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Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle

Eliezer Lederman

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CRIMINAL LAW

CRIMINAL LAW, PERPETRATOR AND CORPORATION: RETHINKING A COMPLEX TRIANGLE

ELIEZER LEDERMAN*

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I. INTRODUCTION

The increasingly active role that corporations assume in all aspects of modern life is accompanied by their correspondingly increased participation in criminal activities. Although most of their delinquent activity is confined to white-collar offenses, it also has spread to other fields of criminality. To contend with this phenomenon, the Anglo-American legal system has transformed the concept of corporate criminal liability into a major legal tool.

The theory of corporate criminal liability has raised difficult issues regarding various aspects of criminal law. These issues became prominent a few years ago when a large automobile corporation was tried for reckless homicide after being charged with recklessly failing to repair known lethal defects in the manufacture of cars which caused the death of three persons.¹

The trial and acquittal that followed provoked great public reaction. This response, however, did not exhaust the analysis of the criminal aspects involved in subjecting corporate bodies to criminal liability. The press was directed mostly to the economic aspects of the manufacturer's product liability,² a subject also addressed by

¹ State v. Ford Motor Co., No. 80-5324 (Ind. Super. Ct. Mar. 13, 1980).

² See, e.g., NEWSWEEK, Mar. 24, 1980, at 74; TIME, Mar. 24, 1980, at 24; U.S. News & WORLD REP., Mar. 24, 1980, at 11; NEWSWEEK, Feb. 25, 1980, at 65-66. See also the editorials of The Miami Herald, Mar. 23, 1980; The Blade (Toledo), Mar. 19, 1980; Des

civil law. Even legal scholars did not take much advantage of the opportunity to make a new and thorough evaluation of the practical and especially the normative questions involved in imposing criminal liability on corporations, particularly with regard to such a serious offense.³ Thus, significant problems concerning this subject received inadequate consideration, including: analyzing which goals of criminal law are achieved by indicting the corporate body; determining the practical and doctrinal significance of labeling the corporate entity a "killer"; and interpreting the meaning of merely imposing a fine as a penalty for such a severe offense as manslaughter.⁴

The purpose of this study is to re-examine the general range of questions spawned by the doctrine which views the corporate entity as an offender capable of violating the most severe prohibitions of substantive criminal law. First, this Article will present a summary of the main attitudes prevalent in the Anglo-American legal system on this subject. It will then outline some of the theoretical and practical problems which follow from making the corporation an object of criminal liability. Finally, this study will present basic guidelines to an alternative solution to the problem of criminal conduct within the framework of corporate entities. The proposed solution will focus on the direct responsibility of the perpetrators of the offenses and on the liability of various levels of corporate management and supervision involved. In addition, the proposed solution will suggest supplementary measures for dealing with the corporate body itself which do not entail conviction. This solution will conclude by

Moines Tribune, Mar. 19, 1980; The Salt Lake Tribune, Mar. 18, 1980; The Dispatch (Columbus), Mar. 18, 1980; The Tennessean (Nashville), Mar. 17, 1980; Albuquerque Journal, Mar. 17, 1980; Detroit Free Press, Mar. 15, 1980; Tulsa World, Mar. 15, 1980; San Jose News, Mar. 14, 1980; The Oregonian (Portland), Mar. 14, 1980.

³ But see Maakestad, *State v. Ford Motor Co.: Constitutional, Utilitarian and Moral Perspectives*, 27 ST. LOUIS U.L.J. 857 (1983); Radella, *Corporate Criminal Liability for Homicide: Has the Fiction Been Extended Too Far?*, 4 J.L. & COM. 95 (1984); Swigert & Farrell, *Corporate Homicide: Definitional Process in the Creation of Deviance*, 15 L. & SOC. REV. 161 (1980); Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465 (1981); Comment, *Corporate Homicide: A New Assault on Corporate Decision-Making*, 54 NOTRE DAME LAW. 911 (1979).

⁴ For some other recent cases concerning corporate criminal liability for homicide offenses requiring *mens rea*, see *Granite Construction Co. v. Superior Court of Fresno County*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1984); *Commonwealth v. Fortner LP Gas Co., Inc.*, 610 S.W.2d 941 (Ky. Ct. App. 1981); *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980); *Commonwealth v. McIlwain School Bus Lines Inc.*, 283 Pa. Super. 1, 423 A.2d 413 (1980); *Vaughan & Sons v. State*, 649 S.W.2d 677 (Tex. Crim. App. 1983). See also Anderson, *Corporate Criminal Liability for Specific Intent Crimes and Offenses of Criminal Negligence—The Direction of Texas Law*, 15 ST. MARY'S L.J. 231 (1984).

considering the exceptional category of administrative strict liability violations.

II. THE ANGLO-AMERICAN APPROACH

The theory that a corporation may be subject to criminal liability has grown in stages, starting from the mid-19th century. There are many parallels in the consolidation of this theory in the English and American legal systems. In both systems, the penetration of civil law doctrines into the criminal arena has contributed greatly to the advancement of the principles of corporate criminal liability.⁵

One commentator has compared the development of the theory of corporate criminal liability in the Anglo-American system to the growth of weeds because "nobody bred it, nobody cultivated it, nobody planted it, it just grew."⁶ Referring to the origin of the theory, this pictorial statement is undoubtedly true. The evolutionary process of the theory was not, however, altogether wild and accidental, nor did it lack internal legal reasoning and legal direction. Three major directions in the development of corporate criminal liability are evident. The first involves the expansion of corporate criminal liability from situations of nonfeasance to situations of positive actions;⁷ the second extends the scope of corporate liability from areas of strict liability to those requiring *mens rea*;⁸ and the third

⁵ For some historical background of corporate criminal liability in the United States, see Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3 (1984); Brickley, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393 (1982); Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 469 (1914); Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927); Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 72 (1976); Comment, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928).

For an introduction to English law on the subject, see L. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATION IN ENGLISH LAW* (1969); Burrows, *The Responsibility of Corporations Under Criminal Law*, 1 J. CRIM. SCI. 1 (1948); Winn, *The Criminal Responsibility of Corporations*, 3 CAMBRIDGE L.J. 398 (1929); Comment, *The Criminal Liability of Corporations*, 62 L.Q. REV. 345 (1946).

⁶ Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

⁷ As to England, see *The Queen v. The Birmingham and Gloucester Ry. Co.*, [1842] 3 Q.B. 223, 231-34, 114 Eng. Rep. 492, 495-96. It was only later that corporations were tried for misfeasance such as causing public nuisance. See *The Queen v. The Great N. of England Ry. Co.*, 115 Eng. Rep. 1294, 1298 (Q.B. 1846).

As to the United States, see *State v. Great Work Milling & Manufacturing Co.*, 20 Me. 41, 43-44 (1841). Cf. *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339, 345 (1854); *State v. The Morris & Essex Railroad*, 23 N.J.L. 360, 370 (1852).

⁸ In England, the possibility of imputing intent to a legal entity was mentioned in *Chuter v. Freeth and Pocock Co.*, [1911] 2 K.B. 832, 836; see also *Mousell Bros. Ltd. v. London and North-Western Ry. Co.*, [1917] 2 Q.B. 836, 846. In the United States, the possibility of imposing criminal liability on a corporation for *mens rea* offenses was referred to in *United States v. John Kelso Co.*, 86 F. 304, 306 (N.D. Cal. 1898). Since the

expands the basis for establishing corporate criminal liability from vicarious responsibility to direct liability.⁹ These developments have undermined all the restrictions originally present in the theory of corporate criminal liability. The theory has evolved into one with almost no limitations, and corporate bodies are being charged and convicted routinely for serious offenses against property and even for offenses against the person.¹⁰

The imputation of criminal liability on the corporation has reached its extreme in American case law. The mainstream of that law transfers the doctrine of *respondeat superior* from the law of torts to the realm of criminal law.¹¹ The *respondeat superior* doctrine, which governs *inter alia* civil corporate liability, is based on the theory of vicarious responsibility which imputes the acts of the agent to the principal. The Supreme Court asserts that establishing *respondeat superior* as the base of corporate criminal liability amounts to carrying the civil doctrine "only a step farther . . . in the interest of public policy" to "control" the conduct of an agent by "imputing his act to his employer and imposing penalties upon the corporation for which he is acting."¹² According to the *respondeat superior* doctrine, the corporation is liable for the criminal act of its agent if the agent, who is himself culpable, acted "within the scope of his employment and with the intent to benefit the corporation."¹³

beginning of the present century, this has become common practice in the United States courts. See, e.g., *United States v. MacAndrews Forbes Co.*, 149 F. 823, 835-36 (C.C.S.D. N.Y. 1906); *United States v. Alaska Packers Ass'n and Babler*, 1 Alaska 217, 220 (1901); *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N.E. 445, 446 (1899).

⁹ The *alter ego* theory, which deals with the corporation's direct responsibility and identifies, under certain conditions, the conduct of the corporation's managerial figures with that of the corporate entity, was developed in England in *Moussell Bros. Ltd.*, [1917] 2 K.B. at 846. The theory reached its maturity in the criminal law area in *D.P.P. v. Kent and Sussex Contractors Ltd.*, [1944] K.B. 146, 155-56; *R. v. I.C.R. Haulage Ltd.*, [1944] K.B. 551, 559; *Moore v. I. Bresler Ltd.*, [1944] 2 All E.R. 515, 516-17.

In the United States this approach is only a minority view. See, e.g., *People v. Canadian Fur Trappers' Corp.*, 248 N.Y. 149, 151, 161 N.E. 455, 456 (1928). Cf. *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 277-78, 275 N.E.2d 33 (1971), *cert. denied*, 407 U.S. 910 (1972). See also *infra* text accompanying notes 38-40.

¹⁰ Mueller, *supra* note 6, at 22-23. (according to prevailing approach, there is no logical reason why corporations should not bear responsibility—even for murder).

¹¹ See, e.g., *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 127 (5th Cir. 1962); W. PROSSER & W. KEETON, ON THE LAW OF TORTS c. 12 (5th ed. W. Keeton ed. 1984); Edgerton, *supra* note 5, at 835-36; Elkins, *supra* note 5, at 97; Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141, 1192-93 (1983); Mueller, *supra* note 6, at 39; Comment, *Criminal Responsibility for Acts of Another*, 43 HARV. L. REV. 689 (1930).

¹² *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909).

¹³ *Id.* at 494-95; see also *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 99 (2d Cir. 1983); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir.), *cert. denied*,

Under this approach, the corporation can be held liable for the conduct of any of its employees or agents, irrespective of the positions they hold.¹⁴ Yet, case law has expanded this doctrine even further. It has been decided, for example, that a precise identification of the agent is not a precondition to holding the corporation liable as long as there is general proof that one of its agents committed the offense.¹⁵ Moreover, even when no individual agent has sufficient knowledge to form the *mens rea* requirement of the offense, courts have convicted the corporation by "piecing together" the knowledge of several employees and ascribing their "collective knowledge" to the entity.¹⁶ Courts also have found the corporate body liable under the *respondeat superior* theory even though the corporation's agents were acquitted¹⁷ of the same offense.

Furthermore, courts have held that a corporation cannot defend itself by claiming that the criminal conduct of a corporation's employee or agent would not have benefitted the corporation.¹⁸ The argument often advanced for denying the corporation this defense is that the theory focuses on the agent's motivation rather than on the advantages of the agent's conduct to the corporation.¹⁹

The judiciary has interpreted the term "scope of employment" to include those acts of employees which do not exceed the limits of their position.²⁰ Yet, the courts have held corporations liable for acts of employees notwithstanding that the employee acted against

459 U.S. 991 (1982); *Steere Tank Lines Inc. v. United States*, 330 F.2d 719, 723 (5th Cir. 1963); *Egan v. United States*, 137 F.2d 369, 379 (8th Cir.), *cert. denied*, 32 U.S. 788 (1943).

¹⁴ *United States v. Hangar One Inc.*, 563 F.2d 1155, 1158 (5th Cir. 1977); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 127 (5th Cir. 1962); *United States v. George F. Fish Inc.*, 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

¹⁵ *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

¹⁶ *United States v. T.I.M.E.—D.C. Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974). See also *infra* text accompanying notes 88-95.

¹⁷ *Magnolia Motor and Logging Co. v. United States*, 264 F.2d 950, 953 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959); *American Medical Ass'n. v. United States*, 130 F.2d 233, 253 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 613 (1941).

¹⁸ *United States v. Carter*, 311 F.2d 934, 942 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949); *Old Monastery v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945).

¹⁹ The Court should acquit the corporate entity only if the agent's action was intended to advance any interest other than his corporate employer's. See *Steere Tank Lines Inc. v. United States*, 330 F.2d 719, 723 (5th Cir. 1969); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 127, 129 (5th Cir. 1962). But cf. *Moore v. I. Bresler Ltd.*, [1944] 2 All E.R. 515, 516 (England); *R. v. McNamara*, (1981) 56 C.C.C. 2d 193, 315 (Canada).

²⁰ See, e.g., *Continental Baking Co. v. United States*, 281 F. 137, 149 (6th Cir. 1960).

corporate policy and was specifically instructed not to perform the act in question.²¹ Moreover, when an agent oversteps the limits of the position, subsequent ratification of the act by an authorized principal is sufficient to render the corporation liable for the criminal acts of its agent.²²

In comparison with American law, English law has adopted a significantly narrower approach, imposing on corporations either vicarious or direct criminal liability. Each of these doctrines is applied to different categories of offences. A corporation is vicariously liable, according to English law, for the acts of its agent only in situations in which individuals would be held similarly liable.²³ The limits, requirements and method of application of the doctrine of vicarious liability apply equally whether the individual's or the corporation's liability is of issue.²⁴ Lord Atkin stated: "Once it is decided that this is one of those cases where a principal may be held criminally liable for the act of his servant, there is no difficulty in holding that a corporation may be the principal."²⁵ In line with American decisions, English courts also will find a corporation vicariously liable for the acts of an agent if those acts are performed within the scope of employment, although in opposition to the ex-

²¹ *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1080 (5th Cir. 1978); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Co.*, 433 F.2d 147, 204-05 (3d Cir. 1970), *cert. denied*, 401 U.S. 489 (1971); *United States v. Armor & Co.*, 168 F.2d 342, 344 (3d Cir. 1948). *Cf. Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946).

Some courts have indicated, however, that acts done contrary to express instructions or policies of the corporation may raise the question whether the employee in fact acts to benefit the corporate body. *See United States v. Basic Construction Co.*, 711 F.2d 570, 573 (4th Cir.), *cert. denied*, 104 S. Ct. 371 (1983); *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979). *See generally* Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME LAW. 173, 182 (1979); Miller & Levine, *Recent Developments in Corporate Criminal Liability*, 24 SANTA CLARA L. REV. 41, 43-46 (1984).

²² *See Continental Baking Co.*, 281 F.2d at 149-51.

²³ *See Newton Ltd. v. Smith*, [1962] 2 Q.B. 278, 284-85; *James & Son Ltd. v. Smee*, [1954] 3 All E.R. 273, 280; *Quality Dairies (York) Ltd. v. Pedley*, [1952] 1 K.B. 275, 278-79; *Griffiths v. Studebakers, Ltd.*, [1924] 1 K.B. 102, 106.

²⁴ Similar to the prevailing legal approach in the United States, the English law requires that the agent or employee must act within the course of his employment for the doctrine of vicarious liability to apply. *See Coppen v. Moore* (No. 2), [1898] 2 Q.B. 306, 312. The technique often used by English courts in interpreting criminal provisions as imposing vicarious liability in addition to direct liability was termed "extension of verbs." It is based on constructing the verb used by the legislature to describe the forbidden conduct so that it refers to the person who performed it as well as to those in whose service he acted. This technique was described as the formation of "a new judicial dictionary." *See* G. WILLIAMS, *CRIMINAL LAW—THE GENERAL PART* 281 (2d ed. 1961).

²⁵ *Mousell Bros. Ltd.*, [1917] 2 K.B. at 846.

press direction of superiors.²⁶

Vicarious responsibility, however, has limited scope in English criminal law. It applies chiefly to the exceptional category of strict liability offenses—offenses with questionable affiliation to criminal law.²⁷ To expand this restrictive application of the vicarious liability doctrine, English law has adopted another doctrine from the law of torts, the theory of the organs of the corporation (i.e., the *alter ego* theory).²⁸ The theory of the organs of the corporation identifies the acts and thoughts of prominent figures in the corporation's hierarchy (known as organs) when acting within the scope of their authority as those of the corporate entity itself. By assigning the organ's *mens rea* to the corporation, this technique serves as a device for the personification of the corporate body, thus enabling the conviction of the corporation as directly liable for offenses which require criminal intent.²⁹ This process of identification is so deeply rooted that Lord Reid has commented that it is misleading to refer to a person acting on behalf of the corporation as its *alter ego*: "The person who speaks and acts as the company is not alter. He is identified with the company."³⁰

The proponents of the theory of the organs of the corporation have had to grapple with the problem of defining the organs by formulating a criterion to distinguish them from other employees of the corporation. No clear test has evolved, however, and many difficulties have been encountered in the attempt to apply the theory.³¹ Nevertheless, the theory is utilized in most of the legal systems influenced by English law, including New Zealand,³² Canada,³³ India³⁴

²⁶ See *Griffiths v. Studebakers, Ltd.*, [1924] 1 K.B. 102, 105; *James & Son Ltd. v. Smee*, [1954] 3 All E.R. 273, 280.

