THE DETERRENCE OF CORPORATE CRIME THROUGH CRIMINAL AND ADMINISTRATIVE LIABILITY

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ABSTRACT

More than the small, family-run enterprises of the past, modern corporations are gaining an increasingly prominent role in our social-political-economic landscape. Corporations now may employ millions of workers, influence product supply and consumer demand and affect the environment. Together with their rising power and stature has evolved a greater potential to cause large-scale harm, ranging from the immediately obvious: polluting the environment or hoarding basic commodities, to the not-so-obvious: price fixing, false advertising, tax evasion, bribery and falsification of records. Despite the harm corporations have and can produce, their illicit activities have not drummed up society's interest as much as the traditional crimes like rape, murder and robbery have. Corporations are incapable of being "criminal" because the civil law tradition does not recognize it as possessing the requisite mental state to do wrong. Liability is borne instead by the corporate actors engaged in these illicit activities on behalf of the corporation who, even then, are viewed at worst as unethical and not as possesed with a criminal mind.

The current system of policing corporations mirrors the present situation. Though we have a civil and administrative system of holding corporations and its agents liable, the criminal aspect of corporate activity is sorely overlooked. Since a crime is always ultra vires, there are two resultant effects: first, the corporation is not bound to answer for the acts of its agents unless the act is clearly a board action and second, society is recompensed by penalizing the individual actor. An evaluation of our present system shows the inadequacy of the law in ensuring that the corporate offender is adequately punished. Even if the corporate actor is punished, the corporation itself is insulated from the consequences of the crime.

The theory and practice of corporate criminal liability evolved in Europe and the United States as a means by which corporations were to be policed by the government, leading eventually to a system of self-regulation. The theory deals with treating a corporation as morally blameworthy, thus chargeable criminally. It is meant to balance out the inadequacies and difficulties of proceeding against an individual within the corporation.

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This thesis evalutes the twin aspects of corporate criminal liability and compares them to the existing system of criminal and administrative penalties. The conclusion that our existing system of criminally penalizing responsible corporate officers should be maintained but more clearly defined, to be supplemented by a more effective system of administratively sanctioning the corporation, does not amount to reinventing the wheel. Aside from proposing new and better defined standards of individual criminal liability, this thesis explores the adoption of principles in corporate criminal liability to administratively sanction corporations.

Corporate crime, regardless of the philosophical perspective from which it is viewed, deserves a second look. More than proposing a full-proof plan for combating crime in the suites by men in suits, this thesis hopes to at least call attention to its existence and hopefully, the necessity for change.

INTRODUCTION

"It is necessary to urge that we redirect our attention from the petty thief to the Corporate Executive, from the offender who haunts the streets and alleys to those who inhabit the finest offices and restaurants, and from the Police to the FTC, SEC, and IRS. Or perhaps I should not say redirect for that implies that the problems of ordinary street crime and violent crimes are unimportant. It is a matter of balance."

Stanton Wheeler (1976)[1]

A. Background of the Study

The Corporation has been traditionally viewed as an artificial entity which affects the real world only insofar as its agents act in it. Though it acts through human beings, such acts are seen more as corporate acts rather than individual acts in behalf of the corporation. The corporation can sue and be sued, purchase property and enter into contracts.[2] It has a reputation capable of being besmirched for which it is entitled to damages.[3]

In the realm of criminal law, however, the corporation's acts and liabilities are abruptly divorced from those of its agents. That a corporation is an artificial being unable to form evil intent to commit crime is of paramount importance. Criminal acts are always considered to be *ultra vires* – not falling within any of

[1] MARSHALL B. CLINARD AND PETER C. YEAGER, CORPORATE CRIME, 12-13 (1980) [hereinafter Corporate Crime] *citing* Stanton Wheeler, *Trends and Problems in the Sociological Study of Crime*, 99 SOCIAL PROBLEMS 525, 532 (1976).

[2] The Corporation Code of the Philippines, Batas Pambansa Blg. 68, §2 (1980).

[3] Mambulao Lumber Company v. Philippine National Bank, 22 SCRA 359 (1968).

the express, implied or incidental powers of a corporation – for which liability falls solely upon the human actor. It is in these instances that a corporation is most a "non-person." It is not the corporation alone that is viewed differently. Even the human actors who actually commit the offenses are not viewed as "traditional" criminals. This is coupled with the problem of finding the criminal mastermind within a corporate maze. The common law concept of corporate criminal liability provides us with a different view of corporate criminality and responsibility – one of duality – where both individual and corporate liability are addressed. This additional facet could serve to enrich the present system without drastically departing from it.

B. Objective of the Study

The purpose of this study is to determine the manner by which corporations and their agents are to be held liable for their actions, particularly in the realm of criminal law. The emphasis of the law on individual liability and its weaknesses will be examined vis-à-vis the current system of corporate criminal liability adopted in common law jurisdictions where the attention is given to both the individual and the corporation as criminal. The comparison between the two systems will serve as a basis for proposing better defined standards of individual liability as well as an improved administrative framework by which corporations can be policed using common law standards of corporate criminal liability.

C. Delimitations of the Study

Corporate criminal activities are not well-understood, much less documented in the Philippines. The proponent will deal with theoretical scenarios when discussing the applicability of the common law doctrine in the Philippines. The study will not delve into any particular corporate crimes, though they will be cited by way of example. It will not cover the procedural aspects of proving the commission of the crime, nor will it propose to set standards of proof per type of industry, corporation or corporate level. Furthermore, the proposed statutory changes are not meant to affect the Revised Penal Code but only special penal laws. Reference will be made to American jurisprudence when discussing certain crimes, although some of them have no similar statutory equivalents in the Philippines, for the purposes of illustrating corporate criminal liability principles.

I. CORPORATIONS AND UNLAWFUL BEHAVIOR

Picture this scenario.

