124-35; 'Federal Alcohol Commission', *Monograph No. 5 of the Attorney-General's Committee on Administrative Procedure,* 16, Administrative Procedure in Government Agencies, U.S. Senate Doc. No. 186, 76th Cong., 3rd Sess. (1940); Lee, 'The Enforcement Provisions of the Food, Drug, and Cosmetic Act' (1939) 6 *Law and Contemporary Problems* 70, 90; Lemov, *op. cit.;* Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 232-8.

Administration.[51] Such news releases are intended to be preventive rather than punitive measures,[52] but have been generally recognised as an informal sanction having a significant punitive and deterrent effect.[53] In the recent case of *F.T.C. v. Cinderella Career & Finishing Schools, Inc.*,[54] which arose from an F.T.C. news release concerning a charge that D had used misleading advertising to induce persons to sign contracts for its courses, the Court of Appeals for the District of Columbia stated that it had 'no doubt that a press release of the kind herein involved results in a substantial tarnishing of the name, reputation, and status of the named respondent throughout the related business community as well as in the minds of some portion of the general public'.[55] However, many releases issued by the F.T.C. are apparently ignored by the mass media on the grounds of triviality and lack of public interest,[56] and find their way only into such specialised publications as the Consumer Reports. Usually the news media will publish releases issued by the various agencies provided that they concern such matters of immediate concern to the general public as false or misleading security promotions, serious consumer frauds, and impure or dangerous food and drugs. Yet fair employment cases under state law and antitrust cases have also been reported frequently, notwithstanding their relative lack of popular appeal.[57]

It is more difficult to find examples of formal publicity sanctions. One example appears in the Food, Drug and Cosmetic Act (1938). Under section 375 (a) the Secretary of Health, Education and Welfare is required to 'cause to be published from time to time reports summarising all judgments, decrees, and court orders [under the Act] . . . including the nature of the charge and the disposition thereof'.[58] The

[51] See Lemov, *op. cit.* in respect of the SEC and the FTC. As regards the FDA, the Food, Drug and Cosmetic Act (1938), 21 U.S.C. s. 375 (b) provides that the Secretary of HEW may 'cause to be disseminated information regarding food, drugs, devices or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer'. This type of FDA publicity is informal, unlike that authorised under s. 375 (a), as discussed in the text. For a description of FDA publicity sanctions see: *Hoxsey Cancer Clinic* v. *Folsom* (1957) 155 F. Supp. 376; McKay, 'Sanctions in Motion: The Administrative Process' (1964) 49 *Iowa Law Review* 441, 457-8; Comment, 'Developments in the Law — Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1115.

[52] Loss, *Securities Regulations* i. 310. However, see Arens and Lasswell, *In Defense of Public Order* 63-6.

[53] Lee, *op. cit.;* Rourke, *op. cit.* (Consumer Reports (U.S.), June 1968, 308.) The problems have been discussed recently by Lemov, *op. cit.* The effect of some news releases has been particularly severe, as in the case of the contaminated cranberries incident. Rourke, *Secrecy and Publicity* 127-8.

[54] 5 Trade Reg. Rep. (1968 Trade Cas.) TT 72385.

[55] *Ibid.* 85144-5.

[56] Letter to author by Professor Louis M. Starr, Graduate School of Journalism, Columbia University.

[57] Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 236-8.

[58] 21 U.S.C., s. 375 (a). These reports, since February 1967, have appeared in a periodical, FDA Papers.

For Canadian provisions no longer in force see Leigh, *op. cit.* 159.

Secretary's reports have been regarded as producing a significant deterrent effect additional to that resulting from other sanctions.[59]

A further example, of greater fame, is the blue eagle campaign conducted by the National Recovery Administration, a body established in 1934. Corporations which refused to co-operate in the economic programs of the N.R.A. were not allowed to display on their products or elsewhere the blue eagle emblem. Public speeches and ticker-tape parades made this emblem the subject of moral pressure. Few corporations could afford not to display the emblem, and the possibility of disqualification was in itself sufficient to compel compliance, at least during the early stages of the N.R.A. programmes.[60] This type of publicity sanction is interesting in that compliance with the law, or rather non-detection, produces a form of publicity which is advantageous to D. The usual type of publicity sanction produces no official reward; the stress is upon adverse or negative publicity in the event of non-compliance.[61]

2. AN ENQUIRY INTO PURPOSES

The main claim of those who advocate the use of formal publicity sanctions is that publicity has effects important for deterrence. But what precisely are these effects?

First, there should be considered the use of publicity to inflict monetary loss. For example, advertisements describing D's offence may lead to a downturn in sales of such moment that a large financial loss results.[62] Or possibly D's shares may drop in value thereby diminishing the amounts of capital which can be obtained for expansion.[63] There is no doubt that publicity sanctions in the past have been used at least in part for the purpose of inflicting a monetary penalty. The N.R.A. blue eagle emblem campaign and the Australian Black Marketing Act are clear examples. Yet the case for using publicity as a deterrent measure is weak if infliction of monetary loss is the only effect desired. Why not simply

[59] Lee, *op. cit.;* Comment, *op. cit.* 1005, 1115.

[60] Rourke, *Secrecy and Publicity* 132; Swisher, *American Constitutional Development* (2nd ed.) 895-6. By the beginning of 1935 withdrawal of the blue eagle emblem had become much less effective and provided a real threat only to those corporations anxious to win government contracts. Chamberlain, Dowling and Hays, *The Judicial Function in Federal Administrative Agencies* 107.

For a good account of the NRA and the blue eagle campaign see Schlesinger, *The Coming of the New Deal* 108 ff.

[61] Rewarding honest businessmen may be an important aspect of enforcement. Clinard, *op. cit.* 357. But is a reward a 'sanction'? Austin, *The Province of Jurisprudence Determined* 16-7.

[62] Particularly if the advertisement provokes concerted consumer pressure. See Comment, 'Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices' (1969) 7 *Duke Law Journal* 1011.

[63] A drop in share prices would not affect expansion programmes where D can obtain money from other sources such as accumulated reserves. There is also the possibility of monetary loss where competitors take advantage of D's misfortune. See n. 58 *infra.*

increase fines to such a level that the same monetary loss can be inflicted? To argue that as a matter of political reality it would be impossible to enact such large maximum fines, or that judges would not impose large fines even if they were made possible, misses the point that the same problems face publicity sanctions.

A much stronger case for the use of publicity can be made out if it is sought to achieve deterrence by inducing loss of prestige or respect, provided that 'prestige' and 'respect' are not merely qualities which reflect financial standing. A fine will produce a loss of prestige to the extent that prestige is governed by wealth[64] and, as indicated above, there is little point in using a publicity sanction solely for the purpose of inflicting a monetary loss. However, there is much more to the notions of prestige and respect than financial standing.[65] Even the wealthy may wilt from social disapproval. Thus, a publicity sanction which lowers prestige or respect may well have a deterrent potential beyond that of the fine. This power of publicity is of particular importance in an area of crime inhabited by white-collar offenders rather than by under-privileged people or members of deviant sub-cultures. Undoubtedly these appealing features influenced the architects of the blue eagle campaign, the publicity sanctions in food and drugs legislation, and the Black Marketing Act.

Publicity might also be used to induce government intervention. Various forms of government intervention may be triggered off by publicity more easily than by conviction and fine.[66] The possibilities include formal enquiries, appointment of official administrators, more active investigation and enforcement by prosecuting agencies, new regulatory legislation, unfavourable changes in tax or tariff structures,[67] black-listing in respect of government contracts,[68] and unsympathetic treatment of requests for

[64] Prestige is often linked very closely with financial standing. The concern of some writers is almost exclusively with the monetary aspect of prestige and images. See Bristol (ed.), *Developing the Corporate Image;* Lauterbach, *Men, Motives, and Money* (2nd ed.) 227; Riley (ed.), *The Corporation and its Publics.*

[65] Berle, *The Twentieth Century Capitalist Revolution* 90-1; Cheit, *The Business Establishment* 184, 188, 191; Katona, *Psychological Analysis of Economic Behaviour* 204; Riesman, *The Lonely Crowd;* Ross, *The Image Merchants* 266-7; Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225. In the U.S.A. the new ideals of graduates seeking employment indicate a further important aspect of prestige or respect which is independent of wealth. See Baumhart, *Ethics in Business* 106; Note, 'Libel and the Corporate Plaintiff' (1969) 69 *Columbia Law Review* 1496, 1510.

[66] I am not suggesting that the decision of a criminal court should compel action by governmental agencies, which, as I see it, would make such use of the publicity received as they see fit. Contrast Salwin, 'Japanese Anti-Trust Legislation' (1948) 32 *Minnesota Law Review* 588 where it is noted that Japanese courts have power to ban violators from obtaining government contracts.

[67] Dr J. Cairns, M.H.R. has indicated informally to my colleague Mr M. Detmold his preference for controlling certain forms of restrictive trade practices by means of tariffs.

[68] Cheit, *op. cit.* 150-1; McFarlane, *Economic Policy in Australia* 34; Weissman, *The Social Responsibilities of Corporate Management* ch. 8; Dershowitz, *op. cit.* 289, n. 37.

financial assistance from the government. Several of these possible forms of government intervention will be feared principally because of the prospect of monetary loss. Unfavourable changes in tax or tariff structures and unsympathetic treatment of requests for financial assistance fall into this category. In such cases a fine would be much more appropriate than a publicity sanction. However, consider the appointment of an official administrator or increased investigation by a prosecuting agency. These types of intervention will be feared not simply because of monetary loss but more because of resentment of government intervention itself. It may be added that many forms of government intervention which are feared mainly because of monetary loss will also produce loss of prestige. Black-listing in respect of government contracts is a case in point.

Publicity therefore may have a useful role to play as a deterrent sanction by instilling fear of loss of prestige or fear of certain forms of governmental intervention. Publicity may also be well-cast if used for three supplementary purposes. First, publicizing the sanction imposed upon D may be expected to increase the general deterrent impact of that sanction.[69] Most publicity sanctions have the unusual advantage of being self-publicizing. If conventional sanctions such as the fine are accompanied by a publicity sanction, the advantage is shared. Second, publicity may be used to warn prospective buyers of defects in products, of deceptive advertising, or of consumer fraud, and to warn investors of fraud or simply of D's tendency to violate regulatory provisions and thereby to expend profits in payment of fines and costs. Admittedly, a warning issued upon conviction is not as timely as is desirable, but at least there would be an improvement upon the present incomplete warning system. Third, publicity could be used to inform the public about the operation of the relevant legislation. The educative and moralizing effect of such publicity could increase the level of compliance, particularly in the long term.[70] An increase in condemnation, and a more widespread internalization of the norms embodied in the legislation concerned might even make further publicity unnecessary.

3. THE FORM OF PUBLICITY SANCTIONS

The form of publicity sanctions is determined by the purposes pursued. The following discussion concerns the different forms of publicity which are appropriate for the possible primary purposes of lowering prestige, inducing

[69] See Moberly, *The Ethics of Punishment* 51.

[70] A recent article is Hawkins, 'Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects' [1969] *Wisconsin Law Review* 550. However, see Ball and Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View' (1965) 17 *Stanford Law Review* 197, reprinted in Geis, *op. cit.* 410. On the use of legislative hearings and enquiries and attendant publicity in the U.S.A. to reinforce values see Truman, *The Governmental Process* 385; Rourke, *op. cit.* 225, 227 ff.

monetary loss, and inducing government intervention, and for the possible supplementary purposes of warning, moralizing and notifying prospective offenders of penalties imposed upon convicted offenders.