²⁷ See generally L. LEIGH, *STRICT AND VICARIOUS LIABILITY: A STUDY IN ADMINISTRATIVE CRIMINAL LAW* (1982). See also *infra* text accompanying notes 191-206.

²⁸ *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, [1915] A.C. 705, 713; *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159, 172.

²⁹ For early signs of deviation from the vicarious liability mode while considering corporate criminal liability, see *Mousell Bros. Ltd.*, [1917] 2 K.B. at 846. However, the significant application of the theory of the organs of the corporation in the criminal area began in England in 1944, probably as a result of pressures imposed by the economy of war. See *Kent and Sussex Contractors, Ltd.*, [1944] K.B. at 155-56; *I.C.R. Haulage Ltd.*, [1944] K.B. at 559; *I. Bresler Ltd.*, [1944] 2 All E.R. at 516-17. For an adoption of the theory of the organs of the corporation by the House of Lords, see *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153, 170-01, 180-01, 187-88, 190-01, 200-01. See also *R.v. Andrews-Weatherfoil Ltd.*, [1972] 1 W.L.R. 118, 123-24.

³⁰ *Tesco Supermarkets Ltd.*, [1972] A.C. at 171.

³¹ See, e.g., L. LEIGH, *supra* note 5; Heerey, *Corporate Criminal Liability—A Reappraisal*, 1 U. TAS. L. REV. 677 (1962).

³² See *Nordik Industries Ltd. v. Regional Controller of Inland Revenue*, [1976] 1 N.Z.L.R. 194; *Morris v. Wellington City*, [1969] N.Z.L.R. 1038; *Muir, Tesco Supermar-*

and Israel.³⁵ Australian law is less clear,³⁶ whereas the South African system appears to adopt principles more similar to those of the *respondeat superior* doctrine.³⁷ A similar school of thought exists in the United States as a minority view and imputes the criminal intent only of the corporation's managerial hierarchy to the corporate entity.³⁸ Some major guidelines of this approach have been adopted by the Model Penal Code³⁹ and several states.⁴⁰

III. DEFICIENCIES OF IMPOSING CRIMINAL LIABILITY ON CORPORATE BODIES

A. DEFINING THE PROBLEM

Subjecting non-corporal legal entities to criminal liability is a broad theory that is usually a starting point for deliberation rather than its outcome. Even the English Law Commission that stated decisively that the courts "have made little attempt to define the nature and purpose of the [criminal] liability [of corporations] which they established"⁴¹ did not thoroughly evaluate those matters. The

kets, *Corporate Liability and Fault*, 5 N.Z.U.L. REV. 357 (1973); Comment, *Indication as to the Real Nature of the Criminal Responsibility of Corporations*, 6 VIC. U. WELL. 85 (1972).

³³ See *R. v. McNamara*, (1981) 56 C.C.C.2d 193; *R. v. St. Lawrence Corp. Ltd.*, [1969] 5 D.L.R. 3d, 263; *R. v. Fane Robinson Ltd.*, (1941) 76 C.C.C. 196; LAW REFORM COMMISSION OF CANADA, CRIMINAL RESPONSIBILITY FOR GROUP ACTION, PART II (Working Paper No. 16, 1976); Caroline, *Corporate Liability and the Courts: Where Are They Going?*, 27 CRIM. L.Q. 237 (1985); Leigh, *The Criminal Liability of Corporations and Other Groups*, 9 OTTAWA L. REV. 247 (1977); Yarosky, *The Criminal Liability of Corporations*, 10 MCGILL L.J. 142 (1964).

³⁴ See *State of Maharashtra v. Messrs. Syndicate Transport Co. Ltd.*, [1964] A.I.R. Bom. 195; 1 H.S. GOUR, PENAL LAW OF INDIA 52 (9th ed. 1972).

³⁵ See C.A. 109/1972 *State of Israel v. Shefa-On Ltd. & Paz*, 28(1) P.D. (Isr. L. Rep.) (Hebrew).

³⁶ See *Morgan v. Babcock & Wilcox Ltd.*, (1929) 43 C.L.R. 163. But see *Universal Telecasters (Qld) Ltd. v. Guthrie*, 18 AUSTL. L.R. 531 (1978) (adopting the English *alter ego* theory); Fisse, *The Distinction Between Primary and Vicarious Corporate Criminal Liability*, 41 AUSTL. L.J. 203 (1967).

³⁷ See 1 E.M. BURCHELL & P.M.A. HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE 336 (1970); Barlow, *The Criminal Liability of a Company, Its Directors and Its Servants*, 63 S.A.L.J. 502 (1946).

³⁸ See, e.g., *Holland Furnace Co. v. United States*, 158 F.2d 2, 8 (6th Cir. 1946); *State v. Adjustment Department Credit Bureau Inc.*, 483 P.2d 687, 691 (Idaho 1971); *People v. Canadian Fur Trappers' Corp.*, 248 N.Y. 149, 151, 161 N.E. 455, 456 (1928). But cf. *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 275 N.E.2d 33 (1971), cert. denied, 407 U.S. 910 (1972).

³⁹ MODEL PENAL CODE § 2.07(1)(c) (1962).

⁴⁰ See, for example, the table comparing the Penal Codes of the States of New York, Illinois, Michigan, Delaware, Pennsylvania and California, prepared by the NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, 1 WORKING PAPERS 214-15 (1970). See also TEXAS PENAL CODE ANN. § 7.22.

⁴¹ ENGLISH LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW, GENERAL PRINCIPLES, CRIMINAL LIABILITY OF CORPORATIONS 10 (Published Working Paper No. 44, 1972).

theoretical basis for imposing criminal liability on the corporation remains unclear. The rationale occasionally suggested for imposing this type of liability emphasizes the corporation's moral responsibility for what goes on within it,⁴² and presents pragmatic arguments concerning its effectiveness,⁴³ often without examining whether the deterrent goal can be achieved in alternative ways. It is no wonder that this subject is considered "the less familiar and more esoteric area of the law of criminal liability."⁴⁴

Perhaps this uncertainty has encouraged the trend toward a slight restriction in the scope of corporate criminal liability. In the United States, the Model Penal Code and some state statutes have suggested, with regard to *mens rea* offenses of affirmative conduct, that unless "legislative purpose to impose liability on corporation plainly appears," the corporate entity is criminally liable only for offenses which were "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent, acting on behalf of the corporation within the scope of his office or employment."⁴⁵

A similar trend of limitation can be observed in England as well. In the 1940's, the group of organs was held to include all "responsible agents"⁴⁶ and "important officials,"⁴⁷ but in the 1970's the House of Lords narrowed the group to include only those who "constitute the directing mind and will of the company,"⁴⁸ thus somewhat restricting corporate criminal liability. These restrictions, however, do not offer a solution to either doctrinal or practical problems that underlie corporate criminal liability.

B. DOCTRINAL-CONCEPTUAL DIFFICULTIES

1. *Prescription and Human Consciousness*

Penal law, being a prescriptive branch of law, purports to direct the behavior of individuals in accordance with society's interests and values.⁴⁹ A prerequisite for the achievement of this goal is transmit-

⁴² See, e.g., Edgerton, *supra* note 5, at 840-44.

⁴³ See, e.g., MODEL PENAL CODE (Tent. Draft No. 4, 1955) § 2.07 comment at 148; Anderson, *supra* note 4, at 250-52; Elkins, *supra* note 5, at 125-29; Fisse, *supra* note 11, at 1145-54; Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1, 62 (1984); Comment, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1231-41 (1979).

⁴⁴ Allen, 33rd Annual Meeting, 1956 A.L.I. PROC. 171.

⁴⁵ MODEL PENAL CODE § 2.07(1)(c) (1962). See *supra* notes 38, 40.

⁴⁶ *Kent and Sussex Contractors Ltd.*, [1944] K.B. at 156.

⁴⁷ *I. Bresler Ltd.*, [1944] 2 All E.R. at 516.

⁴⁸ *Tesco Supermarkets Ltd.*, [1972] A.C. at 180, 187.

⁴⁹ See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); H.M. Hart, *The*

ting the criminal law dictates to an addressee capable of grasping the message, namely the human consciousness. Indeed, the direct and sharp connection with human consciousness is apparent in all major aspects of criminal law: behavior, defenses and punishment. Offenses deal with the individual's conscious deviation from permitted modes of behavior. Defenses are offered to those who act under lack of or diminished or disturbed consciousness. Similarly, the justification for punishing violators rests mainly on the assumption that it will deter future conscious violations by the transgressor and others. Hale, the renowned English jurist, described the inseparable connection between criminal liability and human consciousness almost 250 years ago:

Man is naturally endowed with these two great faculties, understanding and liberty of will, and, therefore, is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath capacity to obey.⁵⁰

This cohesive link within criminal law, between the commanding authority and the conscious individual who alone is susceptible to guidance, is threatened when confronted with the imputation of criminal liability to corporations, which by their very nature lack any consciousness.

Indeed, the very substance of the corporate body is controversial and various views concerning it have emerged. There are those who treat the corporate body as a mere legal fiction devoid of the ability to function independently and requiring permanent representation by human beings (the fictitious approach). Others treat corporations as real entities claiming that the law merely recognizes the existence of corporate bodies rather than creates the corporate entities (the realist approach). A third group of jurists rejects both these approaches and offers additional explanations.⁵¹

Even the staunchest proponents of the realist approach, however, would concede that from a physical standpoint, distinctions must be made between human beings and corporate bodies. Even

Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401 (1958); Morris, *The Proper Role of Criminal Law*, in READINGS ON CONCEPTS OF CRIMINAL LAW 260 (R.W. Ferguson ed. 1975); Williams, *The Proper Scope and Function of the Criminal Law*, 74 L.Q. REV. 76 (1958).

⁵⁰ 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 14 (Emlyn ed. 1736) (London, Professional Book Ltd., 1971).

⁵¹ See generally W. FRIEDMANN, *LEGAL THEORY* 656-59 (5th ed. 1967); G. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* 167-68 (2d ed. 1949); G. PATON, *A TEXT-BOOK OF JURISPRUDENCE* 407-32 (4th ed. G. Paton & D. Derham eds. 1972); 4 R. POUND, *JURISPRUDENCE* 200-61 (1959); Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916).

assuming that the individual desires of a group of people working in concert can form a "collective will" as a result of the interdependence and mutual influence within the group, and even assuming that this synthesis of desires is distinct from the separate wills forming it (because the mutual interest supposedly created is not necessarily identical to the individual interests from which it has originated),⁵² the problem of personifying the corporate body is not thereby brought to a clear-cut solution.⁵³ The corporate entity is an enterprise devoid of the physical ability characteristics of the human race. Man possesses both consciousness and physical aptitude, as well as the power to exercise them. Corporate bodies, in contrast, are bereft of those capacities and depend totally on a human source in order to function.⁵⁴ The theory which views the corporation as subject to criminal liability challenges, therefore, the ideological and normative basis of criminal law and its mode of expression and operation.

2. *The Perpetrator-Corporation Relationship*

a. Defining the Problem

The theory of the organs of the corporation describes the perpetrator-corporation relationship using the term "identification"⁵⁵ while the theory of *respondeat superior* speaks of "imputation."⁵⁶ These terms suggest that the organ's or the agent's conduct performed within his scope of authority is the conduct of the corporate entity and it may serve, therefore, as a base for imposing criminal liability on the corporation. The term "identification" more clearly illustrates this approach. In English law, the use of this term often crystalizes the distinction between vicarious and direct corporate lia-

⁵² Fisse, *supra* note 11, 1190-92 n.235.

⁵³ The reasoning behind the proposition that a separate "collective will" emerges from the incorporation of a number of individuals is even more doubtful in the case of a closely held corporation established by a sole promoter. See Woods, *Lifting the Corporate Veil in Canada*, 35 CAN. B. REV. 1176, 1177 (1957) (when corporation is controlled by single person "the distinct social reality of a corporate personality may be non-existent").

⁵⁴ Many commentators emphasize that "mind" has no meaning when applied to a corporate body and that it lacks the prerequisites for moral culpability. See, e.g., Comment, *supra* note 43, at 1241; Comment, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 6-7 (1928); Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 584 (1982).

⁵⁵ L. LEIGH, *supra* note 5, ch. 7; Fisse, *Consumer Protection and Corporate Criminal Responsibility*, 4 ADEL. L. REV. 113 (1971); Fisse, *Responsibility, Prevention and Corporate Crime*, 5 N.Z.U.L.R. 250, 254-65 (1973).

⁵⁶ See Elkins, *supra* note 5, at 100-15; Comment, *supra* note 43, at 1247-48.

bility,⁵⁷ the scopes of which are completely different in that legal system.⁵⁸ The difference between imputation and identification seems to lose its significance, however, in the analysis of the legal-theoretical relationship between the perpetrator and the corporate entity. American law regards imputation as a form of both personification and identification and employs the term to explain that the conduct and especially the *mens rea* of the agent are the criminal act and intent of the corporation as well.⁵⁹ The case law has reached the same result in England⁶⁰ and Canada.⁶¹ When the agent and the principal are two legally competent individuals, imputation (usually limited to impose vicarious liability for minor strict liability offenses)⁶² serves solely as a transferring device through which the principal is regarded as the one who has committed the offense. When the principal is a corporate body, devoid of any human characteristics, imputation also serves as a personification device which enables the transformation of the human characteristics to the corporation in order to consider it the performer of the offense.

In the area of substantive criminal law (as opposed to the realm of strict liability administrative offenses) neither imputation nor identification is supportable. Penal law, which emphasizes the personal aspect of liability, is hesitant to regard the illegal conduct of one person as the conduct of another.

Therefore, attributing the conduct of an organ or an agent to the corporation for the purpose of imposing liability on both brings into existence a doctrinal limitation. Where a specific statutory provision prescribes such identification, as in several jurisdictions in the

⁵⁷ *Tesco Supermarkets Ltd.*, [1972] A.C. at 170; ENGLISH LAW COMMISSION, *supra* note 41, at 2-3; R. CROSS & P. JONES, *INTRODUCTION TO CRIMINAL LAW* 122-26, 464 (10th ed. R. Card ed. 1984); Fisse, *supra* note 36.

⁵⁸ See *supra* text accompanying notes 22-30.

⁵⁹ *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481, 492-93 (1909); Elkins, *supra* note 5, at 100-15; Metzger, *supra* note 43, at 49; Comment, *supra* note 43, at 1247-48.

⁶⁰ *Kent and Sussex Contractors*, [1944] K.B. at 156.

⁶¹ *R. v. Electrical Contractors Association of Ontario and Dent*, (1961) 27 D.L.R. 2d 193, 200.

⁶² Courts rarely impose vicarious liability for *mens rea* offenses. In English law, such an imposition is restricted mainly to a licensee who delegates his responsibility as licensee to an agent and the latter breaches one of the delegated responsibilities (the delegation principle). See *Howker v. Robinson*, [1973] Q.B. 178; *R. v. Winson*, [1969] 1 Q.B. 371; *Vane v. Yiannopoulos*, [1965] A.C. 486; *Allen v. Whitehead*, [1930] 1 K.B. 211. Commentators have preferred, however, to regard the liability imposed in such circumstances as direct rather than vicarious. See Fisse, *The Delegation Principle: Vicarious Liability in Regulatory Offences*, 10 CRIM. L.Q. 417 (1967); Fisse, *The Elimination of Vicarious Responsibility in Regulatory Offences*, 42 AUSTR. L.J. 199, 250 (1968); Fisse, *Vicarious Liability in Regulatory Offences*, 44 AUSTR. L.J. 147 (1970).