One Friday morning in October of 1995, an unmarked, unlicensed van pulls up in front of a bank as several masked men alight swiftly from the rear end and direct their armalites at the guards at the door. They enter quickly and emerge about 10 minutes later with P5,000,000 in cash and bonds. Fortunately, the Makati police were unusually responsive that day. Squad cars had arrived before the caper had been accomplished, leaving one dead, another in custody, but with two other collaborators at large. The suspects' faces are splashed all over the major dailies

and Vice-President Estrada bemoans the abolition of the Presidential Anti-Crime Commission which he claims would have solved the case in a few days. The investigation lags on, and more public funds are spent tracking down the culprits. The culprit in custody is sentenced to *reclusion perpetua*. Once again, the criminal justice system has succeeded in restoring a sense of security. Golden Lion Films has bought the rights for the movie.

Another scenario. Millions, hundreds of millions, will be made at the expense of the Filipino public, but more quietly and with less fanfare. Corporation A has managed to manipulate the price of its stocks by issuing press releases with misleading information regarding its financial performance. It has also dumped toxic waste into the Pasig River, saving itself the expense of installing a better purifying system. Furthermore, it has falsified its financial statements and will, thus, deprive the government of millions in taxes. There will be no movies made, scant news coverage, and the possibility of any business executive spending one night in jail is remote.

The intent in these two scenarios is the same: to gain. However, the means used, the actors involved, as well as the victims preyed upon are different. The perpetrators in the second scenario are well educated, rich and respected persons motivated by more than the need for three square meals a day. Yet they remain faceless and nameless, except for a few for whom notoriety has gained a perverted sense of fame. This is the world of corporate crime. To understand these crimes, one must begin with a study of a larger class of crimes to which it belongs – white-collar crime.

White-collar crime has been defined as "an illegal act or series of illegal acts committed by non-physical means and by concealment, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."[4] The term was originally defined by Edwin H. Sutherland, who had made the first extensive study on white-collar crime 1949, as a "crime committed by a person of respectability and high social standing."[5] Though this definition is far too restrictive, the importance of his work lay in the fact that, at last, recognition had been given to the double-standards applied by the legislature in dealing with crimes of the non-traditional nature.

White-collar crime, like traditional crime, is punished by law. They differ, however, in two main respects: 1) impact and 2) *modus operandi*. In terms of injury, white collar crimes affect more persons. Also, these crimes are more economically costly than traditional offenses. As to the means employed, white-collar criminals employ deceit and concealment. Force and physical violence are seldom used and play a secondary role.[6]

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[4] HERBERT EDELHERTZ, THE NATURE, IMPACT AND PROSECUTION OF WHITE COLLAR CRIME 4-5 (1979).

[5] *Id.*

[6] AUGUST BEQUAI, WHITE COLLAR CRIME: A 20TH CENTURY CRISIS 3 (1979).

White-collar crime is either occupational and corporate. Occupational crime is committed by individuals or groups of persons in connection with their occupation. Included in this class are those violations of law perpetrated by businessmen, lawyers, politicians, doctors, labor union leaders, pharmacists and employees who defraud their employers of money or steal property. These crimes include under reporting of sales, misappropriation of public funds, padding of pay rolls, tax evasion, granting of favors or getting an occasional "kickback."[7]

On the other hand, corporate crime is "enacted by collectivities or aggregates of discrete individuals. It is hardly comparable to the actions of a lone individual."[8] Corporate crime is differentiated from occupational crime in that the latter usually involves a corporate official or employee who acts for his own personal benefit. Corporate criminal liability has been defined as "conduct of an employee acting within the scope of employment or with apparent authority and with an intent to benefit the corporation."[9] The term "scope of employment" includes "acts on the corporation's behalf in the performance of the agent's general line of work"[10]

Under the doctrine of *respondeat superior*, the corporation is dealt with as a principal.[11] Officers, directors and all employees, whether managers or subordinates, are merely considered agents of the corporation.[12] Criminal liability of the corporation therefore attaches upon acts of 1) officers and directors;[13] 2) managers and supervisors;[14] and 3) subordinate employees.[15]

A. Unexplored Ground

Part of the reason for the slow development of detection and punishment in the area of corporate criminal liability is that individuals or groups of individuals who play a dominant role in these activities came from the upper class of society. Traditional criminology has oftentimes exempted this class from prosecution and punishment. The perpetrator of a business related crime is indeed not viewed in the same light as an ordinary criminal. The former is termed a "shrewd business-

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[7] Corporate Crime, *supra* note 1, at 18.

[8] *Id.* at 18.

[9] William Lauper, *Culpability and Sentencing of Corporations*, 71 NEB. L. REV. 1055 (1992) [hereinafter Lauper].

[10] United States v. Automated Medical Laboratories, Inc., 770 F. 2d. 399, 407 (4th Circ. 1985).

[11] David Overlock Stewart, *Basics of Criminal Liability for Corporations and their Officials, and Use of Compliance Programs and Internal Investigations*, 22 PUB. CON. L.J. 1 (1992).

[12] Lauper, *supra* note 9, at 1055.

[13] *See* United States v. Empire Packing Co., 174 F.2d. 16, 20 (7th Circ. 1949).

[14] *See* C.I.T. Corp. v. United States, 150 F.2d. 85 , 89 (9th Circ. 1945).

[15] United States v. Uniroyal Inc., 300 F. Supp. 84, 87 (S. D. N.Y 1969). The rationale and components of corporate criminal liability will be more fully discussed in Chapter V.

man" whereas the latter a "petty thief." While such individuals would not normally engage in criminal activities like selling drugs on the street or snatching a purse, their entry into the corporate organization may make certain unlawful acts, when done within the context of the present business environment, more acceptable, if not necessary. Perhaps, what is being done is acceptable by industry standards, even if illegal. Bribery, for example, is so rampant and widespread that it is factored in as a cost of production.

The victims of white-collar crime do not always know that they have been injured. A securities fraud may, for example, affect thousands of people without a single executive going to jail. The objective of the crime, though, does not really vary. The perpetrators are out to gain in terms of money or property. Because of new technology and laws which are not quick enough to cope with it, the incidence of white-collar crime, which is now very well documented in the United States, is on the rise.