(a) *Lowering Prestige*

If publicity be used for the purpose of lowering prestige, an important enquiry is whether the prestige of corporate employees should be lowered as well as the prestige of the corporation itself. Corporate prestige will be reflected upon officers and employees but sanctions directed at the entity's prestige will have less effect upon individual officers and employees than sanctions which overtly attack personal status and prestige. This enquiry reaches into the very basis of corporate or entity responsibility. Why not convict the guilty individual employees and abandon the concept of corporate responsibility? The answers to this question have not always been compelling.[71] Probably the most convincing explanation for entity responsibility is that it is difficult to locate guilty individuals in the corporate hierarchy, particularly in the case of large enterprises.[72] Further, some individual employees may be so much in the thrall of their corporate employer that they are prepared to risk their personal fame and fortune in order to advance what they consider to be the corporation's interests.[73] Thus, possibly in a large number of cases, sanctions against the entity provide the only method of deterrence effective against individual employees. For the purpose of this article the assumption will be made that corporate responsibility rests firmly upon the above grounds.

Assuming that entity sanctions are justified, should publicity sanctions against corporations also be directed at individual employees? Should the directors and superior officers be expressly identified in advertisements which describe D's conviction? Should any guilty employees who have been located and convicted be identified? First, it would seem unnecessary to identify those guilty employees who have been convicted. The main purpose of entity responsibility is not to provide additional sanctions against convicted employees, but to provide a method of deterring those guilty individual employees who cannot be located and convicted. Admittedly the purpose of entity responsibility is to provide an additional sanction in the case of employees who are prepared to sacrifice themselves on behalf of the corporation, but the dedication of such employees may mean that even personal adverse publicity would be

[71] See Leigh, *op. cit.* ch. 9.

[72] As in the important U.S. electrical equipment conspiracy cases in 1960-1. See Geis, 'The Heavy Electrical Equipment Antitrust Cases of 1961' in Geis, *op. cit.* 103; and Smith, *Corporations in Crisis*, chapters 5, 6. In some situations there may be no guilty individual employee even in theory. *R. v. Australasian Films Ltd* (1921) 29 C.L.R. 195.

[73] See n. 72 *supra* and Model Penal Code, Tentative Draft No. 4, 148-9.

of little effect.[74] There is the further point that in situations where only a few guilty employees have been located, the severity of identification by advertisement seems unfair, particularly where there is reason to suspect that officers in higher positions have been implicated.[75]

Second, should an advertisement describing D's conviction identify all directors and superior officers irrespective of whether they have been convicted as individual offenders? Clearly there are serious objections to such an approach. In particular it should be realised that the power of sanctions against entities is indirect and diffused, and therefore a more potent sanction usually will be necessary than in cases where sanctions can be applied directly to individual persons. The suggested use of publicity as a sanction against corporations reflects a desire to use potency to counter dissipation of effect. If publicity is used because of its severity it would be inappropriate to extend the sanction to individual officers and employees. A fine or some other conventional sanction would be more fitting. Further, an obvious objection to automatic identification of directors and officers is that a type of strict responsibility would be involved in which defences or mitigating circumstances could not be pleaded.[76] Provision for a court hearing could be made, but an approach so closely concerned with individual responsibility goes far beyond the scope of entity responsibility, the subject of this discussion.

There is also the question whether D's products should be the target of adverse publicity, assuming that the aim is to inflict loss of prestige upon D rather than monetary loss. Attacks upon D's products in many cases would produce a loss of prestige (in a non-monetary sense) but the clear risk of substantial monetary loss seems to preclude this approach,[77] if the view be held that only the fine should be used to inflict a large monetary penalty. Instead the emphasis should be upon lowering the prestige of the corporation itself. Attempts to lower corporate prestige will have a crossover effect which causes some reaction against D's products, but it is far from correct to say that our impressions of a corporation coincide with our estimation of its products. We may dislike a corporation and yet favour its products or services.[78] Thus, if D's convictions are to be advertised, the content of the advertisement should stress D's wrongdoing and should not discourage the purchase of D's products or services. The Australian and New Zealand tax provisions,

[74] However, see Model Penal Code, Tentative Draft No. 4, 149.

[75] As in the electrical equipment cases, *supra* n. 72. See also Arnold, *The Folklore of Capitalism* 10.

[76] Consequently it would also be inappropriate to require all directors and superior officers to attend court when D is convicted and to be exposed personally to criticism from the court.

[77] See text n. 64 *supra*.

[78] Carlson, 'The Nature of Corporate Images', in Riley (ed.) *op. cit.* 24, 27. Similarly, we may dislike South Africa and yet like its wines, tobacco and cricketers, and Juliet Prowse.

which require mention of the corporate offender's name but not the precise nature of its business operations, may be based upon this principle.[79] However the Black Marketing Act and the N.R.A. blue eagle campaign were clearly aimed in part at discouraging the purchase of D's products since profiteering notices and the blue eagle emblem were forms of publicity very closely associated with D's products and D's day to day contact with the world of commerce. Those provisions in the Bread Acts and in food and drugs legislation which provide for publication by newspaper probably were also designed to inflict a substantial monetary loss. The nature of the subject matter is such that avoidance of monetary loss by D would be surprising. On the other hand, provisions in food and drugs legislation which require publicity only in the gazette are little concerned with inflicting monetary loss and seem aimed primarily at inducing loss of prestige and recording information for the use of government departments.

(b) *Inflicting Monetary Loss*

If publicity is used for the purpose of inflicting monetary loss upon D it should be directed at decreasing the volume of sales of D's products or services.[80] Decreasing the volume of sales might be accomplished by a positive appeal to consumers not to purchase, or by a ban on advertising. An appeal to consumers not to purchase has been used in newspaper advertisements describing convictions relating to food and drugs, and in the notices and emblems used under the Black Marketing Act and the blue eagle campaign respectively. The appeal 'Do not buy' is not explicitly stated in such instances, but the implication is obvious, particularly in the case of profiteering notices. An advertising ban has yet to be used, but the possibility has been suggested.[81] As a method of inflicting monetary loss, banning advertising is probably more potent than adverse publicity but it is much less likely to produce the additional desirable effect of lowering D's prestige. Furthermore, if an advertising ban is used instead of adverse publicity additional forms of publicity are required to warn, to educate or moralize, or to notify prospective offenders of the penalty which has been imposed upon D.

Where adverse publicity or an advertising ban is used to inflict monetary loss, it may be necessary to ask consumers to refrain from buying products which are sound or even superior to those offered by competitors. If the offence for which D has been convicted involves only one product and

[79] But see the discussion of 'innocent' products in the text *infra.*

[80] There is also the possibility of directly persuading shareholders to sell their shares, or to exert pressure upon management. I do not discuss this possibility. Suffice it to say that publicity only in the annual report would be an inefficient method. Contrast n. 6 *supra.*

[81] See n. 6 *supra.* The ban might be on all advertisements or possibly D may be ordered not to use an advertisement which is popular and proven. *Cf.* Comment, 'Developments in the Law — Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1051.

D markets hundreds of products, should the sanction be designed to discourage purchase of that one product or should 'innocent' products also be affected? Alternatively, suppose that the particular product has been discontinued at the time of conviction or that the relevant offence concerned a defect in the product and the defect has been cured by the time of the conviction. Under a determined loss-inflicting approach presumably the infliction of a given monetary loss would be important, and therefore it might be necessary to discourage the purchase of 'innocent' products.[82] Many publicity sanctions in the past have not exempted 'innocent' products. For example, a newspaper advertisement describing an offence by D under the food and drugs legislation described above could comply with the statutory requirements although no reference is made to the precise drug or item of food involved.[83] Consequently, unwillingness to buy D's 'innocent' products could easily result, as in the situation where D manufactures an excellent range of drugs bearing the name of the corporation, and only one or two drugs have been impure or dangerous. In the case of some offences 'innocent' products will almost always be affected by a publicity sanction designed to inflict monetary loss. For example, if D understates its income for tax purposes, the offence committed does not relate to any particular product.

The element of distortion involved in persuading consumers not to buy 'innocent' products does not exist where D is fined or where use is made of a publicity sanction designed to lower corporate prestige by attacking D and not its products.

(c) *Inducing Government Intervention*

Exploitation of fear of government intervention suggests a form of publicity which makes clear the possible methods of intervention, and which is directed towards the persons and agencies most appropriate for instituting these methods of intervention. Thus, if new regulatory measures be the method of intervention desired, information in support of such new measures should be conveyed to politicians and law reform bodies. Increased surveillance by prosecuting agencies would require notification of persons in control of such agencies, and possibly there should be an interstate system of notification. Wider publication, by newspaper advertisement or similar means, would be relevant only to the extent that public pressure is necessary to achieve the particular form of government intervention. Ideally, the content of such newspaper advertisements, or the content of publicity directed towards politicians or government bodies would indicate the reasons why the method of intervention specified is desirable.

[82] Consider also the possibility of employing the sanction against those 'innocent' products which are the easiest to attack. Note that 'innocent' products would also be affected where *e.g.* D uses one trade name for all its products.

[83] See text to n. 27 *supra*.

Past and present publicity sanctions reveal that there has been little focus upon the use of publicity for the purpose of inducing government intervention.[84] Apart from the tax reports which must be laid before Parliament in Australia and New Zealand, publication of convictions in the gazette has been the only type of communication to official agencies which has been formally recognised. This form of communication is of a very limited nature. Under the Australian food and drugs provisions described above, gazette notices are not required to indicate whether there is any need for increased investigation of D's activities, or whether any weaknesses in the law are disclosed by the circumstances of D's offence. This is also the position in respect of the newspaper publicity commonly authorised in food and drugs legislation.

It is obvious from the discussion above that the principal problem is not so much the form of the publicity required to induce government intervention, but the nature of the body which is to design and direct that publicity. Clearly publicity appropriate to inducing government intervention would often require the courts to play an excessively political role. The most which could be expected of the courts would be some specific treatment in judgments of such matters as weaknesses in the present law, suspicion of additional undetected offences, the extent to which offences have been repeated, and the measures taken by D to remedy the cause of its offence. If such information were always to be found in judgments, publication in gazettes would be relatively simple, and by placing a greater emphasis upon fear of government intervention, this approach would be an improvement upon past practice. An alternative would be to create a government agency with a mandate to define methods of government intervention appropriate to D's case, and to design and implement the forms of publicity necessary to bring about such intervention. Theodore Roosevelt's ill-fated Bureau of Corporations is an example.[85]

(d) *Supplementary Purposes*

(i) NOTIFYING PROSPECTIVE OFFENDERS OF PENALTIES

Publicity may be used to increase general deterrence by informing prospective corporate offenders of the sanctions which have been imposed

[84] But see Lane, *Lobbying and the Law* 67-9, where provisions relating to dissemination of information about lobbyists are described.

[85] This agency was created in 1903 by a statute which established the Department of Commerce and Labor (see 32 U.S. Stat. at Large, 825). The major purpose was to marshal public opinion against various malpractices of large corporations, notably the trusts. Its function was not only to investigate particular companies but also to maintain an enquiry on an industry-wide level. See Roosevelt, *The Roosevelt Policy* i. 191-5, 236-7. Apparently the Bureau was disbanded after a very short time because of the need to obtain election funds from the large corporations. I have yet to find any writings which provide an adequate post-mortem.