United States,⁶³ the status of the relationship is delineated from the outset. Creating a normative basis for this relationship, however, does not reconcile the doctrinal and conceptual aspects of the legal problem itself. Efforts have been made, therefore, to draw analogies to the perpetrator-corporation relationship from other contexts in which liability for substantial criminal offenses is imposed on two separate personalities following the commission of a single offense, as in the cases of conspiracy and complicity. While supporters have argued that the perpetrator-corporation relationship can be defined in terms of the above mentioned relationships, it is very doubtful whether this approach presents a convincing solution to the issue.⁶⁴

b. The Conspiratorial Relationship

One attempt to comprehend the attribution of the perpetrator's offense to the corporation suggests comparing their relationship to that of conspirators. The theory of conspiracy holds any conspirator liable for crimes committed by fellow conspirators in the furtherance of the conspiracy,⁶⁵ even if the conspirator was not capable of committing the offense himself.⁶⁶ The analogy to the theory of corporate criminal liability suggests that each breach of law the corporate body has been accused of is in furtherance of an offense previously plotted between the corporation and the perpetrator. Hence, the corporation is criminally liable for the acts of the perpetrator in execution of the plan of the conspiracy.

The underlying assumption that a corporation and a perpetrator can be partners to a criminal conspiracy is questionable. The difficulties in applying the rules of conspiracy to the corporation-perpetrator relationship are inherent in the differences between the prospective natures of the relationships being compared. Conspiracy requires an agreement between separate parties to perform an illegal act for which each party must have the necessary criminal intent.⁶⁷ The question is, therefore, whether the perpetrator and the

⁶³ See, e.g., ILL. REV. STAT. ANN. ch. 38, § 5-4 (a) (Smith-Hurd 1978); N.Y. PENAL LAW § 20.20(2) (McKinney 1980); TEXAS PENAL CODE § 7.22(b) (Vernon 1974).

⁶⁴ See *infra* text accompanying notes 65-87.

⁶⁵ *Pinkerton v. United States*, 328 U.S. 640 (1946).

⁶⁶ See *State v. Myers*, 211 P. 440 (Idaho 1922); *State v. Martin*, 199 Iowa 643, 200 N.W. 213 (1924).

⁶⁷ See ENGLISH LAW COMMISSION, REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM 12 (1976); ENGLISH LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW GENERAL PRINCIPLES, INCHOATE OFFENSES, CONSPIRACY, ATTEMPT AND INCITEMENT 19 (Working Paper No. 50, 1973); Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977); Orchard, *Agreement in Criminal Conspiracy*, 1974 CRIM. L. REV. 297, 335.

corporation, which are actually one, can be separate parties to a conspiracy.

Few courts have answered this question affirmatively. A Canadian court found that a corporation can be convicted of conspiring with its director when the director acts in distinctly different functions. The court stated that:

it is not necessarily a defence to an indictment against a corporation. . . (for conspiracy) . . . that only one human being intended to break the law. That person might act in more than one legal capacity. For instance, he might be a director of more than one corporation, or he might have personal interests of the same kind as that of a corporation of which he is a director. Thus, he may be regarded as though he were two separate persons and two separate minds.⁶⁸

A United States federal court followed this line of reasoning with regard to conspiracy, and stated: "[E]mployment alone by a corporation does not so merge the employee's mind and being with that of the corporation so that one person's cognition remains rather than more than one. . . ."⁶⁹

This, however, does not seem to be the prevailing view. Many jurists agree that a corporation cannot be convicted for conspiracy with its organ or agent, nor can it be convicted for conspiracy with another corporation through a common agent.⁷⁰ The rationale behind this approach is that despite the legal perception that the perpetrator and the corporation are separate legal personalities, the corporation is incapable of either thinking or acting independently; whereas the requirement for plurality of offenders in conspiracy is fulfilled only where at least two minds meet, each of which is capable of contributing to the furtherance of the conspiracy. This theory has been adopted in England⁷¹ and Canada,⁷² and finds substantial

⁶⁸ *R. v. Electrical Contractors Ass'n of Ontario and Dent*, (1961) 27 D.L.R. 2d 193, 200.

⁶⁹ *United States v. Consolidated Coal Co.*, 424 F. Supp. 577, 581 (S.D. Ohio 1976).

⁷⁰ ENGLISH LAW COMMISSION (REPORT), *supra* note 67, at 12-13; ENGLISH LAW COMMISSION (Working Paper), *supra* note 67, at 21; Calvert, *The Case of the Schizophrenic Managing Director*, 27 MOD. L. REV. 220 (1964); Goode, *Corporate Conspiracy: Problems of Mens Rea and the Parties to the Agreement*, 2 DALHOUSIE L.J. 121, 138-41 (1975); Hall, *The Substantive Law of Crime 1887-1936*, 50 HARV. L. REV. 616, 648 (1937); Welling, *Intracorporate Plurality in the Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1184-1221 (1982); Comment, *Corporate Criminal Liability for Intracorporate Conspiracy*, 72 KY. L.J. 225, 231-38 (1984); Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 951-52 (1959).

⁷¹ *R. v. McDonnell*, [1965] 3 W.L.R. 1138, 1148. See also ENGLISH LAW COMMISSION (REPORT), *supra* note 67; ENGLISH LAW COMMISSION (Working Paper), *supra* note 67; Calvert, *supra* note 70.

⁷² *R. v. Martin*, [1933] 1 D.L.R. 434, 440. See also Caroline, *supra* note 33, at 252; Goode, *supra* note 70.

support in the United States.⁷³

Conspiracy is an independent offense and does not depend upon the actual execution of what was agreed upon. It is condemned, however, primarily because the conspiracy might have resulted in such criminal performance. Although even latent thoughts of legal infractions are potentially dangerous, penal law interferes only when an overt act is performed because only then does the danger to society become tangible. In the context of conspiracy, an overt agreement to perform an illegal act has a more obligatory effect on its parties and makes retreat from the idea more difficult. Viewed in this way, the suggested comparison between conspirators and perpetrator and corporation seems implausible. Even if the perpetrator represents the corporation as well as himself in his thoughts, these thoughts are anchored in a single human consciousness. There need not have been any expression of the plan at its formation, and if the perpetrator withdraws afterwards from the idea of committing the offense, the plan will cease to exist. Therefore, the practical implication of treating the perpetrator-corporation relationship as a conspiracy amounts to punishing thoughts, a notion that stands in contradiction to fundamental principles of criminal law and poses impossible problems of proof.

Moreover, conceptualizing the perpetrator-corporation as a conspiratorial relationship based upon the distinct functions allegedly performed by the single human mind during the perpetrator-corporation relationship might have far-reaching consequences. Such a line of argument might justify imposing criminal liability for conspiracy by developing a theory of "legal schizophrenia" whereby a human mind fulfilling diverse functions is viewed as a split mechanism. For example, a trustee, a custodian, a bailee, or an agent might be convicted for conspiracy for making a decision to breach their duty of trust, although the person never acted upon this decision.⁷⁴

When the organ involved in the criminal activity consists of a group of people (for example, directors of a corporation) with whom the corporate body is identified with by the doctrines of identification or imputation, the situation is not fundamentally different. A federal court's decision holding a corporation liable for conspiracy with two of its own agents, who had conspired between them-

⁷³ *Union Pacific Co. v. United States*, 173 F. 737, 745 (8th Cir. 1909); *United States v. Carroll*, 144 F. Supp. 939, 941 (S.D.N.Y. 1956); *United States v. Santa Rita Store Co.*, 16 N.M. 3, 113 P. 620 (1911). See also *Hall*, *supra* note 70; *Welling*, *supra* note 70; *Comment*, *supra* note 70.

⁷⁴ *Calvert*, *supra* note 70, at 222.

selves,⁷⁵ therefore, raised severe doctrinal difficulties about how the conspiracy was established.⁷⁶ Even assuming that the cooperation of the group produces a new entity, as proposed by the realist approach, a new separate consciousness or independent thinking center does not evolve. The plurality of agents involved in an agreement to commit an offense would justify conviction for conspiracy among themselves.⁷⁷ The corporate entity might serve as a convenient instrument for carrying out the criminal plan, or it might open new horizons for the perpetrators of the crime, but this does not change the substance of the issue,⁷⁸ nor does it render the corporation a conspirator.

It is difficult, therefore, to explain the relationship between the perpetrator and the corporation (and the resulting expansion of criminal law) on the basis of the conspiracy theory. By definition, the doctrines of identification and imputation are incompatible with the conspiracy relationship. The distinctive feature of these doctrines is that they lift the legal veil which separates the perpetrator from the corporation, and they view both the corporal and the legal entities as one. The criminal conspiracy, on the other hand, focuses on the coordination between two totally separate and independent parties.

Thus, the theory of conspiracy is incompatible with the perpetrator-corporation relationship. Any interference with the mental independence of the individual conspirators or any increase in their mutual dependence gives rise to doubts as to their ability to conspire among themselves. For example, the common law questions the ability of one to conspire with a minor or someone who is incapable of forming the criminal intent required for conspiracy.⁷⁹ Even the capacity of spouses to conspire with each other has been

⁷⁵ *United States v. Hartley*, 678 F.2d 961, 970-72 (11th Cir. 1982); see also *United States v. Consolidated Coal Co.*, 424 F. Supp. 577, 581 (S.D. Ohio 1976). For a similar basic opinion expressed in English law, see *De Jetley, Marks v. Greenwood* (Lord), [1936] 1 All E.R. 863, 872-73; G. WILLIAMS, *supra* note 24, at 861.

⁷⁶ The court avoided such an analysis and found that the "conceptual difficulty" was "easily overcome" by policy considerations. *Hartley*, 678 F.2d at 970. For a criticism of the decision, see Comment, *supra* note 70, at 234-38.

⁷⁷ The director's argument in *People v. Duke*, 19 Misc. 292, 44 N.Y.S. 336, 337-38 (1897), that they can be considered as "fingers of one hand" and should, therefore, be acquitted of conspiracy among themselves, was promptly rejected by the court. See also *American Medical Ass'n v. United States*, 130 F.2d 233, 253 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); *State v. Parker*, 114 Conn. 354, 158 A. 797, 800 (1932); Welling, *supra* note 70, at 1196-99; Comment, *supra* note 70, at 233-37.

⁷⁸ Note, *supra* note 70, at 953.

⁷⁹ ENGLISH LAW COMMISSION (REPORT), *supra* note 67, at 21-23; ENGLISH LAW COMMISSION (Working Paper), *supra* note 67, at 23.

doubted.⁸⁰ If uncertainty as to the independence of one party to an alleged conspiracy can call into question his capacity to conspire with the party upon whom he is dependent, similar doubt must exist when the mind of the alleged party to the conspiracy is in effect the mind of the other party as well.

c. The Complicity Relationship

Another approach is to define the perpetrator-corporation relationship in terms of criminal complicity. Some support for this idea can be found in legal literature⁸¹ and case law.⁸² This approach raises difficulties as well because some of the features of the participants' relationship contradict those of the identification or imputation doctrines upon which the perpetrator-corporation relationship is based.

Criminal complicity concerns the performance of a single offense by a number of participants, each of whom takes a distinct part in its performance. Only the behavior of the principal offender must include all the elements of the offense. The accomplices fulfill diverse functions and their respective contribution to the crime is individually defined.⁸³ The counsellor or procurer is absent from the scene of the crime even though he usually is the originator of the offense, an advisor prior to its commission, and the motivating force behind the commission of the crime. The aider-and-abettor, on the other hand, is actually or constructively present at the scene of the crime and assists the principal offender in its commission. The *actus reus* for accomplice liability consists of persuading, instigating or encouraging the principal offender to commit the offense (referring to the counsellor or procurer) or assisting him in any way in its commission including by words, gestures and even mute presence (referring to the aider-and-abettor).⁸⁴ The *mens rea* for accom-

⁸⁰ *United States v. Dege*, 364 U.S. 51 (1960); cf. *Mawji v. R.*, [1957] 2 W.L.R. 277; *R. v. Whitehouse*, (1852) 6 Cox C.C. 38; see also ENGLISH LAW COMMISSION (REPORT), *supra* note 67, at 20-21; Williams, *Legal Unity of Husband & Wife*, 10 MOD. L. REV. 16 (1947).

⁸¹ See, e.g., P. GILLIES, *THE LAW OF CRIMINAL COMPLICITY* 149-51 (1980); G. WILLIAMS, *supra* note 24, at 865-66; Comment, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 24-28 (1928).

⁸² See, e.g., *R. v. Daily Mirror Newspapers Ltd.*, (1922) 2 K.B. 530, 542; *R. v. Fell*, (1981) 64 C.C.C. 2d 456, 462; *Lewis v. Crafter, Cavendish Laboratories Ltd. v. Crafter*, [1942] S.A.S.R. 30, 33.

⁸³ See generally P. GILLIES, *supra* note 81; W. LAFAVE & A. SCOTT, *HANDBOOK OF CRIMINAL LAW* 495-521 (1972); G. WILLIAMS *supra* note 24, at 346-422; Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581 (1941); Smith, *Aid, Abet, Counsel or Prouve*, in *RESHAPING CRIMINAL LAW* 120 (P.R. Glazebrook ed. 1978).

⁸⁴ P. GILLIES, *supra* note 81, at 51-56; W. LAFAVE & A. SCOTT, *supra* note 83, at 502-05.

plice liability consists of two types: (1) the state of mind rendering encouragement or assistance, which is confined to the accomplice's intention to persuade, instigate, encourage (in case of a counsellor or procurer) or assist (in case of an aider-and-abettor) the principal offender in committing the offense, or at least the accomplice's awareness of the possible results of his conduct; and (2) the state of mind required for the offense committed, which, according to one approach, consists of the appropriate kind and degree of mental element vital to the crystallization of the subject offense, or, according to another view, consists of the mere awareness of the possible occurrence of the offense.⁸⁵

Analyzing the perpetrator-corporation relationship in terms of criminal complicity raises similar problems to those encountered when considering the comparison to conspiracy. The lack of the necessary plurality of offenders, each of whom has independent physical and mental capacities, is fatal to both comparisons. The human consciousness operative in events involving the corporation and the perpetrator is one-dimensional in the sense that it can be only the persuasive force or, alternatively, the persuaded agent—it cannot be both. A functional analysis suggesting that the same intelligence can be construed as performing a double role, at once instigation and being instigated to commit the offense, is completely artificial. The arguments which counteract a similar attempt to compare the corporation-perpetrator relationship to conspiracy are also effective here. Though a similar process of first weighing and then determining whether to commit an offense usually occurs in the mind of every criminal, an individual offender cannot be both an inciter and a performer. The logical conclusion of such a line of reasoning could again lead to the penalizing of thoughts.

The same conclusion results when comparing the perpetrator-corporation relationship to that of the aider-and-abettor and the principal. One physical and mental organism cannot at the same time perform a forbidden act and assist in its performance. One organism cannot intend to execute the crime totally alone and simultaneously intend to support another in doing the same act. By definition, the *actus reus* of the aider-and-abettor is not the performance of the intended offense, but rather, the act of helping another to commit it. Similarly, no form of legal acrobatics can interpret the *mens rea* of a single mental state in ways that differ substantively. The single mental state of the perpetrator corporation cannot be

⁸⁵ P. GILLIES, *supra* note 81, at 56-89; W. LAFAYE & A. SCOTT, *supra* note 83, at 502-12.

interpreted with respect to the corporation as the intention to perform the offense single-handedly, and, at the same time, with respect to the perpetrator, now in the guise of the aider-and-abettor, as the intent to aid another in committing the offense. An American court rejected this possibility and declared unhesitatingly that: "if a corporation can act only through its agent, and thereby become in law completely identified with its agent, how can it be an accessory to this act? For in such a case, it must be accessory to its own act, which is a legal absurdity."⁸⁶

Nonetheless, a functional examination of the above perpetrator-corporation relationship can sometimes be significant, for example, when a manager breaches a law applicable by definition only to the corporate owner or to the corporate licensee of a business. Such a situation illustrates a difficulty in arguing that the same party both committed the forbidden act and assisted in its commission, or that he intended to perform it singly and at the same time to carry it out through another. From a functional point of view, the counseling or procuring in such an event perhaps can be distinguished from the performance. The manager's actions lack the elements required of the principal offender of the crime. The manager is not the *persona* to whom the provision in question applies; therefore, he can neither violate the specific provision nor possess the necessary mental element to do so. Yet, when he operates as an organ or an agent—namely, as the corporation itself, in accordance with the identification doctrine—the manager's conduct might be viewed as that of the principal.

Even under these circumstances, however, the lack of the necessary characteristic of plurality of offenders in the perpetrator-corporation relationship makes it difficult to consider the relationship in terms of the criminal participant theory. Each party within the criminal partnership must be capable of individually fulfilling at least one role in the partnership, otherwise he cannot be defined as a party. In order to view the perpetrator as an aider-and-abettor to the corporation, it would be necessary to prove that the body corporate could independently fulfill the function of one of the parties to the crime. Clearly, the corporate entity cannot satisfy such a condition.