B. History of Corporate Criminal Liability

Though criminal sanctioning of corporations was generally accepted in Europe before the French Revolution, with certain sections of the *"Ordonnance Criminelle"* of 1670 being devoted to it. The 1810 *"Code Penal"*[16] did not replicate this. The Belgium Penal Code also excluded such liability, as did the Dutch Penal Code.[17] English courts originally rejected the idea of corporate criminal liability.

Corporations began as ecclesiastical bodies whose main purpose was to manage church property. They were created only upon a grant of parliament. As the corporate form became increasingly established and utilized, it became vested with a separate corporate personality.[18] The corporation was recognized as an entity distinct from its members[19] with corporate property distinct from property of its members[20] and with judgments against a corporation capable of being executed only against the property of the corporation and not against its members.[21] As a result of this, corporations could not be excommunicated, imprisoned, assaulted or outlawed; nor could it commit a felony. In the words of Edward, First Baron Furlow: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"[22] Despite the corporation's

[16] Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L. & COMP. L.Q. 493, 494 [hereinafter Stessens].

[17] *Id.* at 495.

[18] Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 Wash. U. L.Q. 393, 400 (1982) [hereinafter Brickey].

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] John C.Coffee, *No Soul To Damn, No Body To Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment* 386 (1981) [hereinafter Coffee].

inability to commit wrong, it was endowed with many other capacities and characteristics possessed by natural persons. However, since the corporation possessed no mind, but rather was made up of individuals with their own minds, it could not form any intent.[23]

As early as 1635, corporations were being held liable for non-feasance.[24] In the eighteenth and mid-nineteenth century, corporations were being indicted for breach of duty consisting in inaction, but not for crimes involving personal violence.[25] Borrowing from the principle of vicarious liability in tort law, there came to be recognized corporate criminal liability for the misconduct of employees acting within the scope of their employment.[26] However, these acts clearly outlawed "acts of immorality" such as perjury and crimes against persons.[27]

These developments in English law were further expanded by the American theory on corporate liability. Criminal prosecutions were first used for the abatement of public nuisances.[28] This was due to the public nature of the harm and the need for an effective remedy.[29] In the case of *State v. Morris Essex Railroad*,[30] the United States Supreme Court held that if a corporation could be held civilly liable for the tortuous acts of its agents, it should also be accountable in a criminal prosecution. The individual wrongdoer within the corporation would be, in all likelihood, difficult to identify and financially irresponsible.[31] The courts developed its application from nonfeasance to misfeasance. As the doctrine developed, it began to cover felonies with an intent requirement. The intent of the corporation's agents became imputable upon the corporation.[32] That a corporation could not form an intent was overridden by the contention that the United States Legislature which created its own creature, could very well punish it. The Court also said:

> If for example, the invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do these acts, and can act therein as well viciously as virtuously.[33]

[23] John Braithwaite and Brent Fisse, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 1 SYDNEY L. REV. 468, 475 (1988) [hereinafter Braithwaite].

[24] Brickey, *supra* note 18, at 401 *citing Case of Langforth Bridge*, 79 ENG. REP. 919 (K.B. 1635).

[25] *Id.* at 402.

[26] *Id.* at 403.

[27] *Id.* at 403.

[28] *Id.* at 405 *citing* People v. Corporation of Albany, 11 Wend. 539, 543 (N.Y. Sup. Ct. 1834).

[29] *Id.* at 406.

[30] *Id* at 407 *citing* 23 N. J. L. 360 (1852).

[31] *Id.* at 409.

[32] *Id.* at 412.

[33] Michael Tigar, *It Does The Crime But Not The Time: Corporate Criminal Liability In Federal Law*, 17 AM. J. CRIM. LAW 211, 219 (1990) [hereinafter Tigar].

Furthermore, corporations were begun to be seen as capable of forming a *mens rea* or that intent necessary to be able to commit a crime, called the organizational *mens rea*. Corporate illegality began to be viewed in terms of a corporation being more than a singular person. It was perceived as a complex organization and the commission of corporate wrongdoing had to be viewed within this context.

Today corporate criminal liability is recognized by countries such as England, the United States, Canada, Great Britain, France,[34] Germany,[35] Japan.[36]

II. CORPORATE LIABILITY IN THE PHILIPPINES

A. The Philippine Setting

The Philippines is an heir to two great legal traditions: the Civil Law Tradition and the Anglo-American Common Law tradition. The former puts emphasis on codified law; and while the codes do not embody the law in its entirety, courts cull their decisions from what the statutes provide rather than from what they omit. Common law, on the other hand, is of a less rigid form. While common law countries do have existing legal codes, they are not held in the same regard as in civil law jurisdictions. Statutory rules under the common law tradition, must first be judicially interpreted before being applied and cited.

Corporation law, as practiced in the Philippines, is a result of that melding of these two traditions. Though the Corporation Law was originally derived from American law[37] there now exists a Philippine Corporation Code. However, given the fast-paced development and growth of corporations in the Philippines, the relatively antiquated provisions of the Code are often supplemented by judicial decisions. These laws are therefore not immutable and adapt to the needs of modern business and commercial transactions. For instance, the theory of separate corporate entity has been discarded by courts in cases where businessmen employ the corporate vehicle to abuse their privileges.

[34] Corporations are not held criminally liable, save for a few exceptions. The doctrine of *mens rea* is held in high esteem and corporate criminal liability has difficulty in being reconciled with this principal. The exceptions are in the area of "penal-economic regulations" where responsibility is based on protection of public safety and order. Bruce Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 S.W. L.J. 908, 912 (1975) [hereinafter Coleman].

[35] *Id.* Criminal liability of corporations is rejected except where the legislature has made express provisions to that effect namely, for Internal Revenue Code violations and economic penal law violations, where the defense of due diligence is allowed.

[36] *Id.* There is no liability for ordinary crimes involving *mens rea* but corporations may be convicted of violating regulatory statutes. The doctrine of vicarious liability is rejected. Only crimes of managerial agents can hold the corporation liable.

[37] Soledad M. Cagampang, *The Fiduciary Duties of Corporate Directors under Philippine Law*, 46 PHILIPPINE L. J 513, 514 (1971).