A Bureau of this nature would create problems of co-ordination in sentencing. See n. 28 *supra*.

Consider also the suggestion in Lane *op. cit.* 168-9, that an administrative agency be created to make publicity effective in the context of lobbying.

upon D. Widespread notification is probably unnecessary. Notification to corporations and their employees alone would achieve the desired effect, and for this purpose a circular to all directors, officers, and employees at high levels would be more effective than a newspaper advertisement or a notice in a gazette.

(ii) WARNING CONSUMERS[86]

If it is considered desirable to provide a warning to consumers as well as to lower prestige or to produce some other deterrent effect, there are several basic requirements. A warning should relate closely to the matters which gave rise to D's offence. Warning prospective purchasers about 'innocent' products would be inappropriate. Further, a warning should be so positioned that it can easily be associated with the object to be avoided. If D is convicted of selling soap powder by short-weight and it is considered necessary to warn consumers, a prominent warning attached to the actual packets would be more effective than a mere warning in a newspaper advertisement.[87] On the other hand a newspaper advertisement identifying D rather than its products would be a more appropriate method of inducing loss of corporate prestige without inflicting a substantial monetary loss.

The design of publicity sanctions in the past has not always allowed an effective warning to be given. The food and drugs legislation now in force in Victoria, Tasmania and New South Wales suffers in this respect. Convictions are authorised to be publicized only in newspapers and the gazettes. Provision should be made for warnings more closely linked with the objects which are impure or dangerous. The Queensland legislation which allows notices to be posted up outside D's place of business is superior, but even more adequate warnings are possible in South Australia, where a court can order whatever form of publicity it considers to be necessary.[88]

(iii) EDUCATING AND MORALIZING

The view has been expressed frequently that an approach which seeks to educate and moralize by explaining the social impact of deviance and the aims of the legislation which has been violated is more effective than an approach which teaches merely that conduct is wrong because it

[86] I have considered only consumers in the text. Warning investors adequately requires a different approach, possibly along the lines of SEC procedures. In respect of warning the government and its agencies see the discussion in the text *supra* of the form of a sanction designed to achieve government intervention.

[87] It would be desirable, particularly in the case of products harmful to health, to require warnings to be placed upon items already in stock, or even to require seizure of those items. Clearly problems of compensation then arise.

[88] See n. 25 *supra*. The South Australian provision is similar to the Adulteration of Seeds Act 1869, s. 3 (n. 20 *supra*); Adulteration Act 1872, s. 2 (see n. 20 *supra*); Weights and Measures Act 1889, s. 14 (n. 23 *supra*); Adulteration of Food Act 1880 (N.Z.), s. 40 (n. 25 *supra*); and to Weights and Measures Act 1925 (N.Z.), s. 37 (n. 24 *supra*). For an example in the U.S. see 21 U.S.C. s. 375 (b), as applied in *Hoxsey Cancer Clinic v. Folsom* (1959) 155 F. Supp. 376.

attracts a penalty.[89] Most publicity sanctions have concerned matters where the impact of deviance and the aims of the legislation are so obvious that either no educative or moralizing effect is required or a brief description of the details of D's conviction and offence is sufficient; adulterated bread is adulterated bread. However some regulatory measures, such as those dealing with restrictive trade practices, are much more obscure and short statements of the type usually authorised in food and drugs legislation plainly do not offer an adequate method of enlightenment.

I turn now to an account, in three sections, of the disadvantages suffered by publicity sanctions. These sections are headed 'Problems of Persuasion', 'Counter-Publicity', and 'Uncertainty, Fiscal Loss, and General Disadvantages'. It should be stressed that this account of disadvantages is not a series of arguments aimed at proving the inutility of publicity as a sanction (though some might see it so), but a prelude to the composition of a publicity sanction which takes into consideration the difficulties outlined.

4. PROBLEMS OF PERSUASION

Considerable problems of persuasion arise if publicity sanctions are used in order to lower D's corporate prestige in the eyes of the general public, or to inflict a large monetary loss by asking consumers not to buy D's products or services. Effective persuasion may be difficult for any of four main reasons.[90] First, the characteristics of D and its products or services may create a favourable impression which is difficult to dislodge. Second, the methods of persuasion available are likely to be of limited effect. Third, the nature of corporations and corporate criminal responsibility creates problems of general understanding. Fourth, the type of offence committed by D may not be of popular concern.

The above problems arise in the context of mass media attempts to persuade the general public either to think less of D or to refrain from buying its products. Problems of persuasion also arise where publicity is used to induce government intervention, or to achieve the supplementary purposes of warning and educating and moralizing. The problems which arise in these contexts are mostly of a different nature from those which exist where lowering prestige or inflicting a monetary loss is the aim sought. Where government intervention is desired, political pressures, questions of finance, and reluctance to intervene in the operations of business corporations are the main sources of difficulty, not deep-seated consumer impulses or low levels of comprehension. The general problems of persuasion involved in inducing government intervention or in educating and moralizing are obvious, and a specialized account is beyond the scope of the present discussion.

[89] Hawkins, *op. cit.* 555-60.

[90] A further problem is lack of familiarity with many corporations. Riley (ed.), *op. cit.* 26, 28. Which company makes Maxwell House Coffee?

(a) *D's Favourable Characteristics*

Publicity directed against D for the purpose of lowering D's prestige or inflicting a monetary loss will usually be in competition with the favourable characteristics of D's products or D itself. Where such competition exists clearly it will be difficult to induce changes of attitude or habit.

Where lowering corporate prestige is the aim of a publicity sanction the factors competing for influence will arise from the many component parts of the notion of corporate prestige. A corporate image has been defined as a 'composite of knowledge, feelings, ideas and beliefs associated with a company as a result of the totality of its activities'.[91] The facts which can affect the image or prestige of a corporation are numerous and include the reputation of a corporation's products in respect of price, design, quality, servicing, and re-sale value; the amount of turnover, profits, dividends and growth; the appearance and size of the corporation's plant and offices; the nature of the corporation's advertising; the part played in the country's economic growth or stability; the extent of involvement in government projects such as the construction of weapons or space vehicles; the ability to innovate; working conditions and rates of pay; and the corporation's interest in local communities.[92] Although not all of these matters will influence any one particular public of a corporation, those which are of influence will often diminish or negate the effect of information relating to D's offence.[93] Consider the public of consumers. Their image of D will be much less affected by awareness of D's offence than by such matters as the quality and price of D's products and services. Furthermore, the range of activities in which the large modern business corporation is involved tends to dissipate the prestige-lowering effect of publicity about an offence. The prestige and status of individual offenders are not insulated by the same coverage of impressive achievements and good works.

The position is similar where adverse publicity attempts to persuade consumers not to buy products which are 'innocent'. Information about D's offence will compete for attention with consumer attitudes toward price, quality, and product desirability which are constantly revived by commercial advertising. However, this difficulty would not arise to the same extent if monetary loss is inflicted by means of a ban on advertising.

[91] Messner, *Industrial Advertising* 43. See also Bristol (ed.), *Developing the Corporate Image* 6-8, 36.

[92] See Bristol (ed.), *op. cit.* 210.

[93] See Arnold, *op. cit.* 193-4; Borden, *Advertising Management* (rev. ed.) ch. 9; Christenson and McWilliams, *Voice of the People* 99, 107 (Lippmann's stereotypes); Grunewald and Bass (eds.), *Public Policy and Modern Corporation* 356; the discussion of 'cognitive dissonance' in Kassarjian and Robertson, *Perspectives in Consumer Behaviour* 171; Lane, *Public Opinion* 53-4; Ross, *op. cit.* 168; and Weissman (ed.), *The Social Responsibilities of Corporate Management* 15.

Unlike adverse publicity, a ban on advertising reduces the exposure of a product or service and therefore is likely to lower the competitive influence of the favourable characteristics displayed by that product or service.

(b) *Methods of Persuasion*

Publicity sanctions designed to lower prestige or inflict a large monetary loss either face the problem that effective methods of persuasion have yet to be devised, or require methods which exist but are unlikely to be regarded as acceptable.

We may take as our starting point the following five principles of effective commercial advertising given by Lucas and Britt in their text, *Advertising Psychology and Research*:[94]

(i) The advertisement should relate to some sphere of self-interest.

(ii) There should be an unusual device to attract attention.

(iii) The message of the advertisement should be simple.[95]

(iv) The advertisement should appeal to feelings and emotions—appeal to reason or logic is insufficient.[96]

(v) The advertisement should make it abundantly clear to those persons exposed to it what they are supposed to do.

Can these principles be applied where a publicity sanction is used to lower corporate prestige? No doubt the first four principles could be applied successfully with but a little ingenuity. Advertisements headed 'The Truth about D' would be possible, and it is easy to imagine the use of simple emotive appeals to such areas of self-interest as health, curiosity and quality.[97] Although such methods of persuasion are not inconceivable, a more acceptable approach, and one not dependent upon the employment of advertising or publicity experts, would be simply to set out the details of D's offence in the manner of many existing publicity sanctions.[98] Unfortunately such a flat lifeless account of a corporation's conviction is of little popular appeal, and is reminiscent of 'tombstone' advertising, an outdated form of institutional advertising in which the integrity, faith, reliability and fidelity of a corporation is stressed.[99]

[94] 89.

[95] See Ogilvy, *Confessions of an Advertising Man* 110, 123-5; and the description of the advertisements used by Carl Byoir on behalf of the A & P chain stores, in Byoir, 'Paid Advertising — Best Aid to Public Relations' (1943) 203 *Printers Ink* 17.

[96] Length in itself is not objectionable. Ogilvy, *op. cit.* 108-10.

[97] Lucas and Britt, *Advertising Psychology and Research* 95-101. Lucas and Britt distinguish 'primary' and 'secondary' wants. Primary wants include ego-satisfaction, sex, leisure, social approval. Secondary wants include health, efficiency, quality, dependability, economy, curiosity and information.

[98] See the Black Marketing Act notice set out in n. 47 *supra*. Note also the judicial hesitance about publicity even in the context discussed by Austin, 'Antitrust Proscription and the Mass Media' (1968) 6 *Duke Law Journal* 1021.

[99] Bristol, *op. cit.* 174.