An apparent resemblance seems to exist between the perpetrator-corporation relationship during the commission of the crime and the relationship of two offenders acting concurrently as joint principals with the same intent to perform the offense. A closer analysis will disclose, however, that the disparities override the ap-

⁸⁶ State v. Southern Ry. Co., 145 N.C. 495, 542, 59 S.E. 570, 586 (1907).

parent similarities. Joint principal offenders of an offense affect their common purpose through mutual understanding and coordination. Therefore, the actual criminal outcome of their activity may be viewed as a single unit. Yet, the physical and mental elements of the offense exist independently in each offender and are individually manifest in obvious and concrete forms. The separate formulation by each of the performers of both the *actus reus* and the *mens rea* of the offense distinguishes, therefore, their mutual relationship from that of the perpetrator and the corporation as well as from that of the aider-and-abettor and principal.

The perpetrator-corporation relationship is more similar to that of the innocent agent and his principal⁸⁷ than it is to that of parties to a crime. However, even this comparison is not fully satisfactory. The dependence of the corporation on the perpetrator is even greater than the dependence of the innocent agent on his principal. The innocent agent has the ability (and sometimes even the capacity) to operate independently, but the corporation, by its very nature, lacks any ability to function independently and is manipulated by the principal just as raw material is molded by a craftsman.

3. Over-Personification

Excessive adherence to the doctrines of identification and imputation, upon which the perpetrator-corporation relationship is based, could lead to the development of ideas that contradict basic principles of penal law. In American case law, there is an emerging approach according to which a corporation is convicted by combining the separate elements of conduct of its various agents to form a single crime.⁸⁸ This approach includes not only circumstances in which B's knowledge combines with A's ignorant act, performed unhindered by B, to constitute an offense, as for instance, where one manager intentionally does not prevent another from purchasing goods for the company which the former knows to be stolen. Also included are situations in which one agent is actually unaware of the acts or knowledge of another agent.⁸⁹

A United States federal court followed such an approach and

⁸⁷ As to the doctrine of innocent agency, see P. GILLIES, *supra* note 81, at 138; W. LAFAVE & A. SCOTT, *supra* note 83, at 496-97; J. SMITH & B. HOGAN, *CRIMINAL LAW* 119-20 (5th ed. 1983); G. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 368 (2d ed. 1983).

⁸⁸ Comment, *supra* note 43, at 1248.

⁸⁹ *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974); *United States v. Sawyer Transport Inc.*, 337 F. Supp. 29, 30-31 (D. Minn. 1971); *People v. American Medical Centers of Michigan, Ltd.*, 110 Mich. App. 135, 324 N.W.2d 782, *cert. denied*, 104 S. Ct. 529 (1982).

found a carrier liable for violating an Interstate Commerce regulation by knowingly permitting a driver to operate a vehicle while ill.⁹⁰ One employee put a driver on duty at his request knowing that previously the driver had asked to be discharged from work for medical reasons but had changed his mind after hearing of the company's new absentee procedure.⁹¹ Other agents of the corporate body were aware that the new policy procedure was likely to have significant effect on a driver's decision not to work due to illness.⁹² Neither agent had actual knowledge of the driver's impaired ability to drive, and yet the court held that:

a corporation cannot plea innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.⁹³

A Michigan court was even more direct and explicit, recently stating with regard to Medicaid fraud offenses: "The combined knowledge of . . . employees may be imputed to a corporation to find it liable for fraudulent acts."⁹⁴

Following the approach taken by the courts mentioned above, however, might lead to the conviction of legal bodies under far-reaching and absurd circumstances. For example, a corporation might be held liable for knowingly accepting stolen property that organ A acquired in good faith for the company, but which organ B knows to be stolen, though he knows nothing about the purchase.

The trend that allows the conviction of a corporation by piecing together the conduct of different agents so as to form the elements of one offense is the result of over-personification of corporate bodies. The proponents of this approach regard the actions and thoughts of the separate organs or agents of the corporation as the activities of distinct parts of a single consciousness. This analysis would be accurate if the object under consideration were a human organism. An individual is formed so that information is concentrated in one central intersection—the mind—which operates and supervises the movements of the limbs. When the system functions normally, behavior is controlled by a central intelligence system. Consequently, a claim that the movements of various limbs were un-

⁹⁰ *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974).

⁹¹ *Id.* at 735, 739.

⁹² *Id.* at 739.

⁹³ *Id.* at 738.

⁹⁴ *People v. American Medical Centers of Michigan, Ltd.*, 118 Mich. App. 135, 156, 324 N.W.2d 782, 793 (1982).

coordinated normally would be rejected. Indeed, the practical reason underlying some of the criminal law defenses such as insanity, intoxication and lack of volition, is that malfunctioning of the controlling intelligence system should not be a cause for imposing liability. This line of argument cannot be applied to corporations. The corporate entity lacks the corporal organ that centralizes information and controls the activities of the limbs. It is artificial to argue in such circumstances that the total sum of the agents' information exists in the "mind of the corporation," because this "mind" is a fiction. The proponents of this approach are held captive by the legal presumption they have created, and refer to it as if it were a reality, without discerning its limitations.⁹⁵

Moreover, piecing together the knowledge of the different agents to form the knowledge of the corporation does not conform with the need to integrate the various elements of the offense as a condition to its formation. This need to integrate expresses the requirement of a casual connection between the conduct, as part of the *actus reus* and the *mens rea*, and is known as the principle of concurrence. It emphasizes that, in *mens rea* offenses, criminal liability arises only when the forbidden act or omission is the consequence of the criminal intent.⁹⁶ The artificial process of "piecing together" whereby the *mens rea* and *actus reus* of an offense are attributed to the corporation cannot satisfy the demands of the principle of concurrence. Even the proponents of corporate criminal liability concede that the corporate entity cannot by itself produce the elements necessary to consummate the crime. These elements must first evolve in the minds and actions of the perpetrators and only then, by way of a legal fiction of identification or imputation, are they attributed to the corporation. Hence, the link required by the concurrence principle must also be supplied first by the organ or agent and only then can it be ascribed to the corporation. However, when the knowledge vital to the formation of the link is scattered in more than one mind, the necessary link is obviously not manufactured by any

⁹⁵ The English Law Commission opposed, therefore, the possibility "of piecing together several minds among the controlling officers of a company to render the company liable" and expressed the view that corporate criminal liability can be imposed only when "at least one of its controlling officers has the elements" required. ENGLISH LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW, *supra* note 41, at 27.

⁹⁶ See, e.g., *Commonwealth v. Calig*, 247 Mass. 20, 141 N.E. 510 (1923); *Meli v. R.*, [1954] 1 W.L.R. 28 (P.C.); *R. v. Miller*, [1983] 1 All E.R. 978; (H.L.) *Fagan v. Commissioner of Metropolitan Police*, [1969] 1 Q.B. 439. See also W. LAFAYE & A. SCOTT, *supra* note 83, at 237-242; Marston, *Contemporaneity of Act and Intention in Crimes*, 86 L.Q. REV. 208 (1970); White, *The Identity and Time of the Actus Reus*, 1977 CRIM. L. REV. 148.

human consciousness and it cannot, therefore, be claimed that the criminal mind stimulated the forbidden act.

4. *The Defenses*

The criminal defenses define circumstances that absolve the act of its criminal character. If the perpetrator-corporation relationship can confer liability on the corporate body by ascribing to it criminal acts and intents of the perpetrator, the corporation must be granted access to the criminal defenses available to the perpetrator. However, criminal defenses which, when applied to human behavior, expose the sensitivity of the penal law to extraordinary situations lead to absurd results when applied to situations where corporate liability is in question.

Supporters of corporate criminal liability probably would allow a claim of ignorance or mistake of fact in defense of the corporation. Such a claim might be made, for example, when a manager authorizes an illegal act in a reasonable though mistaken belief concerning a material fact.⁹⁷ But the corporation cannot raise other defenses. To establish the defense of duress, for example, the accused must prove that he acted under the threat of death or serious bodily harm. Yet, it is impossible to "threaten" the body or the life of a corporate entity nor is it reasonable to assume that a threat to the life or body of the manager translates into a threat on the "life" or "body" of the corporation. The doctrines of identification or imputation ascribe only the actions of the organ or agent to the corporation; they do not argue that they are physiologically identical.⁹⁸ Similarly and notwithstanding the ascription of the knowledge of organ or agent to the corporation according to the identification or imputation doctrine, it is illogical to hold the corporation insane or intoxicated.

These absurd results are avoided if the doctrines of identification and imputation are limited to determine that the corporate body is responsible for criminal conduct performed. Thus, the identification or imputation doctrines are applied only after the conduct of the perpetrators has been held criminal, or in other words, only after it is determined that an offense has been committed. The term offense in this analysis would include not only the particular elements in the specific provision, but also the absence of conditions and circumstances upon which a defense can be grounded. The cor-

⁹⁷ See *Chuter v. Freeth & Pocock Ltd.*, [1911] 2 K.B. 832, 836 (holding that corporation can believe statements in warranty given by its agent and thus be liable for those statements if false).

⁹⁸ See *infra* note 117.

poration could be found liable accordingly only if the perpetrator could be convicted for the activity ascribed to the corporation. Conversely, where a valid defense is available to the perpetrator so that his act is absolved from criminality, the question of ascribing his conduct to the corporate body becomes irrelevant. From a practical standpoint, this approach appears to solve the difficulties inherent in extending general defenses to corporate entities. Yet, from a doctrinal perspective, this analysis again makes clear that the common vocabulary of the criminal law becomes foreign language when applied to the body corporate.

C. PRACTICAL WEAKNESSES—SANCTIONING CORPORATIONS

To forward the basic goals of punishment, primarily retribution and deterrence, the penal law contains a wide range of sanctions. The system does not function efficiently, however, when applied to the corporate body. The difficulties encountered become manifest in two ways: the first relates to the palpable inability to impose several modes of punishment on corporations; and the second accentuates the ineffectiveness of sanctioning corporations.

1. *Non-Economic Sanctions*

Non-economic sanctions by their very nature are inapplicable to corporate entities. The threat to life or liberty inherent in these sanctions has validity and significance only within the human context. Some 300 years ago, when corporal punishment was the only criminal sanction, a defense counsel queried: "Must they hang up the Common Seal?"⁹⁹ In a similar vein, the second Baron Thurlow remarked that the corporation "has no soul to be damned and no body to be kicked."¹⁰⁰ Widening the spectrum of non-economic sanctions has not altered the state of affairs. The most obvious example is imprisonment. However, some other restraining measures are also intrinsically inapplicable; and the present form of the probation system cannot be employed fully against corporations, although legislators¹⁰¹ and courts¹⁰² have taken practical steps to

⁹⁹ *R. v. City of London*, 8 St. Tr. 1039, 1138, 89 Eng. Rep. 930 (K.B. 1682).

¹⁰⁰ R. CROSS & P. JONES, *supra* note 57, at 122.

¹⁰¹ See the conditions of probation in 18 U.S.C. § 3653 (effective Nov. 1, 1986). See also Criminal Code Reform Bill, S. 722, 96th Cong., 1st Sess. § 2201(c) (1978); NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 3001(4) (1971); Note, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion*, 52 FORDHAM L. REV. 637, 657-60 (1984).

¹⁰² See *United States v. Nu-Triumph, Inc.*, 500 F.2d 594 (9th Cir. 1974); *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 59-61 (7th Cir. 1972); see also *Apex Oil Co. v. United States*, 530 F.2d 1291, 1292 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

enlarge the scope of this measure in order to adapt it to corporate entities.¹⁰³

This inappropriateness practically narrows the scope of applicable legal sanctions. Moreover, it *a priori* limits the capacity of the penal system to achieve the goals to which punishment in general is directed, for under certain circumstances (or with regard to certain offenses) these ends could be better reached by using the inapplicable non-economic sanctions.

2. Economic Sanctions

Economic sanctions consist of varieties of fines and supplementary economic measures. There is no obstacle to subjecting corporate entities to this type of sanction because corporations usually own property and are involved in economic activities. But the effectiveness of applying economic sanctions to corporations, as well as the fairness, necessity or the extent to which such application advances the purpose of punishment, is questionable.

Supplementary economic measures include forfeiture of property or profits, temporary or permanent restraining orders, and the revocation of licenses. These measures, however, supplement the main punishment prescribed, and conviction usually is not a precondition for their imposition.¹⁰⁴

a. Pragmatic and Inherent Limitations

Fines are arguably the most appropriate punishment for corporations. The purpose of corporations is economic profit and business operations almost always benefit, directly or indirectly, from the criminal activity undertaken within the corporate framework.

¹⁰³ See generally Coffee, "No Soul to Damn; No Body to Kick:" *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 448-57 (1981); Metzger, *supra* note 43, at 70-71; Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 517 (1980); Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353, 368-74 (1979).

One such suggestion includes requirements by courts for corporate contributions to charity, which are in essence fines, as a condition of probation. See, e.g., *United States v. William Anderson Co.*, 698 F.2d 911, 912-14 (8th Cir. 1982); *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787-89 (9th Cir. 1982); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1164-65 (S.D.N.Y. 1983). But see *United States v. Prescon Corp.*, 695 F.2d 1236, 1242-44 (10th Cir. 1982); *United States v. Clovis Retail Liquor Dealers Trade Ass'n*, 540 F.2d 1389, 1390 (10th Cir. 1976). See generally Levin, *supra* note 101; Note, *Corporate Contributions to Charity As a Condition of Probation Under the Federal Probation Act*, 9 J. CORP. L. 241 (1984); Note, *United States v. William Anderson Co.: "Crime in the Suits," Alternative Sentencing of Corporate Defendants*, 16 CREIGHTON L. REV. 1025 (1983).

¹⁰⁴ See *infra* text accompanying notes 178-91.

Thus, taxing the corporation will attack a vulnerable and appropriate target. It would seem, therefore, that fines act as deterrents to criminal negligence. Similarly, in cases of intentional criminal conduct, it is argued that the fine constitutes an appropriate levy on the profits that the corporation sought to attain as a consequence of the offense, thereby achieving the penal system's goals of both retribution and deterrence.¹⁰⁵ Moreover, fines should affect non-profit corporations because these firms also have to act economically and rationally.¹⁰⁶ A more thorough analysis reveals, however, that imposing fines on corporations does not always advance the goals of punishment.¹⁰⁷

The maximum penalties provided by the specific criminal provisions often are relatively low.¹⁰⁸ Yet, low fines lack deterrent value. Occasionally, a corporation might find it economically feasible to risk that its activities might involve criminal transgressions, rather than make the effort to prevent a breach of the law. For example, the financial loss resulting from fines imposed by ordinances prohibiting adulteration of food products is often considerably smaller than the cost of replacing or improving the company's production system. Moreover, the technique of accumulating offenses or indictments to be tried together reduces even further the cost of a single violation because in many cases the fine does not increase proportionately to the number of violations considered at trial. Supposedly, while this dilemma can be solved by increasing the rates of the fines,¹⁰⁹ this solution is not problem-free.¹¹⁰

¹⁰⁵ Metzger, *supra* note 43, at 65-66.

¹⁰⁶ See generally Spurgeon & Fagan, *Criminal Liability for Life—Endangering Corporate Conduct*, 72 J. CRIM. L. & CRIMINOLOGY 400, 427 (1981) ("Even if corporations do not always act as profit-maximizers, profit is the *raison d'être* of corporate existence.").

¹⁰⁷ Elkins, *supra* note 5, at 81; Fisse, *supra* note 11, at 1215; Metzger, *supra* note 43, at 65; Note, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanction*, 71 YALE L.J. 280, 285 (1961).

¹⁰⁸ Davids, *Penology and Corporate Crime*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 524, 527-29 (1967); Fisse, *supra* note 11, at 1215; Fisse, *supra* note 55, at 250-51; Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L. BULL. 377, 381 (1972); Metzger, *supra* note 43, at 65-66; Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 48 (1978); Note, *supra* note 107, at 287-88.

¹⁰⁹ See, e.g., 18 U.S.C.A. §3571 (West 1985) (effective Nov. 1, 1986); S. REP. NO. 225, 98th Cong., 1st Sess. 106-07 (1984). See also Elkins, *supra* note 5, at 81; Metzger, *supra* note 43, at 66; Note, *Corporate Contributions to Charity as a Condition of Probation Under the Federal Act*, *supra* note 103, at 243-44; Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, *supra* note 103, at 362.

¹¹⁰ Some jurists suggest the imposition of fines scaled according to a corporation's annual income or stock. See Davids, *supra* note 108, at 530; Elkins, *supra* note 5, at 81-82; Spurgeon & Fagan, *supra* note 106, at 427; Note, *supra* note 107, at 295.