This hybrid of two traditions has not been as evident in Philippine Criminal Law. Coming strictly from a Civil Law discipline, the sources of Philippine Criminal Law are the Revised Penal Code and special penal laws.[38] Unlike in corporation law, the role of jurisprudence is to simply explain, not expand, the meaning of the law as enacted by the legislature.[39] As a result, there is no such things as "common law crime" as they are known in England and the United States. Where there is no penal provision in either the Revised Penal Code or in any of the the special penal laws that define an act as criminal and provide a penalty for it, there is no crime committed nor any liability incurred.[40]

Corporation law and criminal law in the Philippines are influenced by the civil and common law traditions, respectively. While criminal law covers what has been clearly willed by the Legislature, corporation law fills the gaps for which Congress has failed to provide. Consequently, a melding of the two would not take place without some resistance or difficulty. Furthermore, would it be necessary?

B. Corporate Responsibility

The Corporation Code defines a corporation as "an artificial being created by operation of law, having the right to succession and the powers, attributes and properties expressly authorized by law or incident to its existence."[41] It is an entity which is separate and distinct from that of its directors, officers and stockholders. As a result of this separate juridical personality, the corporation has the right to succession and despite the changes in its individual membership, it remains unaffected.[42] It may acquire and possess property of all kinds.[43] It may bring civil and criminal actions as a natural person can.[44] It may not, as a general rule, be made to answer for acts or liabilities of its stockholders or members, and vice versa.[45]

A distinction must be made between the liabilities personally incurred by the corporation's members and the liabilities incurred by the corporation through its officers and agents acting in the corporation's name. In the first case, the corporation disavows any involvement of liability, its assets not being responsible to its members personal creditors, save for a possible lien on the stockholders' shares of stock which is really their personal property. In the case of corporate liability, while the general rule is that the corporation is liable for acts done in its

[38] These special penal laws are those passed by the Philippine Commission, Philippine Assembly, Philippine Legislature, National Assembly, the Congress of the Philippines and the Batasan Pambansa and the Penal Presidential Decrees issued during Martial Law.

[39] LUIS B. REYES, 1 REVISED PENAL CODE 2 (1993 ed.) [hereinafter Reyes].

[40] *Id.* at 1.

[41] §2.

[42] The Corporation Code of the Philippines, Batas Pambansa Blg. 68, §2 (1980).

[43] *Id.*

[44] Stonehill v. Diokno, 20 SCRA 383, 390 (1967).

[45] Creese v. Court of Appeals, 93 SCRA 483, 4095-496 (1979).

name, Philippine law has limited this liability to those incurred by the corporate agents acting within the scope of their authority. The type of liability incurred also determines corporate accountability. Corporations, for example, are not liable in this jurisdiction for criminal acts of its officers even if done in the corporation's name. Also, even when performing acts generally attributed to the corporation and for which it is answerable, there are cases where the members share personally in the corporation's liability over and above the corporate assets.

1. CIVIL LIABILITY

a. Contractual Liability

Though the corporation is considered as a juridical person, it acts in the real world through its human agents. The term agents include its board of directors as well as other duly authorized officers and representatives. A corporation is bound by the acts of its agents when the following requisites concur: 1) consent of the contracting parties; 2) subject matter of the contract; 3) cause or consideration.[46] The agent creating the obligation must be legally capacitated to bind the corporation. He must be acting within the scope of his authority. The subject matter of the contract must not be contrary to law, morals, good customs, public order or public policy[47] as is with the case of the cause or consideration for contracts.[48]

Since a corporation is endowed with finite powers, it can only be held liable for obligations incurred as a result of the exercise of corporate powers conferred by the Corporation Code, by its articles of incorporation as well as those necessary or incidental to the exercise of powers so conferred.[49] Acts beyond the scope of these limitations fall within the *ultra vires* doctrine through which the corporation may disclaim any liability on a given transaction.

There are three types of *ultra vires* acts: a) those acts or contracts which are illegal *per se*; b) acts done beyond the power conferred upon the corporation by law or its article of incorporation and; c) acts or contracts entered into on behalf of the corporation by persons who do not possess any corporate authority.[50]

Where the contract is illegal *per se*, it is wholly void and of no effect. It is incapable of being ratified or validated. When the act is not illegal *per se*, but merely a result by the exercise of a corporate officer of powers in excess of his authorized or express powers, it may still be enforced by performance, ratification, estoppel or on equitable grounds[51] especially when the contract is already executory, where

[46] Civil Code of the Philippines, Republic Act No. 386, art. 1318 (1950).

[47] Republic Act No. 386, art. 1347.

[48] Republic Act No. 386, art. 1352.

[49] Batas Pambansa Blg. 68, art. 45.

[50] Cesar L. Villanueva, De Facto Corporations, Corporations by Estoppel, and UltraVires Acts 5 (unpublished manuscript) [hereinafter Villanueva].

[51] *Id.* at 332.

no creditors shall be prejudiced thereby or no rights of the state are involved.[52] However, when to declare an act as *ultra vires* would amount to interference with the business judgment of the directors,[53] or when acts are not beyond the corporation's powers but merely beyond the officer's powers;[54] or when the defense of *ultra vires* would allow greater wrong to be done upon innocent parties dealing with a corporation,[55] the courts recognize the ability of the of the stockholders to ratify the act. At the same time, corporations intending to abandon these transactions because they may not be as advantageous as first thought, will not be allowed to do so. They are treated as *intra vires*.[56]

When an *ultra vires* act has been fully performed by both sides, neither party can set it aside and recover what they have lost[57] although recovery has been allowed at times on the basis of equity.[58]

When the corporation has acted in such a manner that the public has relied upon in good faith and in the expectancy that it has the power to perform certain obligations, the corporation would be estopped to deny this apparent authority.[59] Otherwise, the public will have lost its faith in such contracts. Thus, we can see that the courts allow little room, behind this being that to allow otherwise for the *ultra vires* doctrine to prosper because to allow otherwise would impede the growth of businesses.