The fifth and last principle of effective commercial advertising formulated by Lucas and Britt, that advertising should indicate clearly what course of action is expected to follow, is more difficult to satisfy. An advertisement modelled upon the many publicity sanctions which have consisted essentially of a statement that D has committed an offence, would violate this fifth principle by leaving readers and viewers to draw their own conclusions as to what they should do.[1] Thus, to diminish D's corporate prestige, the relevant publicity should direct that something is to be done about D. But what should this be? Publicity directing persons not to buy D's products or services would be inappropriate since such a direction clearly would relate to inducing monetary loss and not to lowering prestige. The appropriate instruction is that D should be less highly regarded. However, an instruction of this nature is likely to be of limited effect since it requires an attitude change which is novel and which goes beyond the demands of most commercial advertising.[2] In this respect the following comparisons made by Lazarsfeld and Merton are instructive:

> Advertising is typically directed toward the canalizing of preexisting behaviour patterns or attitudes. It seldom seeks to instil new attitudes or to create significantly new behaviour patterns. 'Advertising pays' because it generally deals with a simple psychological situation. For Americans who have been socialised in the use of a toothbrush, it makes relatively little difference which brand of toothbrush they use. Once the gross pattern of behaviour or the generic attitude has been established, it can be canalized in one direction or another. Resistance is slight. But mass propaganda typically meets a more complex situation. It may seek objectives which are at odds with deep-lying attitudes. It may seek to reshape rather than to canalize current systems of values. And the successes of advertising may only highlight the failures of propaganda. Much of the current propaganda which is aimed at abolishing deepseated ethnic and racial prejudices, for example, seems to have had little effectiveness.[3]

Can Lucas and Britt's five principles of commercial advertising be applied satisfactorily where publicity is used for the purpose of inflicting monetary loss, as opposed to lowering corporate prestige? The principal problem is that an instruction not to buy D's products or services is even more demanding than an instruction to have less respect for D. We are asked not merely to change or form an attitude toward D, but to change

[1] See also Hovland, 'Effects of the Mass Media of Communication' in Lindzey (ed.), *Handbook of Social Psychology* ii. 1062, 1068, where there are mentioned several studies suggesting that messages which are not explicitly stated are likely to be lost upon the less intelligent members of the audience.

[2] In an interesting article Wiebe, 'Merchandizing Commodities and Citizenship on Television' (1951) 15 *Public Opinion Quarterly* 679, 686, suggests that a documentary radio program upon juvenile delinquency was successful in changing attitudes, if not in arousing action. However, unlike publicity of the nature likely to be used for the purpose of imposing a sanction, the radio programme in question was 'memorable' and its impact was 'vivid and compelling'.

[3] 'Requisite Conditions for Propaganda Success', in Christenson and McWilliams, *Voice of the People* 340, 341-2. See also Cutlipp and Center, *Effective Public Relations* (3rd ed.) 87; Hovland, *op. cit.*

a consumer behaviour pattern. The change required is different from that involved in merely switching brands as a result of commercial advertising since the reasons given as an inducement to change do not relate to areas of immediate self-interest.[4] We are not told to buy other products because they are superior or lower in price. Instead the instruction is to stop buying D's product because D has committed an offence. Except where D's offence relates to health, safety, or consumer or investor fraud, the appeal made calls for a personal sacrifice in the interest of some cause, which if actually stated, would often be remote.[5] However, the element of sacrifice could be concealed by using an advertising ban in place of adverse publicity. The same concealment would result from adverse publicity which depicts D's products in an unpleasant way, but clearly such an approach is unacceptable.[6]

(c) *Nature of Corporations and Corporate Criminal Responsibility*

Effective persuasion of the general public may also be difficult because of the impersonal nature of corporations and the peculiar concept of entity criminal responsibility. There is no need to dwell upon the impersonal nature of corporations or past preoccupations with anthropomorphism.[7] Greater difficulty stems from the nature of entity responsibility.

Four characteristics of entity responsibility create problems of persuasion. First, D may be criminally responsible for the conduct of employees lower in the corporate hierarchy than directors or high-ranking officers.[8] Although such conduct must be within the scope of X's employment, it will often seem remote from D's control centre. Contrast the impression which would exist where D's directors have been involved in a conspiracy to obtain money from the government by false pretences with that where the conspirators are only D's salesmen. Second, corporate criminal responsibility is a species of strict responsibility. D is held responsible for the conduct of its officers or employees irrespective of knowledge or negligence on the part of those manning the control centre.

[4] See n. 97 *supra*. Note also Clinard, *op. cit.* 93: 'The behaviour of many persons was often different when the discussion skipped from the general objectives of price and rationing control to actual specifics of everyday life'.

[5] Appeals for some personal sacrifice are likely to be successful only in times of national emergency. See the description of the Kate Smith bond selling program in Hovland, *op. cit.* 1072-3; and Wiebe, *op. cit.* 682-4.

[6] In the U.S.A. advertisements frequently depict cigarettes and rats as being unpleasant objects, but this form of advertising does not concern the use of the criminal law against a particular offender. See text to n. 13 *infra*. Some competitors use unpleasant advertising in order to overcome their commercial opposition. Ross, *op. cit.* 80. Some commercial advertisements unintentionally create unpleasant associations. Lucas and Britt, *op. cit.* 76-8.

[7] On the impersonal nature of corporations see Arens and Lasswell, *op. cit.* 121-2; Dershowitz, *op. cit.* 287, n. 37.
287, n. 37.

[8] This is more likely in the U.S.A. where no distinction is drawn between primary and vicarious corporate criminal responsibility. However, in Australian jurisdictions, where that distinction is drawn, the statement in the text is true in cases of vicarious responsibility. On these points see the references in n. 14 *supra*.

Consequently, in situations where it is apparent that D has taken reasonable care to avoid or prevent X's conduct, publicity may even result in sympathy. This obstacle would not exist where knowledge or negligence on the part of the control centre is proven, but since such proof is not required for corporate responsibility it will often be lacking. The difficulty mentioned here is even more acute when the offence committed itself imposes strict responsibility. Thirdly, in many cases some guilty individual employees are convicted as well as D. The convictions of individual persons may easily divert attention from the conviction of the corporation.[9] Further, if all guilty individual officers and employees are located and convicted, D's conviction may seem pointless. Finally, corporations can be held criminally responsible not only for the conduct of employees, but also for the conduct of agents, and independent contractors.[10] The justification for such attenuated forms of corporate responsibility will not always be readily appreciated, even by the relatively well-informed.

The difficulties above could be minimised by omitting mention of X's position in the corporate hierarchy, the absence of proof of knowledge of negligence, the fact that individual employees have also been convicted, or the remote nexus between D and say, a guilty independent contractor. Details of this nature rarely have been required for past publicity sanctions. However, such an approach is misleading and should be avoided. From this standpoint, a ban upon advertising would seem even less acceptable since a mere statement that D has committed an offence does at least create a greater chance that the existence of the above extenuating circumstances will be suspected.

(d) *Type of Offence*

Many offences committed by corporations are not of popular concern either because they fall outside the normal areas of self-interest, or because they do not fall into the category of well known offences such as murder or theft. Antitrust offences provide the usual examples.[11] There is the hope that the barriers in the path of persuasion might be broken down by some approach which attempts to explain the importance of the legislation which D has violated. A model might be found in Bentham's recommendations to a legislator anxious to win acceptance of legislation where public opinion is contrary, feeble, or neutral. For Bentham a

[9] This probably happened in the electrical equipment conspiracy cases referred to in n. 72 *supra*. Dershowitz, *op. cit.* 289, n. 37, describes a survey of newspapers which revealed that attention was focussed almost exclusively upon the individual guilty executives.

[10] Fisse, 'Vicarious Responsibility for the Conduct of Independent Contractors' [1968] *Criminal Law Review* 537, 605.

[11] See Cheit, *op. cit.* 151; Kadish, *op. cit.* However, see Flynn, 'Criminal Sanctions Under State and Federal Antitrust Laws' (1967) 45 *Texas Law Review* 1301, 1315-23.

legislator in that position should not stress the infamy or ignominy of the conduct. Instead appeal should be made to the reason of the people in the following manner:

> [The reasons] should be such as may serve to indicate the *particular* way in which the practice in question is thought liable to do mischief; and by that means point out the analogy there is between that practice, and those other practices, more obviously, but perhaps not more intensely mischievous, to which the people are already disposed to annex their disapprobation. Such reasons, if reasons are to be given, should be simple and significant, that they may instruct—energetic, that they may strike—short, that they may be remembered. Take the following as an example in the case of smuggling: *Whosoever deals with smugglers, let him be infamous. He who buys uncustomed goods, defrauds the public of the value of the duty. By him the public purse suffers as much as if he had stolen the same sum out of the public treasury. He who defrauds the public purse, defrauds every member of the community.*[12]

Bentham's approach might well be adopted for publicity sanctions imposed in respect of offences concerning those aspects of health and safety which are not commonly appreciated, or, as suggested by the passage above, revenue laws. However, not all offences are so readily described. The more novel or complicated the relevant regulatory measures are, usually the more difficult it will be to find an appropriate analogy. Where simple analogies are most necessary they are unlikely to be available. Or, if an analogy be found, it is likely to suffer from an undesirable level of distortion. Horizontal price fixing is not larceny or obtaining by a false pretence. Simple analogies are probably acceptable if used by a legislator when explaining the general purport of legislation, but when used in close association with a publicity sanction directed against particular offenders important questions of fairness arise.[13] The challenge upon grounds of fairness will be even stronger where D's offence involves complicated or disputed facts, or where the concept of corporate criminal responsibility causes the difficulties described earlier.

Distorted explanations of novel or difficult regulatory measures therefore should not appear as an integral part of publicity sanctions directed against corporate offenders. Some exceptions may be necessary during

[12] Bowring (ed.), *op. cit.* 465.

[13] See Arnold, *op. cit.* ch. 6. However, Bowring (ed.), *op. cit.* 465, made clear his dislike of untruths with the following reference to the smuggling example given in the text above:

'I say the public purse—I do not say the public simply. Far from the pen of the legislator be that stale sophistry of declaiming moralizers, which consists in giving to one species of misbehaviour the name and reproach of another species of a higher class, confounding in men's minds the characters of vice and virtue. Pure from all taint of falsehood should the legislator keep his pen; nor think to promote the cause of utility and truth by means which only tyranny and imposture can stand in need of. In what I have said above, there is nothing but what is rigorously and simply true. But it were not true to say that a theft upon the public were as mischievous as a theft upon an individual: from this there results no alarm, and the more the loss is divided, the lighter it falls upon each.'

times of national emergency. The N.R.A. blue eagle campaign stressed the importance of complicated economic recovery programmes by focussing attention upon a simple emblem, and this simple emblem was used for the purpose of imposing sanctions upon particular corporations. By contrast, the publicity sanctions authorised under the Australian Black Marketing Act were much more dependent upon the government explaining the evils of profiteering. Any misrepresentation or distortion present in those sanctions arose from their emotive content and not from any attempt to convey the importance of profiteering by means of badges of loyalty or simple analogies.[14]

5. COUNTER-PUBLICITY

The impact of a publicity sanction may be avoided or evaded by D in several ways. Counter-publicity, dissolution,[15] change of location, changing the name of the corporation or its products,[16] and product diversification, are possibilities. Counter-publicity is likely to be the most popular method of evasion or avoidance for the reason that usually it will be the least expensive, particularly in the case of large corporations. Furthermore, many forms of publicity sanctions will be seen as attacks requiring public retaliation rather than quiet retreat. For these reasons this section is devoted exclusively to counter-publicity.

Examples of counter-publicity measures introduce a discussion of the methods of persuasion available to corporate offenders in a publicity contest, and the capacity of counter-publicity to convert a publicity sanction originally aimed at lowering corporate prestige or inducing governmental intervention into a sanction which imposes a monetary loss.

(a) *Examples of Counter-Publicity*

In the U.S.A. the very history of modern corporate public relations began when government criticism and the assaults of Upton Sinclair and other muck rakers provoked response.[17] Numerous public relations campaigns have since been conducted by corporations in order to counter the effects of adverse publicity. The Standard Oil Trust and the great railroad combinations published in newspapers throughout the U.S.A.