Another commentator has suggested that heavier fines should be collected in securities rather than in cash and that "[t]he convicted corporation should be required to

The size of the fine is not the only difficulty in this matter. Sometimes it is illogical to impose a fine, however large, on the corporation even when the offense committed had clear economic overtones. Frequently, corporate giants discover ways to transfer the burden of the fine to their consumers by raising the prices of their products or services.¹¹¹

Market forces, though, generally inhibit the transfer of the entire burden of the fine to the consumers, particularly when competition is heavy and a price increase may lead the consumer to purchase a competing product. Corporate manufacturers of products whose demand is elastic will hesitate to place the burden of the fine on the public. Even monopolists may be disinclined to raise prices because of possible decreases in sales and governmental regulation. Under other circumstances, however, fines will not have this inhibiting effect on corporate bodies. In the absence of governmental supervision, a corporation that manufactures an inexpensive, commonly used item (and therefore is able to absorb the cost of the fine by a small increase in price per unit) or a corporation that supplies products or services which are in steady demand, can easily transfer the burden of the penalty to the consumer. Any attempt to prevent such apportionment of the fine, for example, by authorizing the courts to prohibit such a price increase,¹¹² probably would not be successful. Such a prohibition would necessarily be confined to

authorize and issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity." Coffee, *supra* note 103, at 413. See also Fisse, *supra* note 11, at 1233-37; Metzger, *supra* note 43, at 69-70.

Most of the Scandinavian countries have adopted the "day-fine" system in which the number of the day-fines imposed on the convicted person represents the measure of the punishment and the amount of each day is estimated on the basis of their income. See Thornstedt, *The Day-Fine System in Sweden*, 1975 CRIM. L. REV. 307.

A common denominator underlying most of these various suggestions is their flexibility. Though they may affect an overall increase in the rates of fines, they would introduce a new element to the penal system, the offender's financial ability. This element is appropriate in legal and administrative systems where the mode of progressive liability is central to the system, e.g., in assessment and collection of tax or national social security payments, but it is doubtful whether it is suitable in the realm of criminal law. The severity of punishment must relate only to the severity of conduct. From this point of view, the convict's wealth is relevant to the assessment of penalty only where it is directly related to the profits accrued by the crime. A different approach would discriminate against any wealthy offender whose capital may have been obtained in legal ways.

¹¹¹ G. WILLIAMS, *supra* note 24, at 863-64; Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980); Coffee, *supra* note 103, at 401-02; Fisse, *supra* note 11, at 1219-20; Orland, *supra* note 103, at 516.

¹¹² See McAdams, *The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative*, 46 U. CIN. L. REV. 989, 996 (1977).

the costs of the fine and not to a price increase motivated by other factors, and therefore the corporation easily could circumvent it.

Another deficiency of fines, especially relatively low ones, is that in the business community they lose part of their criminal-punitive impact. Many businessmen regard monetary penalties imposed on corporations for a wide range of illegitimate activities as a "license fee"¹¹³ or the cost of conducting business.¹¹⁴

Furthermore, sometimes the intrinsic nature of fines exposes a severe limitation on their imposition on corporations. Some supporters of corporate criminal liability claim that the corporate entity potentially can be involved in almost the full range of offenses in which individuals can be involved.¹¹⁵ But economic sanctions are not a suitable reaction for all types of violations. If they were, the other modes of punishment developed by the system would not be needed. Thus, even assuming that corporations can be convicted of grave offenses against the person or of severe harm caused to public interest such as manslaughter¹¹⁶ or endangering national security, a fine is not of comparable penal value to the more severe punishments imposed on human transgressors under similar circumstances.

For this reason, many proponents of corporate criminal liability concede that it is impossible to charge the corporation with offenses for which the sole punishments meted out by the law are death or compulsory incarcerations.¹¹⁷ Some legal systems feel that this is a

¹¹³ *United States v. Dotterweich*, 320 U.S. 277, 282-83 (1943).

¹¹⁴ Metzger, *supra* note 43, at 65-66; Orland, *supra* note 103, at 516; Spurgeon & Fagan, *supra* note 106, at 427.

¹¹⁵ See *supra* note 10 and accompanying text.

¹¹⁶ See, e.g., *Granite Constr. Co. v. Superior Court of Fresno County*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1984); *Commonwealth v. Frontner L.P. Gas Co.*, 610 S.W.2d 941 (Ky. Ct. App. 1981); *State v. Lehigh Valley R. R. Co.*, 103 A. 685 (N.J. 1917). Cf. *People v. Warner Lambert Co.*, 51 N.Y. 2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980); *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961). But see *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Crim. App. 1983); *R. v. Cory Bros. and Co.*, [1927] 1 K.B. 810. See also *supra* notes 2-4 and accompanying text.

¹¹⁷ *People v. Strong*, 363 Ill. 602, 2 N.E.2d 942 (1936); *State v. Truax*, 130 Wash. 69, 226 P. 259 (1924); *R. v. I.C.R., Haulage Ltd.*, [1944] K.B. 551, 554; *D.P.P. v. Kent and Sussex Contractors, Ltd.*, [1944] K.B. 146, 149. See also Comment, *supra* note 3, at 484-91; but cf. *Granite Constr. Co. v. Superior Court of Fresno County*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1984).

The English Law Commission made the ostensibly logical proposition that "if . . . the person identified with the company is an embodiment of it, and his guilty mind is the guilty mind of the company, it ought to follow that imprisonment of that individual is imprisonment of the company with which he is identified." ENGLISH LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW, *supra* note 41, at 27. Yet, the Commission went on to say that "however logical, this seems to be absurd and cannot be regarded as an acceptable result in practice." See *supra* text accompanying note 98.

technical barrier only, easily circumvented by enacting express provisions substituting imprisonment for a fine when the accused is a corporation.¹¹⁸ Such legislation, however, expresses a lack of sensitivity to the real significance of the corporal punishment imposed by criminal law in cases of severe offenses which recognizes and emphasizes that such violations cannot be absolved by monetary sanctions alone.

b. Effectiveness of the Punishment

From the perspective of legal policy, the process of expanding the scope of criminal law to include corporations can be justified only if such expansion causes increased obedience to the provisions of criminal law. Corporate delinquency is only a metaphorical term, despite the fact that certain categories of offenses can be violated primarily within the corporate framework (for example, infractions of the banking law, insurance law, and antitrust law). Such delinquency is merely the result of illegal human conduct because "companies are not delinquent, only people are."¹¹⁹ Therefore, the question is whether imposing criminal liability on the corporation will be a deterrent or retributive force that might inhibit the criminal activity of the individuals involved in the operation of the corporate entity.¹²⁰ Without empirical data, this problem can be examined only theoretically.

i. retribution:

Retribution is probably not a significant justification for imposing liability on corporations.¹²¹ The possibility of justifying the punishment of corporations on the basis of the principle of retribution is limited for two reasons. First, many jurists tend to belittle the value of the principle of retribution because of its inherent emotional ingredient which stands in direct opposition to the practical

¹¹⁸ Fine in lieu of imprisonment for corporations is available in several states. See, e.g., KY. REV. STAT. § 534.050 (referred to in *Fortner L.P. Gas Co.*, 610 S.W.2d at 942); TEX. PENAL CODE ANN. § 12.51 (discussed in Anderson, *supra* note 4, at 239-40). See also 18 U.S.C. § 3571(b)(2)(A) (West 1985) (effective Nov. 1, 1986).

The same line of reasoning exists in other penal codes. See, e.g., NEW ZEALAND CRIMINAL JUSTICE ACT § 44(3) (1954). See also Comment, *supra* note 32, at 93-95 (no substantive objection for committing a corporation for trial, even on charge of murder).

¹¹⁹ Andrews, *Reform in the Law of Corporate Liability*, 1973 CRIM. L. REV. 91, 94.

¹²⁰ Many commentators argue that corporate personnel are not amenable to rehabilitation, which is regarded as another goal of criminal sanction. See, e.g., H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 356 (1968); McAdams, *supra* note 112, at 992.

¹²¹ Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 724-30 (1982); Coffee, *supra* note 103, at 448; Comment, *supra* note 54, at 582-85; Note, *supra* note 103, at 360-61; Note, *supra* note 43, at 1234.

aims of punishment.¹²² Second, and more importantly, the objective of redeeming society and the victim through punishment is not advanced by sanctioning corporate entities.

The principle of retribution has two aspects. It is rooted in the instinctive need to take vengeance against wrongdoers and legitimizes the expression of anger and hate. Also, retribution is aimed at encouraging the feelings of the law-abiding by insuring that there is no profit in criminal wrongdoing.

As to the first aspect, the release of these emotions is possible mainly because the punishment is imposed directly and immediately on the wrongdoer whose criminal thoughts and actions resulted in the illegal outcome. In this context, it is very apparent that the corporate entity is devoid of independent thought and action and that these qualities are attributed to it by force of fiction alone. As it is difficult to view the corporation in physical terms as the "perpetrator of the crime," this aspect of the principle of retribution loses its significance. Furthermore, the intangibility of the body incorporate makes it insensitive to punishment as a social reaction. In big corporations, the sanction is absorbed by the human factors standing behind the corporate veil—the shareholders—most of whom are usually innocent of any criminal involvement. Under these circumstances, the principle of retribution is not satisfied, because a third party and not the real offender is the direct object of the punishment. Hence, imposition of criminal liability on the corporation does not restore the unfairness caused by the perpetrator's conduct because it does not achieve a social balance between the offense and the punishment whereby one offsets the other.

As to the other aspect of retribution, intended to prevent the profitability of criminal activity, economic offenses committed within the framework of corporations create profits accumulated by violating the law. Such unlawful profits, when distributed among the shareholders, may infringe upon the fair social balance in the community.¹²³ This problem of unfair distribution of social resources in society can be solved, however, by suitable forfeiture proceedings held against the corporation as a result of convicting the perpetrator, rather than by convicting the corporate entity itself.¹²⁴

ii. deterrence:

Proponents of the personification doctrine argue that even a

¹²² Note, *supra* note 43, at 1234.

¹²³ Fisse, *supra* note 11, at 1169-80.

¹²⁴ See *infra* text accompanying notes 178-89. But see Fisse, *supra* note 11, at 1167-83.

corporate entity can be deterred by the threat of "suffering."¹²⁵ Deterrence is aimed primarily, however, at human consciousness. It is a utilitarian concept based on the assumption that the individual is a rational creature who chooses paths of action which will result in the greatest benefit. One researcher has maintained that deterrence efficiency is not identical under all circumstances and with regard to all offenses.¹²⁶ Yet, even when deterrence is relatively effective, it is doubtful whether imposing criminal liability on the corporation, as well as on the perpetrator, makes it more effective.

In small closely-held firms, where power is concentrated in the hands of a few promoters or shareholders, the perpetrator generally will be among them. In such cases, imposing a fine on the corporation amounts to a circuitous path to a goal which could be attained by increasing the fine imposed directly on the the perpetrator of the offense.¹²⁷ The argument that liability should be imposed on the corporate entity, because the perpetrator may not have sufficient means with which to pay off the fine, becomes less significant under these circumstances. In most closely-held enterprises, the actual performer of the offense also owns stock in the corporate body and if necessary, can liquidate it.

On the other hand, large corporations are characterized by divisions of authority, ownership and performance. The multitude of stockholders are physically distant from, and uninvolved in, the activities taking place at the power center of the organization.¹²⁸ Deterrence then becomes discredited because often the corporate liability does not supplement the liability of the perpetrators but rather replaces it.

¹²⁵ *United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 335 (1st Cir. 1978). Fisse analyzes the deterrence value of criminal stigma, *supra* note 11, at 1147-54, and reaches the conclusion that "deterrence in corporate criminal law depends not only on the infliction of monetary loss but also on *criminal stigma*, impact upon nonfinancial motivations of corporate decisionmakers, and activation of internal discipline and organizational reform." *Id.* at 1166 (emphasis added). But see H. PACKER, *supra* note 120, at 361; Elkins, *supra* note 5, at 78; Note, *supra* note 43, at 1365-66.

¹²⁶ See E. SUTHERLAND, *WHITE COLLAR CRIME* 217-33 (1961); Sutherland, *Crime of Corporations*, in *WHITE-COLLAR CRIMINAL* 57-70 (G. Geis ed. 1968).

¹²⁷ Cf. Woods, *supra* note 53, at 1177.

¹²⁸ For a discussion concerning the distinction between large corporations and other corporations, see Rostow, *To Whom and for What Ends is Corporate Management Responsible?*, in *THE CORPORATION IN THE MODERN SOCIETY* 303 (E. Mason ed. 1959). The writer calls the large corporations "endocratic corporations," defined as "large, publicly-held corporation[s], whose stock is scattered in small fractions among thousands of stockholders." All other corporations he entitles "exocratic corporations," characterized by being controlled by a small group of shareholders. The same terminology was used in *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 277-78, 275 N.E.2d 33, 84 (1971); Note, *supra* note 107, at 291.

In legal systems that apply the doctrine of the organs of the corporation, such replacement generally is limited to administrative offenses. As to *mens rea* offenses, since corporate criminal liability is imposed only after proving that all the elements of the offense exist with respect to the organ, the organ who performed the crime must be identified. In the United States, however, the replacement of the perpetrator's liability with that of the corporation has spread to offenses of criminal intent too. The courts have admitted the possibility of imposing liability on the corporation when the *mens rea* offense clearly was carried out within the corporate framework, yet the perpetrator cannot be pinpointed.¹²⁹ Consequently, for example, there are fewer cases in which directors, managers or other supervisors or officers stand trial side by side with the corporation for violations of the antitrust law.¹³⁰

Prosecuting the corporation alone usually is a direct result of the difficulties in identifying the perpetrator, a problem which is proportional to the size and complexity of the corporation.¹³¹ The process of recognizing and legitimizing the prosecution of the corporation alone has, however, strong internal dynamics of its own. The police and other investigative authorities are liable to be satisfied with a less thorough examination in the attempt to discover the actual perpetrators of the crime, content that they have fulfilled their duties by placing the corporation on trial.¹³² Some jurists have defended imposing liability on the corporation alone on grounds of justice, convenience and economic considerations exclusively, and see no flaw in such reasoning even when the identity of the perpetrator is known.¹³³ This attitude provides fertile ground for plea-bargaining deals between the managers or directors and the prosecution, whereby the corporate entity will admit guilt on the condition that its managers or directors will not stand trial.

The available means of investigation are possibly less effective in uncovering the actual performers of a criminal offense within

¹²⁹ See, e.g., *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963); *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); Note, *supra* note 43, at 1248-49.

¹³⁰ See, e.g., Note, *supra* note 107, at 292-93. See also Fisse, *supra* note 55, at 260; Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 431-33 (1963).

¹³¹ ENGLISH LAW COMMISSION, *CODIFICATION OF THE CRIMINAL LAW*, *supra* note 41, at 31-32; E. SUTHERLAND, *supra* note 126, at 228-29; G. WILLIAMS, *supra* note 24, at 865; Elkins, *supra* note 5, at 83-84; Maakestad, *supra* note 3, at 879; Metzger, *supra* note 43, at 56; Note, *supra* note 103, at 357-59.

¹³² See Hamilton, *Corporate Criminal Liability in Texas*, 47 TEX. L. REV. 60, 72-73 (1968).

¹³³ See Elkins, *supra* note 5, at 82-83. But see Edgerton, *supra* note 5, at 834-35; Note, *supra* 107, at 292; See also L. LEIGH, *supra* note 5, at 142-43.

large corporate bodies. The authorities, therefore, prefer to turn to easier prey — the corporation — especially where petty offenses are involved. However, concentration on the liability of the corporation rather than on that of the human offenders indicates that the authorities have capitulated to the problem, which makes matters worse. Thus, perpetrators may believe that even when they are to be identified, they would not be tried and the police and prosecution would be satisfied with convicting the corporation. This phenomenon undoubtedly has a powerful anti-deterrent effect.¹³⁴

Another argument advanced in favor of corporate liability is that it is an additional deterrent to the perpetrator when he is exposed to a hostile reaction on the part of the shareholders or his supervisors following the predicament of the corporation due to his offense. This argument is also questionable. Such a reaction against the perpetrator can take only one of two forms: either firing the perpetrator or filing a derivative suit against him for reimbursement of the damage resulting from the conviction of the corporate body.¹³⁵ Nothing, however, prevents criminal law from exposing the perpetrator directly to punishments similar to the threat of the derivative suit or dismissal.

An appropriate substitute for the threat of being dismissed would be a prohibition against the perpetrator from serving in a directive or managerial capacity in corporate entities. Such a sanction is even more efficient than mere dismissal. Stockholders can discharge the perpetrator only from their specific corporation, but if convicted criminally, a general prohibition would prevent him from holding similar positions in other corporate bodies as well.¹³⁶

Similarly, the personal criminal summons has greater deterrent effect on the perpetrator than the derivative suit. A criminal summons contains broader possibilities of operation and, following conviction, the appropriate sanction can be chosen from a wide arsenal of punishments. The derivative suit, on the other hand, only exposes the perpetrator to monetary sanctions and is used infrequently because the perpetrator often does not have the financial ability to make good the damage caused to a large corporation.