Another development in corporate law whereby the ends of justice are furthered is the application of the doctrine of "piercing the veil of corporate fiction." The doctrine provides another way by which parties dealing with a corporation may recover from it when the corporate vehicle is[60] used to "defeat public convenience, justify wrong, protect fraud or defend crime."[61] Like the *ultra vires* doctrine, this doctrine was developed to prevent abuse of the corporate form. When it is used as a means to cover up fraud or illegality, the fiction is discarded and the individuals composing the corporation are considered as liable to injured parties. In these cases,

[52] HECTOR DE LEON, THE CORPORATION CODE OF THE PHILIPPINES 332 (1989 ed.) [hereinafter DE LEON] *citing* 7 FLETCHER 585.

[53] Villanueva, *supra* note 50, at 29.

[54] DE LEON, *supra* note 52, at 333 *citing* 11 FLETCHER 566-567.

[55] Republic v. Acoje Mining Co. Inc., 3 SCRA 361, 364-365 (1963).

[56] *Intra vires* acts are those in direct and immediate furtherance of its business, fairly incident to the express powers and reasonably necessary for their exercise.

[57] DE LEON, *supra* note 52, at 335 *citing* 7 FLETCHER 652.

[58] *Id. citing* 7 FLETCHER 620.

[59] Francisco v. Government Service Insurance System, 7 SCRA 577, 584 (1963).

[60] The doctrine that a corporation is an entity separate and distinct from the persons comprising it is a theory adopted for purposes of convenience and fairness.

[61] Yutivo Sons Hardware Co. v. Court of Tax Appeals, 1 SCRA 160, 165 (1961).

however, liability is limited to the "active or intervening stockholders or officers"[62] leaving unaffected the passive non-intervening stockholders.[63]

The diffusion of the *ultra vires* doctrine and the evolution of the piercing doctrine both have the end in mind of making the corporate vehicle more attractive, convenient, but not abusive towards the public in the exercise of its powers.

b. Tort Liability

Torts or quasi-delicts as they are known in civil law, are acts or omissions causing damage to another, there being fault or negligence.[64] Since any act done exceeding the scope of the corporation's powers or contrary to law is *ultra vires*, a tort committed by a corporate officer or employee is always *ultra vires*. While the *ultra vires* doctrine is used to enable a corporation to shield itself from liability, it cannot always be successfully invoked in cases of tortious acts.

A corporation can only act through its officers and agents. This being the case, it is liable for the tortious acts of its agents done within the scope of their authority.[65] The authority to act may come from the express direction or authority of its stockholders acting as a body or from its boards of directors.[66] Hence, acts done in excess of the officer's authority or in contravention of instructions given to the officer or agent would not render the corporation liable. Some commentators have noted, however, that a corporation cannot escape liability by simply asserting that the acts were done in excess or in contravention of authority for all tortiuous acts are, necessarily, *ultra vires*.[67] Article 19 of the Civil Code[68] is used to justify liability.

Corporations may also be held liable under Article 2180 of the Civil Code, which in reference to Article 2176[69] states that one is not only responsible for one's own acts or omissions, but also for acts of certain specified groups of persons,

[62] Cesar Villanueva, Restatement of the Doctrine of Piercing the Veil of Corporate Fiction 41 (unpublished manuscript) [hereinafter Piercing].

[63] Where the principal stockholder uses the business as his personal checkbook, there being an intermingling of personal and corporate assets, that individual is held liable. *See* McConnel v. Court of Appeals, 1 SCRA 722 (1961). Where a corporation is not used as a mere business conduit but is guilty of fraudulent acts, one cannot simply look to the principal stockholder for redress. Liability usually falls upon the officers who can clearly be shown to have participated in the fraudulent act. *See* Del Rosario v. National Labor Relations Commission, 187 SCRA 777 (1990).

[64] DE LEON, *supra* note 52, at 341.

[65] *Id.*

[66] PNB v. CA, 83 SCRA 237, 247 (1978).

[67] DE LEON, *supra* note 52, at 341 *citing* 19 C.J.S. 948.

[68] Republic Act No. 386, The Civil Code of the Philippines, art. 19 (1950): "Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."

[69] Republic Act No. 386, art. 2176: "Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if

such as employees who commit the tortuous act in the occasion of their functions[70] or within the scope of their assigned tasks.[71] These provisions are usually invoked in cases involving physical injury caused to another by an employee. Civil liability attaches upon the owner when it is shown, and not successfully rebutted by the employer that he was negligent in the selection and supervision of his employees, failing to exercise the diligence of a good father of a family to prevent damage.[72]

2. ADMINISTRATIVE LIABILITY

Another liability which may attach to a corporation is administrative. This liability comes in the form of fines and other penalties provided for by the administrative agency.

An administrative agency is a body endowed with quasi-legislative and quasi-judicial powers to enable it to carry out the laws entrusted to it for their enforcement or execution.[73] These twin powers enable the agency to make "rules, issue licenses, grant rights or privileges and adjudicate cases" as well as govern "corporations with respect to functions regulating private right, privilege, occupation or business."[74] These agencies also have the power to mete out sanctions. The sanctions imposed by the administrative agencies upon the guilty corporate officers is limited mainly to disqualification from being an officer, member of the board of directors of the corporation.[75] Pecuniary liability is commonly limited to the corporation. However, there have been cases where the administrative agencies have pierced the veil of corporation fiction in order to enforce a liability,[76] though this is subject to judicial review.[77]

Violations of administrative rules and regulations give rise to administrative proceedings before the proper agency. These proceedings are often summary in nature where the quantum of proof required is substantial evidence. These viola-

there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this chapter."

[70] Republic Act No. 386, art. 2180 par. 4: "The owners and managers of an establishment or enterprise are likewise responsible for damages caused by their employees in the service of the branches in which the latter are employed or on the occasion of their functions."

[71] Republic Act No. 386, art. 2180 par. 5: "Employers shall be liable for the damages caused by their employees and household helpers acting within the scope of their assigned tasks, even though the former are not engaged in any business or industry."

[72] Republic Act No. 386, art. 2180 para. 8.