[14] These methods of persuasion were used only during debate in parliament and in newspaper descriptions of the legislation. *E.g.* Dr. Evatt referred to black marketing as being 'little short of treason'. See n. 46 *supra.*

It is true that the words 'black marketing offence', as used in the publicity sanctions under the Act, could apply to offences involving the many complexities of the National Security (Obscurity?) Regulations. However, most offences presumably were of a simple nature.

[15] See Note, 'Corporate Dissolution and the Anti-Trust Laws' (1954) 21 *University of Chicago Law Review* 480.

[16] For example, D might rename a subsidiary in trouble so that the risk of connection is slight, or D might adopt a name similar to that used by a competitor. *Cf. Consumers' Reports,* October 1968, 515 (confusion over Goodyear's 'hatful of similar-sounding names for different tyres').

[17] Cutlipp and Center, *op. cit.* 34 ff.

'huge advertisements attacking with envenomed bitterness the Administration's Policy'.[18] The infamous Carl Byoir and his associates launched major campaigns on behalf of the A. & P. chain stores in respect of unfavourable tax laws and proposed anti-trust suits,[19] and also on behalf of the Eastern railroads in respect of possible legislation favourable to trucking companies.[20] Public relations guidance enabled McKesson and Robbins Inc., a well known pharmaceutical corporation, to make a very quick recovery from the major scandal which resulted when its president, Coster, was identified as one Musica, a notorious swindler.[21]

The efforts made by Carl Byoir on behalf of the A. & P. chain stores indicate how extreme and forceful counter-publicity can become. Byoir made extensive use of full page advertisements, window posters, and propaganda sheets in grocery bags. Persuasion was attempted by means of *suppressio veri, suggestio falsi,* by identifying the Department of Justice and the Attorney-General as 'the anti-trust lawyers from Washington', and by claiming that an increase in food prices would be the result of governmental action.[22] In some campaigns for the A. & P. company and for other clients Byoir even created seemingly independent organisations for the purpose of distributing favourable publicity.[23] This so-called 'third party' technique has been used frequently in the U.S.A., as in the case recently of the 'Tobacco Industry Research Committee'.[24]

Public relations campaigns also have been used in England and Australia although the methods used have not been as dubious as those of Byoir. In England the Tate and Lyle 'Mr Cube' campaign against the

[18] T. Roosevelt, *op. cit.* 720.

[19] See Ross, *op. cit.* 118-9; and n. 22 *infra.*

[20] Note 'Appeals to the Electorate by Private Businesses: Injury to Competitors and the Right to Petition' (1960) 70 *Yale Law Journal* 135 (dealing with the anti-trust case which arose from Byoir's campaign: *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference* (1960) 362 U.S. 947). See also Ross, *op. cit.* 119 ff.

[21] The counter-publicity campaign is well described by Baldwin and Black, 'McKesson and Robbins: A Study in Confidence' (1940) 4 *Public Opinion Quarterly* 305.

For further examples see Childs, *Public Opinion* 33; Ross, *The Image Merchants;* Truman, *The Governmental Process* 232-8; Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 236; 'U.S. Interior Department's phosphate content figures for Amway products are not correct!', an advertisement by the Amway Corporation in *The Ann Arbor News,* 11 October 1970, 44.

[22] Begeman, 'Psychological Warfare: A & P Brand' (1949) 121 *New Republic* 11; Byoir, *op. cit.* 17.

On *suppressio veri, suggestio falsi,* and other ploys of the propagandist see Christenson and McWilliams, *Voice of the People* 331 ff.

[23] See n. 19 and n. 20 *supra.*

[24] Ross, *op. cit.* 106. For earlier examples see Truman, *The Governmental Process* 233-4.

Australia may have an equivalent of the 'Tobacco Industry Research Committee'. See Playford, 'Smoke on the Campus', *Nation,* 21 February 1970, 6.

Labour Party proposal to nationalize sugar-refining is notable.[25] In Australia the field of public relations is a relatively new one, but there have been a number of campaigns. The most conspicuous has been that conducted by Marrickville Margarine.[26] A less conspicuous example is the recent attempt of the Motor, Marine and General Insurance Company to overcome reports of defective car repairs under insurance claims by means of numerous television advertisements to the effect that the company should be judged upon its low insurance premiums and good overall record.[27]

Public relations campaigns of the type described above have not always been successful. However, the successes, and the enthusiasm and self-interest of those who profess public relations, indicate that counter-publicity will be likely in the event of severe publicity sanctions.[28] Certainly, there is much scope for counter-publicity. D could claim that its conviction will cause a result unfavourable to the general public. An example is provided by Byoir's advertisements that anti-trust action against the A. & P. chain stores would result in increased food prices. D may choose instead to stress its past achievements and its value to society. In some cases the claim could be made that D's conviction should not be taken seriously because of questions of strict responsibility, or because defects in its products have now been remedied. D might also decide to blame guilty or even innocent employees, or to allege discriminatory prosecution.

(b) *Methods of Persuasion*

Corporate offenders enjoy considerable advantages in any publicity contest conducted before the general public, since the methods of persuasion available are more effective than those which are likely to be used by the court or other agency which imposes a publicity sanction. An

[25] Wilson, 'Techniques of Pressure — Anti-Nationalization Propaganda in Britain' (1957), 15 *Public Opinion Quarterly* 225. See also Stewart, *British Pressure Groups* 110, where it is mentioned that the Post Office rebuked the Road Haulage Association for using anti-nationalization slogans on its mail.

[26] See the report in (1966) 3 *Public Relations Australia,* No. 6, 3. Numerous advertisements were placed in newspapers throughout Australia, particularly during September 1966, and materials were circulated by mail to a more limited public.

[27] In Adelaide numerous advertisements appeared in May and June 1970 on Channel 10.

For further examples see Walker, *Communicators* 219, 352; *Sydney Morning Herald,* 1 September 1962, 6 (Rothmans). During the pilots' strike in late 1966 Qantas used large newspaper advertisements to tell its story. These advertisements appeared between 18 November and 22 December.

[28] Where the publicity sanctions are not severe, it is unlikely that counter-publicity would be used. In one instance in the U.S.A. D refrained from using counter-publicity when it was ascertained by survey that the vast majority of the public did not know of the adverse publicity to which D had been subjected. Letter to author dated 16 March 1970 from Patricia A. O'Neill, Director of Communications, Opinion Research Corporation. See also Burton, *Corporate Public Relations* 58. Furthermore, some corporations will be reluctant to encourage an attitude of 'where there's smoke there's fire', or to otherwise increase the amount of attention paid to the adverse publicity.

initial advantage is that D can stress that its products or services should be bought or that it should still be held in high esteem, and thus no significant behaviour or attitude change is demanded.[29]

A second and more important advantage is that D will be able to rely upon simple emotive slogans or phrases which would be rejected for use by official agencies on the grounds of distortion or vulgarity.[30] This is evident from the methods of Carl Byoir. The point is also well demonstrated by the following description of propaganda methods in D. B. Truman's work, *The Governmental Process*:

> The propagandist dealing with a complicated or subtle matter may simplify it in a few phrases or a slogan, so that a layman will grasp the point and feel that he is master of the subject. This technique commonly occurs in group propaganda concerning the complex fields of public finance and government regulation of industry. The subtleties of both these fields were dramatically simplified in the slogan 'What Helps Business Helps You' widely used by the Chamber of Commerce and other groups in the 1930s. Similar complexities are buried by the leftist slogan 'Production for Use and Not for Profit'.[31]

Truman also refers to the following captivating approach used by private electric corporations in their struggle against government utilities. Advertisements depicted umpires participating in a game of football, the referee carrying the ball and a field umpire blocking a player. The captain appealed to the 'rules of the game' and to 'fair play' by using the following wording: 'You wouldn't stand for that sort of thing on a football field—but it happens every day in the electric light and power business. Government not only regulates the electric power companies—but is in competition with them at the same time.'[32]

The methods described by Truman, and those used by Byoir, are too extreme for use by official agencies.[33] But even if they were used, the simple phrases and slogans could easily be matched. A competition between phrases and slogans is likely to leave public opinion confused, particularly if the subject matter of D's offence is complicated or where it is otherwise difficult to ascertain which side is telling the truth.[34] Unlike the usual position where false claims are made about a product in commercial advertising, there would be no consumer proving ground for misleading counter-publicity.

[29] See text to n. 2 and n. 4 *supra*.
[30] On distortion see text to n. 13 *supra*.
[31] Truman, *op. cit.* 227-8.
[32] *Ibid.* 232. See also Lane, *op. cit.* 174; Ross, *op. cit.* 269-70; Golby, 'The Use of Metaphor in Persuasion' (1966) 7 *Advertising Quarterly* 41.
[33] For a discussion of the advantages possessed by private interest groups in matters of publicity see Childs, *Public Opinion* 248.
[34] Cutlipp and Center, *op. cit.* 483; Kelley, *Professional Public Relations and Political Power* 232. The situation described occurred recently in South Australia during the Chowilla and Dartmouth dam debate. See also Truman, *op. cit.* 245-6.

Apart from the above advantages D would also have the opportunity of increasing the effectiveness of its counter-publicity by using favourable publicity in advance of any publicity sanctions. Propaganda is most effective when it encounters no counter-propaganda or specific knowledge of the subject.[35] A skilful campaign based upon existing psychological studies could build up considerable resistance to later publicity sanctions.[36]

The methods of persuasion available to D in using counter-publicity therefore seem likely to obstruct the impact of publicity sanctions. What restraints are possible or desirable? A code of ethics for the public relations profession may help to prevent the abuses found in many of Byoir's campaigns,[37] but inevitably such a code would be breached and might not even apply to those corporations which employ their own public relations personnel. The present restraints imposed by the law of contempt and the tort of defamation could easily be skirted.[38] For example, there would not be a contempt if D conducted an extensive campaign when proceedings are not yet pending,[39] and even when proceedings are pending it would seem lawful for D to continue its commercial advertising and to advertise its achievements and value to society, particularly if such advertising had been in use previously. Furthermore, the fountain of justice would scarcely be poisoned if D were to argue publicly at any stage that the relevant legislation is unsound or should be amended, or that the basis of corporate criminal responsibility or strict responsibility is unsound.[40]

[35] Burton, *op. cit.* 95; Truman, *op. cit.* 240; 'Corporate Images: Are They Real?' (1961) 277 *Printers Ink* 80 (*re* G. E. and the electrical equipment conspiracy); Note, 'Controlling Press and Radio Influence on Trials' (1950) 63 *Harvard Law Review* 840, 843. See also n. 93 *supra.*

[36] See Steiner and Fishbein (eds), *Current Studies in Social Psychology* 167, 186; Hovland, *op. cit.* 1097. Note that D would have the advantage of the time between conviction and the time by which an appeal must be made. See *e.g.* Food and Drugs Act 1910 (Tas.), s. 58. Further advantages are the greater opportunities available to D to use repetition and an appeal to herd instinct. For recent examples of advance counter-publicity see the description of the environmental control advertisements of the major U.S. oil companies—*Time,* 17 August 1970, 62; and the account of Valley Milk's activities in 'Milk', a Victorian Milk Board advertisement in the Melbourne *Age,* 8 July 1970, 6.

[37] See Cutlipp and Center, *op. cit.* 484 ff.

[38] However, consider the possibility of D being placed under a bond.

[39] *James v. Robinson* (1963) 37 A.L.J.R. 151. But see Smith and Hogan, *Criminal Law* (2nd ed.) 526-7.