¹³⁴ Cf. NAT'L COMM'N ON REFORM OF THE FEDERAL CRIMINAL LAWS, *supra* note 40, at 190.

¹³⁵ See *Graham v. Allis-Chalmers Mfg. Co.*, 41 Del. Ch. 78, 188 A.2d 125 (1963); Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143, 157 (1961); Dykstra, *The Revival of the Derivative Suit*, 116 U. PA. L. REV. 74 (1967); Comment, *Federal Antitrust Law—Stockholders' Remedies for Corporate Injury Resulting from Antitrust Violations: Derivative Antitrust Suit and Fiduciary Duty Action*, 59 MICH. L. REV. 904 (1961).

¹³⁶ See *infra* text accompanying notes 175-77.

c. Fairness of the Punishment

Taking punitive measures against large corporations in response to the offenses of its organs or agents is unfair and raises a moral issue. Due to the distinction between perpetrators and owners in these corporate bodies, the burden of sanctions for the criminal conduct of the former must be borne by the latter.¹³⁷

• Dubious arguments are proposed by corporate criminal liability proponents to justify the injury to shareholders. One approach suggests that shareholders usually are directly involved in the delinquent activity because the determination of basic policy often is made after consulting them and obtaining their approval.¹³⁸ However, only a few of the offenses committed within the framework of big corporations concern basic policy decisions requiring the involvement of stockholders. When this occurs the stockholders become parties to the offense and are directly responsible for its commission. Therefore, punishing them indirectly by rendering the corporation liable is unnecessary; direct conviction is much more effective and offers a wider range of possible punishments.

Another approach contends that stockholders are liable due to negligence. The theory is that stockholders have direct—or at least indirect—power to choose and supervise the high echelons of the corporation and the commission of the offense proves that they acted negligently in exercising their authority.¹³⁹ This reasoning is problematic. Even assuming such negligence, which is questionable, it would merely justify enacting a specific provision dealing with it. Such a provision would impose on the shareholders direct criminal responsibility upon proving both their negligence in the direct or indirect choice or supervision of the directors or managers, and the causal connection between that negligence and the criminal act committed. Nevertheless, this argument cannot be the basis for imposing on the shareholders any responsibility beyond that of negligence. The stockholders should not be burdened with liability for the reckless or intentional conduct of the directors or the managers. Rendering the corporation liable for offenses performed by the directors or the managers involving the elements of intent or recklessness will injure the negligent stockholders to a greater extent than that justified by the gravity of their conduct.¹⁴⁰

Moreover, the “fault” theory is dubious because the larger the

¹³⁷ Edgerton, *supra* note 5, at 836-40; Fisse, *supra* note 11, at 1219.

¹³⁸ See Winn, *supra* note 5, at 410-412.

¹³⁹ See Mueller, *supra* note 6, at 39.

¹⁴⁰ But see Mueller, *supra* note 6, at 39-41.

size of the corporate body the more it becomes remote from reality. Although a stock certificate represents ownership, individual stockholders of small amounts in large corporations lack the power to control or supervise—directly or indirectly—the activities of the entity. Stockholders have only scanty knowledge of the corporate structure, the flow of daily transactions, the process of decision making and the performance of those who fulfill the directive or managerial positions. The physical separation of the stockholders from each other and from the corporation, their inability to communicate with one another, the complexity of the business transactions, and the minimal amount of knowledge offered by the entity to the stockholders has caused the stockholders' power to be merely theoretical and has made the argument concerning their ability to control the corporation fictional.¹⁴¹

The absurdity in the suggestion that the stockholder is somewhat "at fault" is even more salient when an offense is performed by an underling of the corporation over whom the stockholders do not have even theoretical indirect control. Furthermore, this argument certainly is inapplicable when the shareholder purchased stock after the offense had occurred, but prior to the conviction and sentencing of the corporation. Similarly, this argument provides no answer to situations in which the shareholder opposed the appointment of the director or manager who perpetrated the offense for which the corporation eventually was convicted. Under these circumstances, there is no justification for placing the burden of the penalty on the individual stockholder whose actions are without blame.

Another claim has been made that associating with corporations, which are commercial entities, is a gamble involving risks as well as opportunities.¹⁴² When making an investment decision, the shareholder must weigh, among other things, the risk that the corporation might be convicted of illegal activity. According to this approach there is no distinction between the injurious effect of criminal conviction and other possible injuries resulting from mismanagement of the corporation or from civil liability imposed on the corporation in tort or contract. The supporters of this reasoning argue that the harm to an individual shareholder resulting from

¹⁴¹ MODEL PENAL CODE § 2.07 comment at 148 (Tent. Draft No. 4, 1955); NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 40, at 191; ENGLISH LAW COMMISSION, *supra* note 41, at 32-33; L. LEIGH, *supra* note 5, at 151; G. WILLIAMS, *supra* note 24, at 863; BURROWS, *supra* note 5, at 4; Edgerton, *supra* note 5, at 836-37; Metzger, *supra* note 43, at 2; Comment, *supra* note 5, at 187; Note, *supra* note 103, at 355-56.

¹⁴² See, e.g., Elkins, *supra* note 5, at 82; McAdams, *supra* note 112, at 995; Note, *supra* note 43, at 1242-43.

corporate criminal liability is not serious and is limited to a part of the investment. Furthermore, the impact of this harm is spread among the stockholders proportionate to their share in the profits.¹⁴³

Yet, the imposition of small injustices is also not justifiable. The techniques of dividing the total harm into small portions and separately examining the injury caused to each stockholder distorts the general picture. Only the examination of the damage to stockholders as a whole evaluates its gravity correctly. As for the assumption of risk by the shareholders, its relevance declines as the offense committed within the corporation's framework becomes more grave. The stockholder hardly can be expected to foresee the possibility of the management's or employee's conscious entanglement in grave criminal activity.¹⁴⁴

Neither the comparison of the damage to stockholders ensuing from the imposition of a criminal fine on the corporation to the burden they must bear when tortious damages are awarded against the corporation nor the attempt to view both as costs of doing business is convincing.¹⁴⁵ Both the criminal and the civil proceedings result in a financial loss, but the concept of compensation is different from the concept of the criminal fine. The injury to the stockholder which is the outcome of a tort claim, even though it may be unjustified, forwards the goals of the law of torts. The award of compensation constitutes an attempt to limit, in the fairest manner, the general harm caused by the tortious conduct, and to ameliorate the damage caused to the injured party. The economic capacity of corporate entities to contribute to the advancement of this policy is significant. On the other hand, serious doubts exist whether burdening the shareholders advances the aims of penal law. Criminal proceedings are meant to examine the responsibility of the accused with respect to the illegal outcome of his conduct and to punish him if found guilty. There is no reason to cause damage to those who did not participate in the prohibited act and who, in most cases, did not even have the power to prevent it.

Some commentators claim that fining a corporation is merely a form of withholding illegally accumulated profits.¹⁴⁶ Corporate

¹⁴³ See generally MODEL PENAL CODE § 2.07 comment at 148 (Tent. Draft No. 4, 1955); ENGLISH LAW COMMISSION, *supra* note 41, at 33; W. FRIEDMANN, LAW IN A CHANGING SOCIETY 209 (2d ed. 1972); Edgerton, *supra* note 5, at 837; Elkins, *supra* note 5, at 82; Winn, *supra* note 5, at 412-13; Comment, *supra* note 5, at 185.

¹⁴⁴ ENGLISH LAW COMMISSION, *supra* note 41, at 33.

¹⁴⁵ See also *supra* notes 113-14 and accompanying text.

¹⁴⁶ See, e.g., Friedman, *supra* note 21, at 186; Metzger, *supra* note 43, at 65; Comment, *supra* note 3, at 921; see also Fisse, *supra* note 11, at 1171.

bodies should be deprived of their unlawful profits and in this context the issue of unfairly harming the innocent shareholders absolutely does not arise. However, to combine fining with forfeiture of illegal profits is improper and reveals a difficulty. First, the intent to deprive the corporate body of its illegal profits cannot serve as a sweeping justification to fine it in every case following its conviction, because only in some instances is the unlawful activity within the corporate framework profitable. Moreover, a fine is a rough and unsuitable tool for absorbing illegal gains. It is a purely punitive measure and should be reserved solely for achieving sanctioned ends. Therefore, there is no necessary connection between the size of the fine and the amount of the accumulated illegal profits. The goal of abrogating the corporation of its unlawful profits is achieved better by using forfeiture proceedings, which are adjusted and designated for this aim and do not require the conviction of the corporate body as a prerequisite for its application.¹⁴⁷

Some jurists have belittled the harm caused to the stockholders by comparing it to the suffering of the family of a convicted criminal who must serve his sentence.¹⁴⁸ A certain similarity does exist between the two groups. Neither a stockholder of a corporation nor the accused's family stand trial and the judgement is not directed personally against them. But, the similarity ends there. The suffering of the family is a side effect and the convicted offender personally carries the heaviest burden of the punishment. The situation of the shareholders differs greatly. The corporation itself is incapable of absorbing the punishment, therefore, the stockholders must pay the price. Moreover, the obligations cannot be compared because the willingness and the devotion inherent in the human relationships of the family unit are not part of the relationship between the stockholder and the corporation. Most people are prepared, under most circumstances, to sacrifice and suffer injuries on behalf of a family member, and therefore, their sense of injustice is not heavy. In contrast, the relationship between the corporation and the shareholder, especially that between a small investor and a large corporation, is purely economic and lacks emotional content.

d. Necessity of the Punishment

The supporters of imposing criminal liability on large corporations argue that often the violation of law cannot be attributed to an

¹⁴⁷ See *supra* text accompanying notes 178-89.

¹⁴⁸ Braithwaite, *supra* note 121, at 729; Fisse, *supra* note 11, at 1174-75; Winn, *supra* note 5, at 412.

individual's initiative and conduct only, but rather is the result of the policy of the corporation or of the basic defects in the mode of operation and organization of the corporate entity.¹⁴⁹ Sometimes the atmosphere at the enterprise exerts pressures and indirectly encourages illegal activity. Frequently, the illegal activities are directed by the management hierarchy and augmented by pressures that can be traced to interested parties behind the scenes. The difficulty arises, the proponents argue, because those who are really responsible find shelter behind the corporate veil or in the labyrinth of its complicated structure and cannot be located.¹⁵⁰ According to this viewpoint, punishing the actual perpetrator of the offense is not sufficient and the harm done to the interest of the corporate body as a whole is a good substitute for the inability of the penal law to locate and strike the real offenders.

The deficiency of this argument lies in its generalizations as well as in the spirit of the solution it offers. The attempt to explain the violations of law within the framework of corporate bodies as the outcome of a conspiracy of hidden pressures seems to be based on assumption and speculation rather than on serious empirical study. If the directors, managers or stockholders exerted pressures and created an unhealthy climate of improper working methods, then the individuals involved should be charged on the basis of personal and direct liability as accomplices to the offense. This method of direct liability is a more effective deterrent than punishing those figures indirectly via the medium of corporate liability.

Moreover, if the leading officers of the corporation encourage criminal activity and are able to muster the support of stockholders for such activity, then the remedy is the liquidation of the entire framework. There is no justification for the existence of a corporation which operates and advances its business goals by way of regular and frequent criminal activity. The state is responsible for dissolving it. Yet, such a measure could be taken without subjecting the corporation as such to criminal proceedings; rather, dissolution could be a complementary measure taken after the trial of the actual perpetrator of the offense.¹⁵¹ If, on the other hand, the suspicions against the stockholders and the high echelons of the corporate hi-

¹⁴⁹ See, e.g., Fisse, *supra* note 11, at 1190-92; see also Note, *supra* note 43, at 1243.

¹⁵⁰ MODEL PENAL CODE § 2.07 comment at 148-49 (Tent. Draft No. 4, 1955); ENGLISH LAW COMMISSION, *supra* note 41, at 31-32; Burrows, *supra* note 5, at 19; Kadish, *supra* note 130, at 431; Watkins, *Electrical Equipment Antitrust Cases—Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97, 106 (1961).

¹⁵¹ See *infra* text accompanying and following note 190.

erarchy are unfounded, there is no legal basis for harming them by punishing the corporate body.

The argument that because it is impossible to identify the true offenders in the absence of proof of guilt on the part of the directors, managers or stockholders, criminal liability must be imposed on the corporation, is incompatible with the principle of personal liability. It is stretching the point to consider penalizing the corporate body as a collective punishment in every respect,¹⁵² because the shareholders are not directly punished. However, corporate liability, like collective liability, imposes the burden of the sanction on individuals whose involvement in the transgression has not been proven and whose sole fault lies in their being part of a group connected to the offender. But it is a basic principle of criminal law that collective punishment is strictly prohibited, for as one jurist aptly stated, collective responsibility "may be an effective way of enforcing law and order, but it does violence to our more sophisticated present-day conceptions of justice."¹⁵³

IV. TOWARDS PERSONAL LIABILITY

A. IMPOSING PERSONAL LIABILITY

1. *The Suggested Approach*

The alternative theory to imposing criminal liability on the corporation emphasizes the personal liability of the individual actually involved in the violation of the law. Commensurate with directly punishing the perpetrator of the crime or those responsible for it, the alternative approach suggests that, where appropriate, complementary actions be taken against the corporation. Beyond these general propositions, an exception has been made with respect to penal legislation of a regulatory or an administrative character.

There are two closely connected basic starting points of the suggested approach. First, the penal system is designed to protect the public order by directing its commands to individuals and threatening them with punishment in case of violation. It should strive to achieve its goal in a similar manner where human activity within the framework of the corporate bodies is concerned. Secondly, it follows that corporations are not an object of criminal law

¹⁵² Some jurists argue that collective punishment is the proper starting point for examining corporate criminal liability. See, e.g., S. HURWITZ, *BIDRAG TIL LAEREN OM KOLLEKTIVE ENHEDERS PONALE ANSVAR* (Copenhagen, 1933); see also J. ANDENAES, *THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY* 245 (1965); H. MANNHEIM, *GROUP PROBLEMS IN CRIME AND PUNISHMENT* 43 (enl. 2d ed. 1971).

¹⁵³ Comment, *supra* note 11, at 717 n.102.

and should not be treated as offenders, at least with respect to substantive criminal law as opposed to administrative strict liability provisions.¹⁵⁴ The corporate entity is a tool in the hands of the actual perpetrator and should be dealt with accordingly.

This line of reasoning, which corresponds with the trends of European-Continental Law,¹⁵⁵ assumes that if criminal law "takes care of individual responsibility the group will take care of itself."¹⁵⁶ The theory of corporate criminal liability likewise does not preclude the imposition of personal liability on the perpetrator. Its supporters have consistently emphasized that the threat to the corporate body serves only as an additional deterrent aimed at influencing the behavior of its human constituents.¹⁵⁷ However, notwithstanding this proclaimed objective, attention often has strayed and focused on the corporation as a target of the legal sanctions. To a considerable extent, this tendency has dulled the impact of direct personal liability of the perpetrator.¹⁵⁸

2. *Perpetration on Behalf of the Corporation*

The suggested approach, like the core of criminal law, focuses primarily on the personal liability of the perpetrator. It asserts that every director, manager, employee, agent, stockholder or other functionary of the corporation whose behavior warrants the imposition of criminal liability should stand trial personally for his activities. It is irrelevant whether the individual acted in the name of the corporate entity or on its behalf. When the issue is the personal liability of the perpetrator, no distinction should be made between sole perpetrators who have committed the offense personally and those who are bound up in a web of complicity or conspiracy.¹⁵⁹ The question of personal liability must be determined as if the perpetrator acted on his own behalf, regardless of whether the conduct

¹⁵⁴ Andrews, *supra* note 119, at 94.

¹⁵⁵ See ENGLISH LAW COMMISSION, *supra* note 41, at 12-15; Mueller, *supra* note 6, at 28-35. For a description of the situation in Continental Europe, see J. ANDENAES, *supra* note 152, at 244 (Norway); H. JESCHECK, *LEHRBUCH DES STRAFRECHTS* (Allgemeiner Teil) 171 (2. Aufl. 1974) (Germany); V. MANZINI, *TRATTATO DI DIRITTO PENALE ITALIANO* 535 (1961) (Italy); G. STEFANI & G. EVASSEUR, *DROIT PÉNAL GENERAL ET PROCEDURE PENALE* para. 245 (6. ed. 1972) (France).

¹⁵⁶ Francis, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305, 319 (1924).

¹⁵⁷ *The Queen v. Great N. of England Ry. Co.*, 115 Eng. Rep. 1294, 1298 (Q.B. 1846).