[73] CARLO L. CRUZ, PHILIPPINE ADMINISTRATIVE LAW 10 (1991) [hereinafter CRUZ].

[74] Administrative Code of 1987, Executive Order 292, bk. VII, ch.I, §2(1).

[75] Revised Securities Act, Batas Pambansa Blg. 178, §46(c) (1983).

[76] *See* Lidell and Co. v. Collector of Internal Revenue, 2 SCRA 632 (1961); Commissioner of Internal Revenue vs. Norton and Harrison, 11 SCRA 714 (1961).

[77] Piercing, *supra* note 62, at 9.

tions may also give rise to criminal prosecution but only when the Legislature prohibits such acts and imposes a corresponding penalty. Such proceedings are no longer within the jurisdiction of the administrative agencies but rather within the courts. The agency may only recommend that criminal proceedings be commenced against erring individuals.

The Securities and Exchange Commission (SEC) is the primary administrative body charged with the supervision and control over all corporations, partnerships and associations who are the grantees of primary franchises, licenses or permits issued by the government to operate in the Philippines.[78] Falling within the jurisdiction of the SEC are the following types of cases:

1. devices or schemes employed by the Board of Directors, business associates, officers or partners amounting to fraud and misrepresentation, and which may be detrimental to the interest of the public, and/or the stockholders, or member;
2. controversies arising out of intra-corporate relations between and among stockholders and members, between and among stockholders or members and the corporation, and between the corporation and the state but only insofar as it concerns its franchise;
3. election or appointment controversies of directors, trustees, officers or managers;
4. cases of suspension of corporations for failure to and impossibility of meeting its debts as they fall due or for insufficiency of assets to cover liability.[79]

The SEC generally imposes sanctions upon the corporate entity. The SEC is empowered to impose fines and penalties for violations of any of the laws implemented by it[80] as well as violations of its rules, regulations, orders and decisions.[81] It may suspend or revoke, after proper notice and hearing, the franchise or certificate of a corporation upon any of the grounds provided by law including:

1. fraud in procuring its certificate of registration;
2. serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damages to the general public;

[78] Reorganization of the Securities and Exchange Commission With Additional Powers And Placing The Said Agency Under The Administration Supervision Of The Office Of The President, Presidential Decree No. 902-A, §3 (1976).

[79] Presidential Decree No. 902-A, §5.

[80] B.P. Blg. 68; B.P. Blg. 178; Republic Act No. 386, art. 1768-1867; P.D. 902-A; The Investment Company Act, Republic Act No. 2629 (1961); The Financing Company Act, Republic Act No. 5980 (1970); The Foreign Investments Act of 1991, Republic Act No. 7042 (1991).

[81] P.D. 902-A, §4(1).

3. refusal to comply with any lawful order of the Commission restraining acts which would amount to a grave violation of its franchise;
4. continuous inoperation on a period of at least five (5) years;
5. failure to file by-laws within the required period;
6. failure to file the required reports in appropriate forms as determined by the Commission within the prescribed period.[82]

The grounds mentioned above do not comprise an exclusive list as can be seen from the phrase "any of the grounds provided for by law, among others."[83] The grounds for a *quo warranto* proceeding to dissolve a corporation are also relied upon. These grounds found in Section 2 of Rule 66 of the Rules of Court are:

a. when it has offended against a provision or an Act for its creation or renewal
b. when it has forfeited its privileges and franchises by non-user.
c. when it has omitted an act which amounts to a surrender of its corporate rights, privileges and franchises;
d. when it has misused a right, privilege or franchise conferred upon it by law, or when it has exercised a right, privilege or franchise in contravention of law.

Where a provision of the Revised Penal Code or of a special law is violated, the Prosecution & Enforcement Department (PED) of the SEC imposes an administrative sanction upon the corporation and, at the same time, initiates or recommends that criminal proceeding be taken against the guilty or responsible officers.[84] These sanctions are imposed if it can be shown that the board of directors or corporate officers have indeed employed or ordered the fraudulent schemes, or have defied a lawful order of the Commission, among others.[85]

[82] *Id.*

[83] a. Violation by the corporation of any provision of the Corporation Code (Batas Pambansa Blg. 68, §144);
b. In the case of a deadlock in a close corporation and the SEC sees dissolution as the only practical solution (Batas Pambansa Blg. 68, §104).

[84] Interview with Glen U. Sumague, Chief of the Record/Docket Division of the PED, Quezon City, 5 November 1995.

[85] P.D. 902-a, §6: "The Prosecution and Enforcement Department (PED) shall have, subject to the Commission's control and supervision, the exclusive authority to investigate, on complaint or *motu proprio*, any act or omission of the board of directors/trustees of a corporation, or of a partnership, or other associations, or of their stockholders, officers or partners including any fraudulent devices, schemes or representations, in violation of any rules and regulations issued by the Commission and in appropriate cases, the corresponding civil or criminal cases before the Commission or the proper court or body upon *prima facie* finding of violation of any laws or rules and regulations administered and enforced by the Commission and to perform such other powers and functions as may be provided by law or duly delegated to it by the Commission."

III. CORPORATE CRIMINAL LIABILITY IN THE PHILIPPINES

A. Philosophical Difficulties

Though corporations have been endowed with juridical personality, enabling them to enter into civil acts as well as allowing them to be held liable for contracts entered into or tortious acts committed on their behalf, the notion of corporations committing crimes and being held criminally liable has never been accepted in our civil law jurisdiction. In this particular situation, the corporate fiction is disregarded in favor of the recognition of individual actors within the organization who suffer individual punishment.