[40] Is any prejudice created by D's counter-publicity as serious as that which is *adverse* to D, or, in civil cases, which operates to the possible disadvantage of another party? Further, most corporate offences are not tried before juries. See *Vine Products Ltd v. MacKenzie & Co., Ltd* [1965] 3 All E.R. 58; but remember *Re Truth and Sportsman Ltd* (1961) 61 S.R. (N.S.W.) 484.

As regards scandalizing the court, consider the limitations upon this form of contempt expressed in *Fletcher* (1935) 52 C.L.R. 248; *Brett* [1950] V.L.R. 226; and *R. v. Commissioner of Police of the Metropolis, ex p. Blackburn* [1968] 2 All E.R. 319.

See generally Smith and Hogan, *Criminal Law* (2nd ed.) 524 ff; and Cowen, 'Some Observations on the Law of Criminal Contempt' (1965) 7 *University of Western Australia Law Review* 1.

There remains the possibility of using a publicity sanction which is designed to prevent the use of counter-publicity, or enacting a provision which actually bans counter-publicity, at least in its more exaggerated or distorted forms. A ban upon advertising would by its very nature restrict the use of counter-publicity. D would not be able to increase its level of commercial advertising in order to counter the loss of sales resulting from the advertising ban, and even institutional advertising would probably fall within the scope of the ban. But should D be stopped from criticising the regulatory measures by which it has been ensnared, or the basis of corporate or strict criminal responsibility? The same question arises where the desirability of legislation aimed directly at banning the use of counter-publicity is mooted.

Attempts to keep the flow of publicity pure and clean by banning criticism are probably unacceptable. The forum of ideas loses too many speakers.[41] Yet it may be argued that if it is possible to control false and misleading commercial advertising or to ban advertising for the purpose of imposing a publicity sanction, it is also possible to control the use of counter-publicity. A strong reply to this argument has been made in the U.S.A. Under the First Amendment the 'right to be wrong' exists in respect of 'public issues' but does not extend to commercial advertising.[42] Public issues are to be kept open to debate and therefore all comments, even from 'third party' organisations formed to disguise the source of the comment, are permissible.[43] Commercial advertisements relate to products rather than ideas, and the importance of debate is very much less. The line between products and ideas may be very difficult to draw in some cases,[44] but if anything this is a reason for not introducing restrictions upon the use of counter-publicity. It should be noted that a distinction between products and ideas would need to be made if a publicity sanction takes the form of a ban upon advertising—the ban should not extend to discussion of ideas.

(c) *Publicity Sanctions, The Fine, and Counter-Publicity*

Where D utilises counter-publicity it incurs costs. These costs may take the form of either expenditure for a publicity campaign itself, or for improvements in personnel and equipment in order to provide a basis for counter-publicity. Thus where a publicity sanction provokes the

[41] Comment, 'Developments in the Law — Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1027-38. However, see Frankfurter and Greene, *The Labor Injunction* 104; Lerner, *Ideas are Weapons* 22-3; Lucas, *The Principles of Politics* 308-11; Riesman, 'Democracy and Defamation' (1942) 42 *Columbia Law Review* 727, 775 and 1282, 1318; and Brett, 'Free Speech, Supreme Court Style' (1968) 46 *Texas Law Review* 668.

[42] See Comment, *op. cit.* 1029-30. For a further discussion see Emerson, *The System of Freedom of Expression* 414-7.

[43] *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference* (1960) 362 U.S. 947. See also Note, 'Appeals to the Electorate by Private Businesses: Injury to Competitors and the Right to Petition' (1960) 70 *Yale Law Journal* 135, 148-50.

[44] See Comment, *op. cit.* 1028, 1029 and 1038.

use of counter-publicity, D will suffer a monetary loss which may be equivalent to or even greater than that which would eventuate from a fine.[45] This effect of counter-publicity may mean that a publicity sanction which is imposed originally for the purpose of lowering prestige or inducing government intervention, may develop into a sanction which produces substantially only a monetary loss. The implications of this result are important. For reasons given earlier, it may be desirable not to use publicity for the purpose of inflicting a monetary loss. Yet if lowering corporate prestige or other purposes are pursued, the pursuit may be in vain. Since counter-publicity is initiated solely by D and is not subject to any significant restraints, the ultimate purpose of the publicity sanction will lie beyond the control of the court or other sanctioning agency.

There is however an important difference between the effect of a fine and the effect of counter-publicity. Where D is fined it has incurred a monetary loss which is irretrievable,[46] and any measures taken by D to reduce the chance of future violations will mean an additional monetary loss. Where D is exposed to a publicity sanction instead of a fine, a monetary loss incurred in reducing the chance of future violations will not necessarily constitute an additional loss. If D makes use of remedial measures for the purpose of counter-publicity virtue will in fact be rewarded and not penalized as in the situation where D has been fined. A vision of the blue eagle appears. This feature of counter-publicity is taken up again in the concluding section of this article.[47]

6. UNCERTAINTY, FISCAL LOSS, AND GENERAL DISADVANTAGES

The foregoing two sections have shown that publicity sanctions are handicapped by problems of persuasion and by the availability of counter-publicity. Publicity sanctions are also subject to a number of other disadvantages, and these are now discussed under the headings of uncertainty, fiscal loss, and general disadvantages.

(a) *Uncertainty*

A sanction which is implemented by means of publicity clearly is a sanction which is indefinite in impact. Unlike the fine, no certain penalty is imposed at the time of the conviction; sentence is determined later by

[45] The costs of counter-publicity, however, may constitute a tax deduction, but see Note, 'Public Policy and Federal Income Tax Deductions' (1951) 51 *Columbia Law Review* 752; Note '"Ordinary and Necessary Legal Expenses", The Federal Tax and State Criminal Law', (1958) 25 *University of Chicago Law Review* 513; Note, 'Deductibility of Business Expenses and the Frustration of Public Policy' (1952) 38 *Virginia Law Review* 771.

[46] Except to the extent that D can pass fines on to consumers.

[47] On this desirable aspect of counter-publicity see Bowring (ed.), *op. cit.* 464; Ross, *op. cit.* iv. 22-3, 57-8 and 268.

the capricious jury of public or governmental opinion. Furthermore, the sentence may be varied by D's use of counter-publicity. Consequently control of the quantum of a publicity sanction is removed from the hands of a court, and legislative upper and lower limits upon quantum are difficult to set. In these respects, the fine is much the superior sanction.

Publicity sanctions are also uncertain because their impact will often vary according to the characteristics and circumstances of particular offenders. Some corporations will fear loss of corporate prestige more than others.[48] On one hand a corporation may be made particularly sensitive to loss of prestige by the persuasion of its own public relations departments. On the other hand the view may be held that no publicity is bad publicity or, in respect of monetary loss, some corporations will stand to lose more from a publicity sanction than others. For example, D's products may be branded and therefore attract more notice than anonymous products such as nuts and bolts. D would be more fortunate where its products bear names similar to those used by competitors. Confusion would be particularly likely in the case of a name which has passed into the public domain as the generic term for a product,[49] or where a product name has been imitated. We might refrain from buying Bio-A when the object of our disaffection should be Bio-B.

The factors described above will be difficult to ascertain with precision and, if precision be attempted, the complexity of sentencing is increased considerably. By contrast, the fine is much more certain. Although the impact of a fine may vary according to wealth, or be reduced where D compensates by increasing the price of its products, it is at least comparatively easy to take possible variations into consideration. In order to balance variations in wealth, fines could be based upon a percentage of D's average annual turnover for the past four or five years.[50] The passing of fines on to consumers could be discouraged by an approach which requires the payment of a provisional fine, the final amount to be determined according to a percentage of D's annual turnover for say two years after conviction.[51] Publicity sanctions do not offer similar opportunities for achieving an even impact.

The uncertain impact of publicity sanctions is of further significance in respect of general deterrence. General deterrence reputedly works best when the punishment inflicted upon offenders is evident to those who are to be deterred. Secret punishment is wasted. In the case of publicity

[48] There is a good discussion in Rourke, 'Law Enforcement Through Publicity' (1957) 24 *University of Chicago Law Review* 225, 240-2.

[49] *E.g.* jello, cellophane, alfoil, electrolux. Drugs create the same difficulty. See Comment, 'Developments in the Law — Deceptive Advertising', *op. cit.* 1104-5. Consider also co-operative trademarks as in the case of 'Sunkist' orange juice and 'Homestyle' bread (New Zealand).

[50] See Davids, *op. cit.* and Dershowitz, *op. cit.*

[51] Turnover rather than profits because profit levels are more readily manipulated.

sanctions the only portion of the punishment clearly evident is the publicity which is used to initiate the adverse reaction, and this is not even apparent where D suffers an advertising ban.[52] The actual impact of publicity sanctions will often be unknown. Corporate prestige is a subtle asset susceptible to only the most inexact measurement, and adverse reaction to D's products or governmental intervention frequently will be viewed as the result of forces other than the publicity sanction imposed upon D.[53] The fine, of course, provides a much less equivocal method of indicating the loss suffered. However publicity sanctions are superior to the fine where, as a result of the unknown impact, prospective offenders overestimate the loss which D has suffered. Secret punishment is not necessarily wasted.[54]

(b) *Fiscal Loss*

Publicity sanctions, unlike the fine, suffer from the disadvantage that they do not generate funds for official purposes.[55] Consequently, the enforcement effort, which itself is vital to deterrence, may suffer. Furthermore, there would not be created any fund from which the victims of D's offence can be compensated.[56] Providing such a fund is an important possible function of the fine, particularly in the context of consumer protection where civil remedies available to individual consumers often are inadequate.

(c) *General Disadvantages*

Publicity sanctions, depending upon their form, are subject to a number of more general disadvantages. Adverse publicity directed to the public at large may be distasteful or produce anxieties.[57] D's competitors might capitalize upon D's misfortune in their advertising and thereby derive an unfair advantage.[58] Adverse publicity against D may also affect innocent

[52] Unless, of course, D complains publicly about the sanction, or the conviction and penalty are reported by the news media.

[53] *Cf.* Wilson, *op. cit.*

[54] Rourke, *op. cit.* 225-38.

[55] A point which would have disturbed Thurman Arnold. See Grunewald and Bass, *op. cit.* 77; 'Congressional approval of the antitrust programme was in large measure due to the tremendous publicity resulting from the indictments—plus Arnold's unabashed demonstration that for every dollar appropriated to the [antitrust division], two or three dollars flowed into the Treasury in fines received from indicted defendants'.

[56] This is stressed by Dershowitz, *op. cit.*

[57] Lauterbach, *Men, Motives and Money* (2nd ed.) 84; Comment, 'Developments in the Law—Deceptive Advertising', *op. cit.* 1013-6.

[58] Roosevelt, *op. cit.* 236-7; Lemov, *op. cit.* 79; Gaguine, 'The Federal Alcohol Administration' (1939) 7 *George Washington Law Review* 844, 864-5. However, 'one bad apple' may affect competitors too.

Borden, *Advertising Management* (rev. ed.) 162; Riley (ed.), *The Corporation and its Publics* 47. See also Note, 'Legal Responsibility for Extra-Legal Censure' (1962) 62 *Columbia Law Review* 475.