¹⁵⁸ See *supra* text accompanying notes 128-34.

¹⁵⁹ See, e.g., *United States v. Precision Medical Laboratories, Inc.*, 593 F.2d 434, 442 (2d Cir. 1978); *United States v. Amrep. Corp.*, 560 F.2d 539, 545 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); *United States v. Berger*, 456 F.2d 1349 (2d Cir.), *cert. denied*, 409 U.S. 892 (1972).

was performed allegedly in the name of the corporation or on its behalf.¹⁶⁰

The aforementioned principle, which is incorporated in several proposed codes,¹⁶¹ is designed primarily to clarify the issues. It precludes any attempt by the perpetrator to avoid liability when all the elements of the offense originate in his behavior. Yet, precise legal interpretation of the verbs, terms or provisions of a specific criminal statute may raise doubts as to whether a particular act, which was allegedly performed in the name of the legal body or on its behalf, can be considered the performer's individual act.¹⁶² The principle stated would preclude, for example, a manager of a real estate leasing corporation who signs a rental contract in the name of the corporation while knowing that the property would be used for immoral purposes from claiming that the corporation that owned the property was the lessor and that he is not personally responsible. Similarly, an employee of a legal entity, who sells unlawfully manufactured goods belonging to the corporation and deposits the money into the corporation's cash register would be prevented from claiming that he was not the seller.

3. *Offenses Attributed Solely to the Corporation*

Occasionally, the criminal norm is directed only towards a party who has fulfilled a particular prerequisite, and sometimes it is the corporate body which answers to the condition. Examples are where the criminal legislation refers to licensees or property owners who happen to be corporations, or where the definition of the offense applies to the employer, a title which, in the particular case, fits only the corporation and not the human being who carried out the offense. If the individual who perpetrated the offense in the employment were brought to trial, the individual might argue that the governing statute does not apply to him. In other words, the accused might argue that he lacks the power, status, capacity or authority referred to in the statute. The argument appears even more persuasive when raised with respect to omissions, i.e., where the statute imposes a positive duty which, under the circumstances, is directed at the corporation.

¹⁶⁰ See, e.g., *United States v. Wise*, 370 U.S. 405, 416 (1962); *United States v. Amrep. Corp.* 560 F.2d 539, 545 (2d. Cir.), *cert. denied*, 434 U.S. 1015 (1978); Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337, 1339-40 (1982); Note, *supra* note 43, at 1265-66.

¹⁶¹ MODEL PENAL CODE § 2.07(6)(a) (1962); NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 101, § 403(1).

¹⁶² See, e.g., *People v. Strong*, 363 Ill. 602, 606, 2 N.E.2d 942, 944 (1936).

This argument could be counteracted by specific legislation explicitly stating that where a provision refers to a condition or description which in the particular case suits only the corporate body, the law ascribes that condition or description to certain functionaries within the corporate hierarchy, such as directors, managers and other officers.¹⁶³ An alternate legislative technique would be to maintain that each member of the corporate hierarchy falling into one of the specific categories is deemed liable for such a transgression, unless the person can prove that they were not involved in its commission. In the case of crimes of omission, the individual will have to show that he took all necessary precautions to ensure compliance with the law.

These two proposals are similar but not identical, as becomes evident when analyzing crimes of commission as opposed to crimes of omission. The first alternative does not deviate from the traditional principle of the onus of proof in criminal law. It merely suggests that responsibility be attributed to those personnel whose thoughts and actions are proved by the prosecution to form the elements of the specific offense. The second alternative is much broader. It establishes a presumption of guilt, albeit rebuttable, upon proof of both an *actus reus* and the defendant's fulfillment of one of the roles specified in the statute. In accordance with the subject at hand, the legislator should determine which technique is more appropriate and whether the categories of persons potentially liable for the offense should be widened or narrowed.

4. *Managerial and Supervisory Responsibility*

The suggested approach acknowledges the importance of increasing the supervision and involvement of the senior officers of the corporation by emphasizing their personal and direct liability for the events taking place in the corporate body which they supervise.¹⁶⁴ *Prima facie* there is no room to distinguish in this regard between the senior officials of incorporated and unincorporated enterprises. Such a generalization, however, deserves a more thorough examination than is possible within the scope of this study.

a. Knowledge of Subordinates' Intent

When corporate supervisors are aware of a subordinate's criminal design, they should be required to employ all possible means to

¹⁶³ See MODEL PENAL Code § 2.07(6)(b) (1962); NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 101, § 403(2).

¹⁶⁴ See Metzger, *supra* note 43, at 55; Note, *supra* note 43, at 1261.

prevent a transgression. Although legal systems tend to limit the resort to statutory offenses of omission, an exception should be made here. The corporate body is a closed system with a defined hierarchy. Imposing duties upon the figures in authority will increase and emphasize their particular responsibility for the events taking place within the corporate entity. The power to control and supervise, which carries many advantages, must also entail duties.¹⁶⁵

There is no intention to impose liability on directors, managers and other supervisors for all offenses which happen to occur during working hours (such as petty thefts of one worker from another at work). The suggested duty should extend only to offenses directly connected to work. Moreover, in order to prevent an atmosphere of informing and eavesdropping, the positive duty imposed on the senior officers should not necessitate divulging to the authorities the identities of the designers of the offense. Rather, the duty should focus on the undertaking to prevent the illegal act or to curtail it. Under most circumstances, those obliged to act can do so without depending on police assistance because of their status and relationship with the designers.

Directors, managers or other supervisors who did not fulfill the duty under discussion can be incriminated, within the context of the complicity doctrine, because they are aiders-and-abettors. The duty of the senior officers to act derives from their relationship with their subordinates as well as from obligations imposed by public interest.¹⁶⁶ Therefore, in terms of the *actus reus*, any director, manager, or other supervisor who is aware of an employee's criminal design and is able to take preventive measures but does nothing contributes to the performance of the offense. With respect to the *mens rea*, such a conscious failure to take preventive measures is an omission which reflects that person's intent to aid in the commission of the offense.¹⁶⁷ Alternatively, similar results can be reached by adopting a general principle that would specifically establish the direct and independent responsibility of the managerial and supervisory eche-

¹⁶⁵ See generally W. LAFAVE & A. SCOTT, *supra* note 83, at 186.

¹⁶⁶ See, e.g., Brickey, *supra* note 160, at 1342; Note, *supra* note 43, at 1266-70; Note, *Individual Liability of Agents for Corporate Crimes Under the Proposed Federal Criminal Code*, 31 VAND. L. REV. 965, 970-71 (1978).

¹⁶⁷ See *Morgan v. United States*, 149 F.2d 185, 187 (5th Cir.), *cert. denied*, 326 U.S. 731 (1945); *Moreland v. State*, 164 Ga. 467, 471-72, 139 S.E. 77, 78-79 (1927); *State v. Gilbert*, 213 Wis. 196, 216-17, 251 N.W. 478, 485 (1933); *Tuck v. Robson*, [1970] 1 All E.R. 1171, 1174-75 (Q.B.); *Rubie v. Faulkner*, [1940] 1 K.B. 571, 574-75; *Gough v. Rees*, 29 Cox C.C. 74, 79-80 (K.B. 1929); *Du Cros v. Lambourne*, [1907] 1 K.B. 40, 45-46; *Howells v. Wynne*, 143 Eng. Rep. 682, 688 (C.P. 1863). See also W. LAFAVE & A. SCOTT, *supra* note 83, at 504; G. WILLIAMS, *supra* note 24, at 361, 866.

lons for offenses committed within the scope of their supervision and authority in cases where they were aware of the criminal design but did not take reasonable measures to prevent its completion.

b. Recklessness or Negligence

In addition, legislatures should enact general provisions to address defective supervision or management of the corporate body and impose, as a result thereof, separate and independent responsibility. Such legislation, which might be divided into separate categories of recklessness and negligence, supplements the other form of management and supervisory liability discussed above.¹⁶⁸

The proposal suggested would be applicable only if the prosecution proves that the director, manager or supervisor deviated from reasonable standards of supervision or management within the scope of their authority and that they deviated while aware that the outcome might be a criminal violation. The main difference between this and the other type of management or supervisory responsibility discussed previously lies in the domain of *mens rea*. The proposed offense of reckless supervision would not require the extreme criminal intent (e.g., actual knowledge) which is a component of the other offense.

The impact of offenses of reckless management or supervision would be reinforced by transferring the burden of proof from the prosecution to the director, manager or supervisor. Thus, a rebuttable presumption would exist that with respect to offenses carried out within the corporate entity, there was a deviation from reasonable methods of supervision or management.

Several commentators have recommended expanding even further the responsibility of managers and supervisors by enacting an additional provision which would specifically address negligent management or supervision of the corporate body.¹⁶⁹ According to this approach, the director, manager or supervisor would be liable for negligence if they could objectively have foreseen the violation of law that took place within the scope of their authority. This approach has found some support in those decisions of the United States Supreme Court that analyze managerial and supervisory re-

¹⁶⁸ See the Criminal Code Reform Bill, S. 1437, 95th Cong., 2d Sess. § 403(c) (1978), which makes it a misdemeanor for a "person responsible for supervising particular activities on behalf of an organization" to contribute to the commission of an offense by "reckless failure to supervise adequately those activities." Cf. NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAW, *supra* note 101, § 403(4).

¹⁶⁹ Davids, *supra* note 108, at 530-31; Note, *supra* note 107, at 303-04.

sponsibility for corporate violation of strict liability offenses.¹⁷⁰ Some jurists claim that these decisions can be interpreted as broadening the prerequisites for imposing liability on the manager or supervisor by requiring proof of some basic elements of "guilt," i.e., "a departure from a standard of care."¹⁷¹

Such a broad statutory provision imposing liability for negligent management or supervision, however, raises difficulties. The absence of due diligence on the part of the directors, managers or other supervisors may indicate that they have not developed an efficient method for the prevention of offenses, or it may indicate the negligent operation of an existing efficient system.¹⁷² The first alternative presented raises questions as to which method can be considered effective and how much effort must be invested in establishing and operating it, including the weight that should be given to economic considerations. The other alternative, concerning negligent operation of an existing efficient control system, entails undesirable effects on the supervision and management of corporations. Consequently, directors, managers and other supervisors who are fearful of indictment might become overly cautious and inhibited, thus hindering their own efficiency and the initiatives of their subordinates. Yet, effective operation in the economic system requires great flexibility and room for maneuvering.¹⁷³ Such considerations have led many jurists to the conclusion that statutory criminal intervention in negligent behavior of directors, managers and other supervisors should be abandoned,¹⁷⁴ and that criminal law should be preserved in imposing liability for reckless management or supervision alone.

B. SUPPLEMENTARY AND PREVENTIVE MEASURES

Many legal systems apply supplementary and preventive measures. The value of these measures is increased due to their flexibility. Traditionally, penalties are administered against a convicted

¹⁷⁰ *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943). See also *United States v. Hata & Co.*, 535 F.2d 508 (9th Cir. 1976); *United States v. Starr*, 535 F.2d 512 (9th Cir. 1976).

¹⁷¹ Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 U.C.L.A. L. REV. 463, 469 (1982). But see Brickey, *supra* note 160, at 1346-57.

¹⁷² See *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153, 188 (Per Viscount Dilhorne); *Nattrass v. Timpson Shops Ltd.*, 1973 Crim. L. Rev. 197; Howells, *A Blow Against Enterprise Liability*, 34 MOD. L. REV. 676 (1971).

¹⁷³ Note, *supra* note 43, at 1270-72.

¹⁷⁴ Panel Discussion, *Economic Crimes—The Proposed New Federal Criminal Code*, 27 BUS. LAW. 177, 188 (1971); Fisse, *supra* note 55, at 261-62; Kadish, *supra* note 130; Muir, *supra* note 32; Note, *supra* note 43, at 1270-72.

party after trial. Supplementary and preventive measures, however, also can be exercised against entities who have not been convicted. Such measures can be taken, therefore, according to the suggested approach, not only against the perpetrators but, in appropriate circumstances, even against corporate entities.

1. Measures Against Directors, Managers and Supervisors

a. Disqualification

Courts should be empowered to prohibit convicted managerial or supervisory personnel of a corporation from continuing to act in such capacities. This measure is central to the suggested approach which views the corporation as a tool, because it is necessary to restrain unreliable and dangerous persons from manipulating such powerful instruments. This sanction would be in addition to other penalties to which the functionaries may be subject. The court should have broad discretion in setting the duration of the disqualification and its scope.¹⁷⁵

Disqualification is a measure with personal penal overtones, yet its general preventive aspects are also apparent. Courts should use this measure where there are reasons to fear recurrent abuses of power and authority to the detriment of the public. The laws of many countries authorize the disqualification of a convicted criminal from particular professions, usually referring to abuse of position or severe breach of duties as the appropriate circumstances under which this measure should be applied.¹⁷⁶ Some of these provisions, as that of the English Companies Act, are directed explicitly to the managerial and supervisory personnel of corporations.¹⁷⁷

Disqualification is more effective against the highest echelons of corporate management and supervision than it is when employed against lower ranking officials, because the latter usually enjoy greater flexibility in finding alternative employment. Naturally, courts most frequently would exercise this measure against direc-

¹⁷⁵ The court must decide whether the official should be disqualified from serving in a certain capacity only in the corporation in which the offense was perpetrated or in a certain category of corporate entities, or perhaps in all corporations.

¹⁷⁶ See, e.g., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 4, THE GERMAN PENAL CODE § 424 (G. Mueller & T. Buerghenthal trans. 1961); THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 23, THE ITALIAN PENAL CODE §§ 31, 35 (1978); THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 3, THE NORWEGIAN PENAL CODE § 29 (H. Schjoldager & F. Backer trans. 1961); THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 20, THE ROMANIAN PENAL CODE art. 115 (1971).

¹⁷⁷ THE COMPANIES ACT, 1985, §§ 295-302. See also NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAW, *supra* note 101, § 3502. But see Panel Discussion, *supra* note 174, at 182.

tors and managers of larger corporations. The unique structure of corporate bodies often makes the measure of disqualification vulnerable to circumventing tactics, especially in small closely-held corporations. Even if the defendant were forbidden from managing a small corporation, he would be able to do so indirectly through his family or other figurehead directors or managers. It is illogical to extend the prohibition to include management or supervision through others because it would be impossible to enforce such a prohibition.

2. *Measures Against the Corporation*

The impersonal character of some supplementary measures makes them available for use against parties not indicted in the offense. By implementing such measures, the criminal law does not limit itself to dealing with the offense and the offender directly. After punishing the perpetrator, it concentrates, where necessary, on eliminating the results of the delinquent activity and reforming the system and framework which bred the offense.

a. Forfeiture

Forfeiture of profits is another supplementary measure whose adoption is essential to the suggested approach.¹⁷⁸ The rationale for depriving the corporate body of the fruits of its offense is clear. This goal can be achieved through forfeiture of profits accumulated by illegal means without resort to a conviction, which one jurist described as "a rough instrument for this purpose."¹⁷⁹

Forfeiture represents a convergence of the objectives of the criminal and tort laws, and is justified by the principle of restoration. From the perspective of criminal law, forfeiting the fruits of the offense annuls the results of the criminal activity and restores the original situation. Such a measure is necessary because leaving those fruits in the hands of the offender or another harms the public interest and our sense of justice and often creates a dangerous situation (e.g., leaving a weapon or drugs in the hands of a criminal).

Many penal codes allow for the forfeiture of illegal profits as a supplementary measure to punishment,¹⁸⁰ and most apply the remedy of forfeiture even to the fruits of crime held by a third party

¹⁷⁸ See generally McAdams, *supra* note 112, at 997-98; Note, *supra* note 107, at 298-300.

¹⁷⁹ Andrews, *supra* note 119, at 94.

¹⁸⁰ See, e.g., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 16, THE GREENLAND CRIMINAL CODE § 113 (Center for Studies in Criminal Justice, U. of Chicago Law School, 1970); THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 3, THE NORWEGIAN PENAL CODE § 36 (H. Schjoldager & F. Backer trans. 1961); THE AMERICAN SERIES OF FOREIGN

beneficiary.¹⁸¹ American federal legislation lacks a general provision concerning forfeiture, even though specific federal laws authorize forfeiture of real property or tangible or intangible personal property constituting or deriving from a prescribed illegal activity and the forfeiture of any interests acquired or maintained in violation of these laws.¹⁸² Moreover, one of these laws provides for the forfeiting of "any . . . interest . . . security . . . claim . . . or property or contractual right" that the accused person might have in any enterprise that he has "established, operated, controlled or conducted" in a pattern of racketeering activity.¹⁸³ Another federal law, concerned with drug abuse, allows for the forfeiture of "property that is . . . transferred to a person other than the defendant."¹⁸⁴

Depriving the corporate body of its illegal profits, as a supplementary measure to punishing the convicted perpetrator, is in essence a forfeiture of a third party, the corporation. It should be emphasized, however, that the forfeiture of illegal profits of a corporation is much more justifiable than the forfeiture of an innocent party due to its instrumentality in the offense committed by the perpetrator¹⁸⁵ or from a third party who purchased the property after the commission of the offense.¹⁸⁶ Where unlawful profits of the corporation are usurped, the protected rights of the corporate entity are not affected, because property acquired in a legal manner will remain untouched. The forfeiture cannot be considered, therefore,

PENAL CODES NO. 17, THE SWEDISH PENAL CODE ch. 36 (T. Sellin & J. Getz trans. 1972); THE CRIMINAL CODE OF JAPAN art. 19 (T. Blakemore trans. 1950).