The reason behind this is rooted in the basic principle which underlies Philippine criminal law – that criminal acts must be committed with malice or intent.[86] Article 5 of the Revised Penal Code defines felonies as acts or omissions punishable by law which may be committed by means of *dolo* (deceit) or *culpa* (fault). There is deceit when the act is performed with deliberate intent; there is fault when the wrongful act results from imprudence, negligence, lack of foresight or lack of skill.[87] There are other elements in the commission of a felony involving *dolo*. The actor must have freedom while doing or omitting to do the act, possess intelligence and intent to do or not to do the act.[88] A negligent act is likewise performed or omitted to be performed with freedom, intelligence and imprudence.[89] Corporations, being artificial beings, are incapable of formulating evil intent or malice. This was enunciated by the case of *West Coast Life Insurance Co. v. Hurd*.[90] In this case, a criminal case for libel was filed against the said foreign corporation as well as its general agent and manager for the Philippine Islands and it's branch treasurer. Summons was issued to the 3 defendants, whereupon they filed a motion to quash the information and the summons issued contending that the lower court had no power or authority under the law to proceed against the corporation criminally and hold it liable for the violation of criminal statutes.[91] The Code of Criminal Procedure provided a procedure for arrest, bail and imprisonment – obviously contemplating a natural person as the perpetrator.[92] The Supreme Court held that the law restricted liability to the officials of the corporation and is never directed to the corporation.[93]

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[86] This does not take into account *mala prohibita* offenses.

[87] Revised Penal Code, Act No. 3815, art. 3 (1932).

[88] REYES, *supra* note 39, at 37.

[89] *Id.* at 47.

[90] 27 Phil. 401 (1914).

[91] *Id.* at 405.

[92] *Id.* at 406.

[93] *Id.* at 408.

The ruling in *West Coast Life* was reiterated by way of *obiter dictum* in the case of *Time Inc. v. Reyes*[94] where the Supreme Court added that "if the accused is a corporation, no criminal action can be against it, whether the corporation is resident or non-resident".[95]

Criminal liability, it is said, presupposes human choice. Only human agents are capable of responding to the deterrent threat of punishment. It has been said that:

> Penal law, being a prescriptive branch of law, purports to direct the behavior of individuals in accordance with society's interests and values. A prerequisite on the achievement of this goal is transmitting the criminal law dictates to an addressee capable of grasping the message, namely the human consciousness... the justification for punishing violators rests mainly on the assumption that it will deter future conscious violations by the transgressor and others.... 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.[96]

More succinctly and vividly put:

> [e]ven depicting the horrors of hellfire and damnations which await evil persons... can have no influence on fictitious persons who do not have the psychological make-up of real ones.[97]

Indeed, a corporation, unlike natural persons, cannot be confined in prison. However imprisonment is not the only way by which a corporation can be penalized. Corporations have been subjected to fines but the deterrent effect is suspect. Monetary fines have been seen by some businessmen as simply the cost of doing business – sometimes being necessary for their survival. The threat of jail, especially when posed against the typical middle to upper class white-collar worker or business executive and bringing with it not only deprivation of liberty but also social stigma, is deemed by some to be the more effective deterrent against crime. To increase deterrence, fines imposed would have to be substantial. An objection to this lies in the consequences of a huge monetary fine, or the application of other harsh measures such as dissolution through *quo warranto* proceedings. It is not only the direct actors who will be "punished" by the sanctions, but the innocent ones as well: shareholders, creditors, employees and consumers. Furthermore, corporations are not seen as capable of being reformed. It is the people that comprise the corporation who are actually punished that seem to be proper subjects for reform.

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[94] Time Inc. v. Reyes, 39 SCRA 303 (1971). This case involved a libel suit filed by Manila Mayor Antonio J. Villegas and Juan Ponce Enrile, against Time Inc. and Time-Life International.

[95] *Id.* at 313.

[96] Braithwaite, *supra* note 23, at 488.

[97] *Id.* at 489.

B. Subsidiary Criminal Liability

Though direct criminal liability cannot be assumed by a corporation, the law does not provide for subsidiary criminal liability in Article 102 and Article 103 of the Revised Penal Code.

Article 102, paragraph 1 states:

> In default of persons criminally liable, inn keepers, tavern keepers and other persons or corporations shall be civilly liable for crimes committed in their establishments, in all cases where a violation of municipal ordinances or some general or special police regulation shall have been committed by them or their employees.

Article 103, states:

> The subsidiary liability established in the next preceding article shall apply to employers, teachers, persons and corporations engaged in any kind of industry for felonies committed by their servants, pupils, workmen, apprentices or employees in the discharge of their duties.

Though it makes mention of corporations, Article 102 is usually invoked with respect to crimes committed physically in establishments where the proprietor was at the same time violating a law or ordinance. For example, if a brawl erupts in a restaurant where somebody is injured, and alcohol is being served in that establishment to minors when it is so prohibited by a municipal ordinance, the proprietor is subsidiarily liable.

Under Article 103, for an employer to be subsidiarily liable, three requisites must be met: 1) the employee committed a crime in the discharge of his duties; 2) the employee is insolvent and 3) the employer is engaged in some kind of industry.[98]

In order for the liability to attach, the employer-employee relationship between the corporation and guilty employee must be shown. The employee must be convicted and the criminal case against him must be proven for the employer's conviction. It is a condition *sine qua non* for the employer's subsidiary liability.[99] Of course, an injured party may elect to sue under Article 2180 of Civil Code under quasi-delicts in which case, proof of criminal conviction would not be necessary. Further, the burden of proof is upon the injured party to show insolvency of the employee. The lack of any one of the requisites enumerated above may serve as a defense to the liability. Again, this subsidiary criminal liability is actually a civil

[98] CESAR SANGCO, TORTS AND DAMAGES 444 (1994 ed.) [hereinafter SANGCO].

[99] M. D. Transit and Taxi Co. Inc. v. Court of Appeals, 22 SCRA 559, 564-565 (1968).

liability passed on to the corporation where the defendant employee has insufficient assets to pay the civil liability arising from the crime.

C. Officer Liability in General

Although corporations cannot be held criminally liable for the acts of their agents, the law as it now stands does not leave the injured public without recourse. In the case of *West Coast Life Insurance Co. v. Hurd*,[100] the Supreme Court said:

> It is undoubted that, under Spanish Criminal Law and Procedure, a corporation could not have been proceeded against criminally, as such, if such an entity as a corporation in fact existed under the Spanish Law, and as such it could not have committed a crime in which a willful purpose or malicious intent was required. Criminal actions would have been restricted or limited, under that system, to the officials of such corporations and never would have been directed against the corporation itself.[101]

Our law recognizes that corporations are able to perform acts in violation of criminal statutes but the liability for these criminal acts, particularly in terms of prison sentences, are suffered by certain individuals. The Revised Penal Code and special penal laws contain provisions which provide for the liability of certain officers or persons through whom the corporation acts.[102]

[100] 27 Phil. 401 (1914).