The possibility of competitors taking advantage of D's misfortune also exists where D has only been fined, but the adverse publicity must first be generated by the competitors: they cannot simply refer to an official publication which calls for public reaction.

dealers and distributors, and even innocent competitors. For example, Bio-B may be confused with Bio-A and Bio-C, in which event a large number of innocent parties, including competitors and their dealers and distributors, could easily be injured. Further disadvantages arise from the chance that newspapers and other media may refuse to publish the required notices or statements,[59] from the risk that the use of illegal methods will be encouraged as a result of making those methods known,[60] and, in the case of publicity sanctions aimed at 'innocent' products, from the possible need to discourage consumers from buying items which may be sound and perhaps even superior to those offered by competitors.[61]

7. EVALUATION

Publicity Sanctions and Deterrence

(i) TOWARDS A 'LIMITED PUBLICITY SANCTION'

Do publicity sanctions have an important role to play in respect of deterrence? The usual answer is no. The treatment of this topic in Leigh's recent work, *The Criminal Liability of Corporations in English Law,* reflects the conventional pessimism. After citing several examples of formal publicity sanctions Leigh states that

> [this type of sanction] has become less useful in the light of more widespread business operations, and perhaps, the increased size of newspapers. A very real problem lies in bringing home the fact of conviction to the public in the context of a dynamic rather than a relatively static community . . .
>
> As a general proposition, publicity, and the stigma of conviction are likely to prove useful with respect to regulatory legislation, the purpose of which is to ensure adherence to proper standards, particularly with respect to foodstuffs, drugs, and other articles of consumption. Otherwise it is likely to go unnoticed. Yet to be effective, the stigma would have to be such that the corporation's clientele were much less ready to deal with it.[62]

In support of Leigh's position there must be added the problems of persuasion which arise where publicity sanctions are used,[63] the possible use of counter-publicity,[64] and the catalogue of disadvantages set out in the preceding section.

[59] Compulsory publication would be necessary as in present and past publicity sanctions. On the prospect of a government newspaper or publication see Berelson and Janowitz, *Public Opinion and Communication* (2nd ed.) 226-7; Mayer, *The Press in Australia* 251-2.

[60] Chamberlain, Dowling and Hays, *The Judicial Function in Federal Administrative Agencies* 138-9; Clinard, *op. cit.* 85; Hawkins, *op. cit.* 559, n. 35.

[61] In the case of a ban on advertising, would D be able to advertise a reduction in the price of consumer goods?

[62] Leigh, *op. cit.* 159-60.

[63] See text, section 4.

[64] See text, section 5.

At first glance the case against the use of publicity sanctions seems strong, except in respect of a limited range of situations. However this impression is probably false. An initial point is that an advertising ban could be used to inflict a substantial monetary loss, and since the problem of attracting public attention does not arise, the range of products which could be affected may easily extend much beyond foodstuffs, drugs, and other articles of consumption.[65] There are also forms of government intervention which produce monetary loss and which may be activated without widespread publication. An example is black-listing in respect of government contracts.[66]

A point of much greater importance is that Leigh's position is based upon the express assumption that the sole purpose of a publicity sanction is to inflict a monetary loss. Yet, as has been stated earlier, there is little need to use publicity for a purpose which can readily be achieved by using a fine. Instead, advantage should be taken of deterrent effects which are possessed by publicity but not by the fine. Publicity sanctions therefore should be aimed at lowering prestige or at inducing those forms of government intervention which are feared for reasons other than monetary loss.[67] Now if publicity is to be used only for these purposes there are two consequences of note. First, a publicity sanction, whether in the form of adverse publicity or an advertising ban, should not be used to inflict monetary loss even in the case of foodstuffs, drugs and other articles of consumption. However, monetary loss will be inevitable if it is necessary to warn consumers of defects, and this loss should be taken into account in assessing the quantum of any fine to be imposed. Secondly, if publicity is used to lower prestige or to induce government intervention it is much less obvious that widespread publication and attention is required. A much more limited class than the general public would probably suffice. Government intervention may need no more than transmitting information to a particular department.[68] Sufficient loss of prestige may well be inflicted by publicity directed only to business executives and 'opinion leaders' at relatively high levels in the social structure.[69]

[65] There are, however, a number of disadvantages associated with the use of an advertising ban. See text, section 3(b), section 4(c), section 5(b), but consider text, section 4(a) and (b).

[66] See text, section 2.

[67] See text, section 2.

[68] This could be the case in respect of increased enforcement.

[69] On 'opinion leaders' see Katz, 'The Two-Step Flow of Communication: An Up-to-date Report on an Hypothesis', in Proshansky and Seidenberg (eds.), *Basic Studies in Social Psychology* 196. 'Opinion leaders' exist at all levels in the social structure and are not much above followers in their level of interest. It is clear from the text that I have in mind a limited range of 'opinion leaders' and followers.

For convenience of discussion a publicity sanction aimed at a limited class *and used for the purpose of lowering prestige or inducing government intervention*[70] may be labelled a 'limited publicity sanction'.[71]

(ii) LIMITED PUBLICITY SANCTIONS, PROBLEMS OF PERSUASION, AND COUNTER-PUBLICITY

If publicity is directed at a well-informed group then problems of persuasion are less likely to arise and counter-publicity will be more limited in effect. For example, business executives and 'opinion leaders' are less likely to be confused by entity responsibility and complicated offences than the general public. Emotive and distorted counter-publicity of the type used by Carl Byoir and described by D. B. Truman will encounter greater resistance from the well-educated and well-informed. Such an audience is likely to be more interested than the general public in learning whether D has remedied the cause of its offence, although it may be necessary to indicate that remedial measures are important. If D is forced to apply remedial measures in order to found a counter-publicity campaign clearly the publicity sanction imposed has been far from futile.[72] Nonetheless, it cannot be suggested that the difficulties presented by problems of persuasion and counter-publicity will simply disappear. It should be realised that many business executives may be united in opposition to some offences, in which event publicity would be more fruitfully directed to 'opinion leaders' or politicians. Moreover, some types of regulatory measures may be so complicated or esoteric as to receive the attention of only those with highly specialized interests.

(iii) DISADVANTAGES OF A LIMITED PUBLICITY SANCTION

What disadvantages arise if a limited publicity sanction is used? Are not all publicity sanctions uncertain in impact, and subject to a number of general disadvantages? Do publicity sanctions generate funds for enforcement or for distribution to injured victims?[73]

The principal difficulty is uncertainty. All publicity sanctions are indefinite in impact, a characteristic which removes accuracy from sentencing and which may lead prospective offenders to underestimate the law's force. There seems no way in which to overcome this problem, but it is minimized if a fine is used to inflict a definite monetary loss and publicity is reserved for the special additional effects of lowering prestige

[70] Monetary loss can also be induced by publicity of limited range, particularly in the case of governmental intervention.

[71] Professor Schwartz, *supra*, has indicated to me that the National Commission on Reform of Federal Criminal Laws would reject any suggestion that publicity sanctions be limited *expressly* in a statute to opinion leaders or other limited classes. Such limits should, in his view, be left to the discretion of the sentencing agency.

[72] See text, section 5(c).

[73] See text, section 5(b).

and inducing government intervention.[74] It should also be remembered that, where prospective offenders overestimate the punitive effect of a publicity sanction imposed upon D, uncertainty will be an advantage.

The problem of fiscal loss is more easily overcome. If D is subjected to both a fine and a limited publicity sanction funds will be generated for enforcement and other purposes although presumably a fine imposed in conjunction with a publicity sanction would produce less money than a fine imposed alone. But what general disadvantages exist where a limited publicity sanction is used? Several spring to mind. Illegal methods may be publicised and thereby become more widespread.[75] Compulsory publication of notices and statements is unlikely to be viewed favourably by the news media or private publishers except possibly in times of national emergency. Competitors may gain an unfair windfall by making use of D's misfortune in their own commercial advertising.[76] Indeed, a limited publicity sanction seems subject to all the general disadvantages which are possible in the case of a publicity sanction aimed at inflicting monetary loss,[77] except that 'innocent' products are much less likely to suffer. For example, D's good product Bio-B is more likely to enjoy continued high sales if, instead of a request to stop buying Bio-B, we are asked only to have less regard for D because it has violated employee safety laws in one of its factories.[78]

(iv) LIMITED PUBLICITY SANCTIONS AND SUPPLEMENTARY PURPOSES[79]

Will a limited publicity sanction achieve the supplementary purposes of warning, educating or moralizing, and notifying prospective offenders of the penalties imposed upon D? Notification to prospective offenders would result from publicity directed to business executives, but warning and educating or moralizing would create more difficulty. A warning to the general public would not necessarily be provided by publicity directed at business executives and 'opinion leaders', and educating and moralizing might also be confined to a limited front. Where a warning should be given to the general public usually it will be necessary to use a special form of publicity distinct from the publicity sanction itself.[80] However, special forms of publicity may be unnecessary to achieve a desirable level of educating or moralizing. Adequate enforcement of regulatory measures may not require extensive popular support.[81] A sufficient level

[74] However, if a fine is imposed will this distract attention from the requirement that we must think less of D? See Bowring (ed.), *op. cit.* 460-1.
[75] See text to n. 60, *supra.*
[76] See text to n. 58, *supra.*
[77] See text, section 5(c).
[78] D's products are more likely to be affected if those products carry the corporate name, as where D is the 'Bio Corporation'.
[79] See text, section 2.
[80] See text, section 3(d)(ii).
[81] Ball and Friedman, *op. cit.*

of educating and moralizing might well result from publicity directed to business executives who are after all the persons in the best position to prevent corporate offences. If it is desirable to describe novel or complicated regulatory measures to the general public, the simplified and distorted explanations necessary are best contained in a programme of education rather than in a sanction which relates to a particular offender.[82]

(v) THE FORM OF A LIMITED PUBLICITY SANCTION

If a publicity sanction is to be aimed at business executives and 'opinion leaders' what form should be adopted? Newspapers, including the *Financial Review* or the *Wall Street Journal* would be suitable,[83] and use could also be made of magazines and trade journals. There are a large number of media suitable for widespread dissemination at the level desired for a limited publicity sanction. Publication would be at D's expense, and would need to be compulsory.[84] The notices or statements to be published could be prepared by the court or other sanctioning agency and should contain a reasonably full account of D's offence and the aims of the legislation involved. It should be made clear that a loss of respect for D is appropriate, and any request, express or implied, that D's products not be bought should be avoided since the infliction of a monetary loss is not desired. For the purpose of channelling possible counter-publicity in a desirable direction D's plans for preventing a repetition of its offence should be indicated, or if D has made no plans, the importance of remedial measures should be stated.[85]

These suggestions are not free from difficulty. First, as has been mentioned earlier, compulsory publication will not be viewed favourably by private media interests. This problem is avoided only by using a government publication, a possibility considered below. Second, care would be needed to avoid lowering the courts too far into the public arena. In order to avoid the impression of direct involvement in matters of public debate, it would seem desirable for some body other than the court of conviction to compose and publicize the requisite notices and statements. What appears to be required is an official and more proper version of Byoir's 'third-party' technique.[86] A number of possible agencies might be used for this purpose, and the court could retain substantial control of sentencing if final approval of the notice to be published were necessary.

[82] See text, section 4(d).

[83] Note that a newspaper account may arouse interest in more specialised treatments of the topic. See Berelson and Janowitz, *Public Opinion and Communication* 354-5. On the effect of newspapers on 'opinion leaders' see Katz, *op. cit.* 206-7.