Other codes generally allow confiscation of the "fruits of the crime" or "thing[s] produced or acquired by criminal conduct." See, e.g., THE AMERICAN SERIES OF FOREIGN PENAL CODES NO. 1, THE FRENCH PENAL CODE art. 11 (J. Moreau & G. Mueller trans. 1960); THE AMERICAN SERIES OF FOREIGN PENAL CODES NO. 2, THE KOREAN CRIMINAL CODE art. 48. (P. Ryu trans. 1960); THE AMERICAN SERIES OF FOREIGN PENAL CODES NO. 20, THE ROMANIAN CRIMINAL CODE art. 118 (1971).

¹⁸¹ See, e.g., THE CRIMINAL CODE OF JAPAN art. 19(2) (T. Blakemore trans. 1950); THE NORWEGIAN PENAL CODE § 36; THE SWEDISH PENAL CODE ch. 36, § 4.

¹⁸² See 21 U.S.C.A. § 853(a)(1) (West Supp. 1985); 18 U.S.C.A. § 1963(a)(3) (West Supp. 1985).

¹⁸³ 18 U.S.C.A. § 1963(a)(2) (West Supp. 1985).

¹⁸⁴ 21 U.S.C.A. § 853(c) (West Supp. 1985).

¹⁸⁵ American courts have recognized for a long time the possibility of forfeiting goods entrusted by an innocent owner to a third party who uses them in violation of drug control statutes. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *United States v. One 1975 Mercedes 280s*, 590 F.2d 196 (6th Cir. 1978); *Commonwealth v. Two Ford Trucks*, 185 Pa. Super 292, 137 A.2d 847 (1958); *People v. One 1951 Ford Sedan*, 122 Cal. App. 2d 680, 265 P.2d 176 (1954). See generally Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

¹⁸⁶ 21 U.S.C.A. § 853(c) and (n) (West Supp. 1985).

an unfair harm to innocent shareholders.¹⁸⁷

In using forfeiture as an instrument to abrogate illegal profits, care should be taken not to affect the rights of the parties from whom the profits or goods were illegally acquired. The power of the court to issue an order of forfeiture ought to be constrained in circumstances where the original owner requests return of what has been appropriated from him, or its equivalent. Therefore, the prosecution usually would request the forfeiture of illegal profits, and especially those of a corporation, when the harm done by the illegal activity is spread among a large number of people. In such circumstances, the actual damage to each individual seems to be small, and hence, they are not likely to sue the corporation.

A practical problem with respect to the forfeiture of illegal profits is assessing their size. In some cases approximation of those profits raises merely technical difficulties requiring the consolidation of various factors. Other situations are more complicated and involve approximation, as for instance, the determination of the profit resulting from the sale of a product falsely claimed to contain a particular ingredient. The tendency should be towards simplifying the methods of evaluation. There ought to be a compromise between the contention that all profits or even receipts from sale of the product are illegal because consumers would not have bought the product had they known its true content, and the assertion that illegal profits consist of the difference in cost between the ingredient falsely claimed to be included in the product and the amount of that ingredient actually included therein.¹⁸⁸

Forfeiture proceedings against a corporation for illegal profits may be held separately from the trial of the individual accused. Another possibility is to combine the forfeiture proceedings with the proceedings against the accused agent.¹⁸⁹ If the latter alternative is implemented, special legislation would have to be enacted to regulate such trials, and the corporation, which might be affected by the deliberation, should be allowed appropriate representation.

b. Dissolution

An order to commence dissolution proceedings is the most extreme preventive measure available.¹⁹⁰ Its use must be reserved

¹⁸⁷ See *supra* text accompanying notes 146-47.

¹⁸⁸ But see Note, *supra* note 107, at 298-99.

¹⁸⁹ Cf. 21 U.S.C.A. § 853 (West Supp. 1985). See also *supra* note 107, at 299.

¹⁹⁰ MODEL PENAL CODE § 6.04, 2(a)-(b) (1962); MODEL PENAL CODE § 6.04 comment at 202-04 (Tent. Draft No. 4, 1955); NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 40, at 193; see also L. LEIGH, *supra* note 5, at 157-58.

only for extreme situations in which the most severe kind of criminal action has been exposed and it is established that the offense committed is a symptom of a severe disease which has spread throughout the corporate body that has been corrupted beyond correction. Once such a decision has been made, civil dissolution proceedings can be instituted.

Small corporations occasionally could be dissolved. The injury to those who depend economically on a closely-held corporate entity would not be greater than the injury caused when a regular offender is incarcerated and his business collapses. The position is different, however, when a large corporation is involved. In such a case the burden will fall not only on the shareholders, but also on the many employees whose source of income will be eliminated. In some instances, consumers too may be injured by the dissolution. Moreover, dissolving a large corporation may cause a chain reaction leading to the collapse of other financially related institutions. The dissolution of a large corporation, therefore, should be undertaken even more carefully.

In view of the numerous manners of circumventing a dissolution order, its effectiveness as a preventive measure seems questionable. It is theoretically possible for the dissolved corporation to be resurrected because it is difficult to prevent shareholders from reincorporating and even adopting the name of the dissolved corporation and engaging again in the same line of business. This loophole does not necessitate an *a priori* abandonment of dissolution as a preventive measure. Instead, it would necessitate improvement of precautionary and supervisory methods, such as disqualifying shareholders of the dissolved corporation from reincorporating. Concurrently, the legislature could enact measures to expose persons hiding behind the corporate veil and to reveal the interconnection among different corporate entities.

c. Restriction of Activity

A court order prohibiting corporate activity in the sphere in which the offense was committed is another preventive measure, although more moderate in impact than the dissolution of the corporation. An injunction of this kind would not affect the existence of the corporate entity. Nevertheless, a prohibitive injunction that would limit or stop the corporation's activity in a certain field is a drastic measure that should be used rarely, especially if it might adversely affect the corporation's operation.

While deliberating whether to resort to this measure, the court

should address two basic issues. First, it should examine the chances of altering the basic conditions that spawned the criminal activity. Second, the court should assess the public interest in the matter. Where severe damage to the public interest is unavoidable and the danger of recurrence cannot be eliminated by less drastic measures, a restriction on corporate activity in the area within which the offense was committed is in order.

V. THE EXCEPTIONAL CATEGORY—STRICT LIABILITY

An exception to the suggested approach, which generally disapproves of penalizing corporate bodies as a means of contesting criminal activity in their framework, occurs where criminal provisions of an administrative character are concerned. Substantive criminal law regulates the modes of behavior shaped to protect the basic social values. Without these laws, society's ability to function would be jeopardized. On the other hand, administrative offenses are strict liability violations characterized by eliminating the element of *mens rea* as a prerequisite to the formation of criminal liability.¹⁹¹ These provisions regulate the convenience and welfare of society by forming a system dictated mostly by the process of modernization to govern technical patterns of behavior.¹⁹² Examples include traffic violations, sanitation regulations and safety ordinances.

The unique nature of strict liability violations markedly affects the subject under discussion. Some of the arguments against imposing corporate criminal liability are less convincing when strict liability offenses are involved. For example, the contention that an indicted corporation is at a disadvantage due to the unavailability of the complete range of defenses open to its human counterpart weakens its impact because some defenses are inapplicable to strict liability violations. Similarly, the argument that emphasizes that fines are the only penalty available against the corporation, although the severity of the offense committed normally would dictate a heavier punishment, becomes irrelevant. The reason is that in most cases, a fine is the only sanction applied by the courts for infringements of administrative penal violations.

¹⁹¹ See generally C. HOWARD, *STRICT RESPONSIBILITY* (1963); Brett, *Strict Responsibility: Possible Solutions*, 37 MOD. L. REV. 417 (1974); Jackson, *Absolute Prohibition in Statutory Offences*, in *THE MODERN APPROACH TO CRIMINAL LAW* 262 (Radzinowicz & Turner eds. 1945); Note, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

¹⁹² See generally LAW REFORM COMM'N OF CANADA, *STUDIES ON STRICT LIABILITY* 193 (1974); P. DEVLIN, *THE ENFORCEMENT OF MORALS* 26-42 (1965); Fitzgerald, *Real Crimes and Quasi Crimes*, 10 NAT. L. F. 21 (1965); Note, *The Distinction Between 'Mala Prohibita' and 'Mala in Se' in Criminal Law*, 30 COLUM. L. REV. 24 (1930).

Moreover, strict liability greatly differs in character and substance from the liability imposed by substantive criminal law. The relatively moderate fine that usually follows the violation of the strict liability provisions often is designed only to act as a reminder to the offender that he has veered from the correct path and that he should take greater care in the future. Therefore, jurists have referred to strict liability offenses by various epithets such as: "quasi crimes,"¹⁹³ "civil offenses,"¹⁹⁴ "administrative misdemeanors,"¹⁹⁵ "public torts,"¹⁹⁶ or "pseudo-criminal offenses."¹⁹⁷ Professor Hall expresses the view of many that "it is clear that whatever sort of liability strict liability may be, it is not criminal liability."¹⁹⁸

Thus, the tendency of some legal systems to detach strict liability violations from substantive criminal law becomes clearer. Penal codes proposed in the United States explicitly distinguish between criminal offenses in the traditional sense and those breaches of the law that lack any element of fault, defining the latter as "violations"¹⁹⁹ or "infractions."²⁰⁰ A more extreme suggestion separates strict liability violations from criminal law and establishes an autonomous branch of "corrective law" in which those violations would be compiled.²⁰¹ For example, in Germany, there is a separate category of regulatory ordinance infraction termed "*Ordnungswidrigkeiten*,"²⁰² and the French Criminal Code views "contraventions" as a subject of administrative regulations.²⁰³

Strict liability violations are located on the border between criminal and public law. Therefore, the issue of corporate criminal liability in this context is less objectionable than in the context of the substantive criminal offenses.²⁰⁴ Apparently, this is the reason many European countries which uphold the Latin proposition *societas delinquere non potest* (corporations do not commit crimes) have

193 *Fiorella v. Birmingham*, 35 Ala. App. 384, 387, 48 So.2d 761, 764 (1950).

194 W. FRIEDMANN, *supra* note 143, at 207.

195 Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 636 (1942).

196 Note, *Public Torts*, 35 HARV. L. REV. 462 (1922).

197 Ginossar, *Autonomy of Corrective Law: A Projection of the Doctrine of Constructive Negligence*, 9 ISR. L. REV. 24, 37 n.37 (1974).

198 J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 326 (2d ed. 1960).

199 MODEL PENAL CODE §§ 1.04(5), 2.05(2)(a) (1962).

200 NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAW, *supra* note 101, at § 302(2).

201 H. SILVING, *CONSTITUENT ELEMENTS OF CRIME* 198-99 (1967); Ginossar, *supra* note 197, at 24.

202 See E. GÖHLER & H. BUDDENDIRK, *GESETZ ÜBER ORDNUNGSWIDRIGKEITEN (OWiG)* (1968).

203 H. SILVING, *supra* note 201.

204 Canfield, *supra* note 5; Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283 (1946).

created exceptions to this principle, mostly in the area of criminal administrative legislation and in the periphery of substantive criminal legislation. Among the exceptions are violations of fiscal law, price gouging and trade regulations.²⁰⁵

Therefore, an allowance made with respect to corporate criminal liability in the area of strict liability violations does not invalidate the thesis that corporate bodies are inappropriate objects of substantive criminal liability.²⁰⁶ Perhaps the exception proves the rule. Conceding this exception implies that only violations of this particular nature, which are so different from substantive offenses, demonstrate the basic principle that only individuals can be liable in criminal law.

VI. CONCLUSION

The purpose of this Article has been to re-examine the Anglo-American approach that routinely imposes, with almost no limitations, criminal liability on corporations. This approach has resulted in the extension of the boundaries of the penal law—the substance, structure, goals and means of which were traditionally formulated to regulate the behavior of individuals only. This extension has led to several theoretical problems, including: the potential harm to the ideological basis of criminal law; the deviation from the recognized framework of relationships which might serve as a basis for widening criminal liability; and the possible damage to other basic principles of the criminal system. Other difficulties are practical and result from defects and inefficiencies ensuing from the punishment of corporate bodies.

The presented approach emphasizes that the corporation is merely an economic and social enterprise, namely a tool for perpetrating offenses. The possible manipulation of the corporate body by human offenders does not transform it, however, into a criminal. Criminal law, therefore, should concentrate on the responsibility of the individuals operating the corporate entity and should determine that only an individual who commits or is involved in an offense can be considered an offender.

The human characteristics sometimes attributed to the corporate entity should apply only in the civil law. The determination that a corporation manufactured a product, sold a commodity, signed a

²⁰⁵ See P. BOUZAT ET J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* 232 (1963) (France); A. SCHÖNKE *STRAFGESETZBUCH* (Kommentar) 356 (16. Auf., 1972); *STRAFGESETZBUCH* 16 (E. Dreher 37. Aufl. 1977) (Germany); J. ANDENAES, *supra* note 152, at 246 (Norway); V. MANZINI, *supra* note 155, at 546 (Italy).

²⁰⁶ Andrews, *supra* note 119, at 94.

contract, or even committed a tort, does not necessarily mean that it has the capacity to be held guilty for infractions that occurred as a result of those actions. This distinction between the respective branches of substantive criminal law and the civil law is the direct outcome of the goals that differentiate the criminal system from others. In civil law, direct dictation to the human consciousness is not the cornerstone upon which the entire corpus of regulations is built, therefore, personification of the corporate entity seems less artificial within its framework. Furthermore, the corporate entity is a creation of economic activity and therefore is subject to the rules of civil law. In order to enable a party to do business with a corporation and sue it where necessary, the corporation must be personified so that it can become a party to a contract or a tortfeasor.

Criminal activity carried out within the corporate framework presents unique challenges to criminal law. Corporate bodies are powerful tools and their manipulation for criminal purposes can cause great harm to the public. Moreover, the structure of the corporation and its modes of operation often provide convenient screens for perpetrators, thereby obstructing the process of their detection. Thus, enforcement authorities need to increase precautionary and investigative measures. Furthermore, legislation is needed to improve the quality of supervision within the corporate framework by imposing additional legal duties on officers in supervisory and management positions. The cumulative effect of these efforts would be to convince all actors inside the corporate framework that the penal system focuses on the individual perpetrator.

The preventive and supplementary measures of the penal law also should be applied to the corporation in appropriate circumstances. Resorting to these measures is not a deviation from the principles outlined in this Article because they can be employed without first requiring the legal body to stand trial and assume criminal liability. Of those measures, forfeiture should be most used. More severe decrees, such as restraining orders or orders of dissolution, should be resorted to only in the most extreme cases.

Strict liability offenses are an exception to this general solution. Infringement of such provisions should result in imposition of liability on the corporation and on the person who committed the violation. In any event, this possible exception does not affect the basis of the rule. On the contrary, the exception reinforces the rule by emphasizing that a deviation from the basic principle that criminal liability may be imposed solely upon individuals should occur only where the statutory provision differs in substance and purpose from substantive criminal law.

The suggested approach is not a panacea for all problems. The accumulated information and experience may be insufficient for a comprehensive investigation of all aspects of the issue. Also, it may be impossible to reach a completely satisfactory resolution to this difficult dilemma. Nevertheless, the proposed solution has advantages over those theories that view the corporation as a proper defendant to almost all criminal indictments. It confines the doubts and the subjects of controversy to a discussion whose contentions, limitations and problems are familiar to the criminal system as a whole.

The practical problems of this approach of identifying the perpetrator of a crime within a complex corporate structure, or determining the actual amount of illegal profit derived from the offense in question, or trying to prevent the corporation from compensating the convicted agent might be no easier to resolve than the practical problems inherent in imposing corporate criminal liability. But the difference is in the ramifications to the entire system. The current approach requires overstepping the boundaries of criminal law and deviating from its principles and basic structure, while the suggested alternative reflects a complete and consistent application of criminal law.