[84] See the examples given in section 1.

[85] See text, section 5(c).

[86] See text, section 5(a).

Should government gazettes be used either in place of newspapers and the other media above, or as a supplementary medium? Gazettes possess several advantages. Questions of refusal to publish do not arise and information is readily recorded for use by government departments and by politicians. The recording of information for official purposes could extend to a description of the measures taken or planned by D to prevent any repetition of its offence, provided that an attempt is made by the court or other sanctioning agency to set this information out in its judgment.[87] By these means the official record would be more useful and, as a result of the greater risk of government intervention, there is the hypothesis that deterrence will be increased. A further advantage of the gazettes is that they allow the courts to remain at a discreet distance from the forum of public debate, assuming that the notice or statement is so worded that it appears as a comment from a government source rather than as a judicial utterance. The principal disadvantage of a government gazette is of course that it is a barren journal not commonly read by business executives or a wide range of 'opinion leaders'. It provides a useful medium for reaching official agencies and politicians, but a limited publicity sanction also requires publicity in newspapers and other media.

Is there some superior medium which alone will enable sufficient publicity to be directed toward business executives, 'opinion leaders', and official persons? No such medium appears to exist at present but, apart from the possibility of a government newspaper,[88] inspiration could be taken from a proposal of Patrick Colquhoun in the early nineteenth century. Colquhoun suggested that a Police Gazette be instituted for the purpose of assisting the detection of crime and for disseminating moral principles.[89] This gazette was to contain, inter alia, details of crimes committed, descriptions of stolen articles, rewards offered, accounts of the life and fate of notorious criminals, short abstracts of chosen statutes with commentaries indicating the advantages of observance and describing the penalties attaching to violation, and short essays of a moralizing nature. Colquhoun's idea might be adapted for the purpose of combatting corporate crime in the twentieth century. Why not a 'Corporation Gazette' published by an official agency and which contains descriptions of corporate offences, penalties imposed, and the aims of the legislation involved? This gazette could also perform the task, so often neglected in the past, of publicizing new regulatory measures and suggesting methods of preventing the commission of offences within the corporate structure.

[87] See text, section 3(c).

[88] See n. 59.

[89] Radzinowicz, *A History of English Criminal Law* iii. 296-8. Colquhoun also advocated that appropriate themes be made available to ballad singers for propagation, *ibid.* 275.

The journal could be funded by compulsory subscriptions from corporations and their directors and executives, and could either be sold or distributed free of charge to government departments, politicians, newspaper editors, members of the university community, and other persons who are interested. In order to compete for attention with newspapers and other private publications an imaginative editor might well incorporate many items of interest particularly to the business community.[90] The possibilities include information upon exporting, overseas investment, taxation problems, developments in the law relating to certain fields such as restrictive trade practices, and many government contracts and tenders might profitably be advertised in a 'Corporation Gazette' as well as in a government gazette.[91]

8. CONCLUSION

Publicity sanctions which are directed at lowering prestige or inducing governmental intervention rather than inflicting a monetary loss have deterrent effects which are not shared by conviction and fine alone. Because publicity sanctions of this nature do not require widespread public reaction but depend more upon the reactions of business executives, official persons, and 'opinion leaders', the conventional pessimism surrounding their use is probably unjustified. There is no need to persuade the general public that D's products should not be purchased, and indeed such an approach would be undesirable given that the fine is a much more certain and ready method of inflicting a monetary loss. Moreover the problems of persuasion and the chances for counter-publicity which arise in the case of publicity sanctions directed at the general public are of much less significance in the case of a limited publicity sanction.

If a limited publicity sanction is to be used there are a number of requirements. The media should be newspapers, magazines, government gazettes, and possibly a special 'Corporation Gazette'. The restrictions upon media which exist in many present publicity sanctions would be inappropriate.[92] The content of publicity notices should stress D's wrongdoing and wherever possible should avoid the impression that D's products are unfit to buy.[93] An instruction 'Do not buy' would be fitting only where it is considered necessary to warn consumers of defects. The notices should also indicate whether D has taken, or plans to take, remedial measures. Finally, a limited publicity sanction should be used in conjunction with the fine. A fine will impose a certain monetary loss,

[90] Note that newspapers could still be used to arouse interest in the more specialized reports to be found in the Corporation Gazette. See n. 83, *supra*.

[91] A good cartoonist would help. See the excellent cartoon on the electrical equipment cases by Herblock of the Washington Post, reproduced in Kefauver, *In a Few Hands* 82.

[92] Past and present publicity sanctions have been limited as to media. See text, section 1.

[93] See text, section 2, section 3(a).

and this impact, together with the impact of the publicity sanction itself,[94] will be brought to the attention of prospective offenders in the business community.

But are not publicity sanctions articles of faith? If a limited publicity sanction is used will anybody be watching? Will this type of sanction in fact produce a sufficiently potent deterrent threat to make the effort worthwhile? Confident answers cannot be given. Publicity is not a black and white art. Furthermore, where one stands will depend very largely upon personal conceptions of the future shape of corporate criminal responsibility.[95] Publicity sanctions will probably be regarded as pointless by those who believe that entity responsibility is too indirect and diffused and that emphasis should be placed upon devising better methods of locating and prosecuting guilty individual officers and employees. For those who dislike tinkering with the internal affairs of business corporations new methods of imposing individual responsibility or achieving corporate reformation and rehabilitation will very often be anathema, and publicity sanctions may be seen as a more palatable method of decreasing the incidence of corporate crime.

There remains the position of those who favour a system of corporate criminal responsibility wherein the aim of deterrence is replaced by that of rehabilitation or reformation. Will the advocates of a forward-looking approach favour publicity sanctions? Glimpses of such an approach are discernible in the treatment of publicity sanctions which has been given here. Publicity may exert pressures which thrust in the direction of reformation or restructuring. These pressures exist where a publicity sanction is aimed at inducing certain forms of government intervention. For example, the sanction may indicate the need for new industry-wide safety standards, or for an official administrator to control D's affairs pending the implementation of corrective measures. Another pressure toward reformation exists where D finds it necessary to base a counter-publicity campaign upon the fact that remedial action has been taken.[96]

Clearly it is fortuitous whether publicity sanctions result in reformation or rehabilitation. These consequences are merely uncertain by-products of a deterrence-oriented approach. Yet fortuity and uncertainty may be advantageous. The attempt at reformation or rehabilitation is much less overt than in a direct forward-looking approach and is therefore less likely to attract the cry that business corporations should be left alone.

[94] See text to n. 69 *supra*.

[95] See introduction.

[96] But if a limited publicity sanction is used is counter-publicity likely? See n. 28 *supra*. My own guess is that in many cases counter-publicity would be used, particularly where some form of government intervention is in the offing. The counter-publicity, however, would be directed at a more limited public than in the case of a widespread publicity sanction.

In the long run would the facilitation of entry into a brave new world of business regulation be seen as a more important function of publicity sanctions than deterrence?

SETTING ASIDE AGREEMENTS OF COMPROMISE

By I. J. HARDINGHAM*

In this article, the first of its kind, the author has collated under one head the learning on setting aside agreements of compromise. It is especially important for the practitioner, as well as the student, because compromise agreements are such an important part of the legal process. In particular, the author has given an interesting insight into the development of the doctrine of mistake in equity in Australia and has foreshadowed future developments in a comparison with the American doctrine.

INTRODUCTION

The compromise is relevant to all fields of the law. Policy favours the effecting of compromises bringing, as they do, an end to litigation. The courts would bear an intolerable burden if every legal dispute was to be pursued to a judicial determination. The problem to be considered in this article is as follows: when can a compromise be set aside so that the parties to it are not contractually prevented by its terms from proceeding further with the dispute? In considering this problem special emphasis has been placed upon the effect of mistake, misrepresentation and lack of form on the validity and enforceability of compromises. These aspects of the problem are the most interesting and, especially in the case of mistake, the most controversial. For the sake of completeness, however, other miscellaneous grounds upon which agreements of compromise may be attacked have been considered albeit, at times, briefly.

THE NATURE OF A COMPROMISE

First it should be noted that a compromise or settlement of a dispute is a contract; and the general principle is that a compromise of a disputed claim made *bona fide* is good consideration for a promise (to pay a sum of money) even though it ultimately appears that the claim was wholly unfounded.[1] The claim which is compromised must not be vexatious or frivolous.[2] *Bona fides,* in this context, connotes two things: the claimant must believe in his claim; it must not be contrived; and no facts should be held back or concealed which would affect the validity of the claim.[3]

Thus the party seeking to affirm a compromise must spell out the elements of a contract in order to prove *prima facie* enforceability. In order to demonstrate sufficient consideration he must establish that a

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[1] *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449. *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266. *Butler v. Fairclough* (1917) 23 C.L.R. 78, 96. *Hercules Motors Pty Ltd v. Schubert* (1953) 53 S.R. (N.S.W.) 301.

[2] *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, 291.

[3] *Ibid.* 284.

serious claim maintained by a *bona fide* claimant was compromised in return for say, a cash consideration. If he cannot demonstrate this *prima facie* enforceability, *cadit quaestio.*

Given, however, the establishment of *prima facie* liability in respect of the contract of compromise, under what circumstances can this sort of contract be set aside or declared void?

At this stage it is convenient to point out that '[a] judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order'.[4] So the fact that the compromise is embodied in a consent order does not unduly complicate the issue under consideration.

VITIATING FACTORS

Illegality

If the compromise agreement is illegal it will, generally speaking, be void and unenforceable. The consideration offered in return for the withdrawal of the claim may be illegal or, as in *Windhill Local Board of Health v. Vint*,[5] the claim may be of such a nature that it cannot be validly compromised. In the latter case, the plaintiff, a local board, brought an indictment against the defendant for interfering with and obstructing a public road. At the trial of the indictment an agreement of compromise was effected between the parties, sanctioned by the judge, and embodied in a deed; the defendant covenanted to restore the road which it had broken up within seven years, and the plaintiff covenanted that then it would consent to a 'not guilty' verdict being entered on the indictment. In an action by the plaintiff on the covenant for a decree of specific performance and damages, relief was denied. The Court held that the agreement of compromise was illegal. No agreement can be valid that is founded on the consideration of stifling a prosecution in respect of an offence of a public nature.[6] An honest claim, however, in respect of a breach of an illegal contract can, it seems, be the subject of a valid compromise.[7]

Fraud, Duress and Undue Influence

Contracts of compromise may be set aside if effected or obtained by fraud or the application of duress or coercion in the nature of undue

[4] *Halsbury's Laws of England* (3rd ed. 1958) xxii. 792; *Wilding v. Sanderson* [1897] 2 Ch. 534; *Huddersfield Banking Company Limited v. Henry Lister & Son Limited* [1895] 2 Ch. 273; *Kinch v. Walcott* [1929] A.C. 482; *Harvey v. Phillips* (1956) 30 A.L.J. 140, 143.

[5] (1890) 45 Ch. D. 351.

[6] See also *Goldsbrough, Mort & Co. Ltd v. Black* (1926) 29 W.A.L.R. 37; where the offence is of a private nature, the compromise will be valid: *Kerridge v. Simmonds* (1906) 4 C.L.R. 253. In the latter case the distinction between offences of a public and of a private nature was considered.

[7] *Stevens v. Hoberg* [1952] St. R. Qd 10.