[101] *Id.* at 407-408.

[102] Persons Responsible:

1) Act No. 3815, art. 360 : "Any person who shall publish, exhibit, or cause the publication or exhibition of any defamation in writing or by similar means, shall be responsible for the same.
   The author or editor of a book or pamphlet, or the editor or business manager of a daily newspaper, magazine or serial publication, shall be responsible for the defamations contained therein to the same extent as if he were the author thereof."
2) Act No. 3815, art. 186 : "*Monopolies and combinations in restraint of trade* — ... whenever any of the offenses described above is committed by a corporation or association, the president and each one of the directors or managers of the said corporation or association who shall have knowingly permitted or fail to prevent the commission of such offenses, shall be held liable as principals thereof."
3) The Anti-Dummy Law, Commonwealth Act No. 108, §2-A (1936).
4) Trust Receipts Law, Presidential Decree No. 115, §13 (1973).
5) Pawnshop Regulation Act, Presidential Decree No. 114, §18 (1973).
6) Insurance Code of 1978, Presidential Decree No. 1460, §389 (1978).
7) The Omnibus Investment Code of 1987, Executive Order No. 226, art. 57(3) (1987).
8) Batas Pambansa Blg. 178, §56.
9) Batas Pambansa Blg. 68, §144.
10) Penalizing squatting and other similar acts, Presidential Decree No. 772, §1 (1975).
11) Revising Presidential Decree No. 389, Otherwise Known as the Forestry Reform Code of the Philippines, Presidential Decree No. 705, §68 (1975).
12) General Banking Act, Republic Act No. 337, §34, 34-A, 87-A (1948).
13) Dangerous Drug Act of 1972, Republic Act No. 6425, §25 (1972).
14) An Act Increasing the Penalties for Tax Evasion, Amending for This Purpose the Pertinent Sections of the National Internal Revenue Code, Republic Act No. 7642, §255 (1992).

In the case of *People v. Tan Boon Kong*,[103] the defendant, as manager of the corporation Visayan General Supply Co., Inc. was held criminally liable for violation of Sec. 2723 of Act No. 2711 and Sec. 1458 of the same act.[104]

On demurrer to the complaint, the defense raised the argument that the offense charged must be regarded as committed by the corporation and not by the officials or agents.[105] The Supreme Court said:

> This view is in direct conflict with the great weight of authority. A corporation can only act through its officers and agents, and where the business itself involves a violation of the law, the correct rule is that all who participate in it are liable.[106]

As Tan Boon Kong was the manager of the corporation and he made the false return, constituting a violation of the law, he was the author of the illegal act who must be held criminally liable. The case may remanded to the lower court for further proceedings.

In the case of *Sia v. People of the Philippines*,[107] the Court of Appeals referred to the ruling in the *Tan Boon Kong* case. In this case, Sia was being charged with maliciously and feloniously violating a trust receipt agreement by failing and refusing to return the objects for sale which were unsold under the trust receipt or account for the proceeds of the sale and converting the goods and/or profits to his own personal use and benefit.[108] Sia was the general manager of the Metal Manufacturing Company of the Philippines, Inc. who had signed and entered into the trust receipt agreement for the corporation.

The Supreme Court held that the *Tan Boon Kong case*, while sound, was not squarely applicable in this case. First of all, in *Tan Boon Kong*, there was an express requirement in the law made upon a corporation to perform a particular act in a prescribed manner. The law made failure to do so a violation of the law, and the person who was conferred the responsibility to perform the said act but did not or who wrongfully performed it, criminally liable. The court said:

[103] 54 Phil. 607 (1930).

[104] Section 1458 stated that it was the duty of every person conducting a business subject to percentage taxes to make, within proper period, payment of the quarterly installment of the fixed taxes, as well as to make a true and complete return of the amount of the receipts or earnings of the business during the preceding quarter and to pay the tax. Section 2723 made any person who, being required by law to make a return of the amount of the receipts sale, shall fail to do so within the period required, liable for a fine or imprisonment or both. (*Id.* at 609)

[105] *Id.*

[106] *Id.*

[107] 121 SCRA 655 (1983).

[108] *Sia*, 121 SCRA at 660.

> [s]ince it is a responsible officer or officers of the corporation who actually performed the act for the corporation, they must of necessity be the ones who assume the criminal liability; otherwise, this liability as created by the law would be illusory, and the deterrent effect of the law, negated.[109]

In this particular case, it was unclear whether or not a crime was committed or merely a contract breached. The allegations in the information seemed to make out a case for estafa under Article 315(1)(2) of the Revised Penal Code. The Court said that to render a breach of a trust receipt agreement as one giving rise to criminal liability was questionable in the light of the passage of P.D. No. 115[110] which contained an express provision that if the violation is committed by a corporation, the penalty provided for in said law shall be imposed upon the directors, officers, employees or other officials or persons therein responsible for the offense.[111] This being the case, Article 315(1)(b) was susceptible to two interpretations – whether the goods were held merely as a security for a loan, there being no element of trust or deceit or that the goods held by the defendant corporation were owned by the bank and held in trust by it. Thus, failure to return the goods or the proceeds thereof constituted not merely a breach of contract, but a breach of trust, giving rise to estafa. Because the intent of the parties was not clearly shown, the Supreme Court acquitted the defendant of estafa.

The Supreme Court said, while referring to the fact that in *Tan Boon Kong*, a person was made expressly liable for failure to perform an act:

> In the absence of an express provision by law making the petitioner liable on the criminal offense committed by the corporation of which he is a president as in fact there is no such provision in the Revised Penal Code under which petitioner as being prosecuted, the existence of a criminal liability on his part may not be said to be beyond any doubt.[112]

What then can be inferred from this statement? According to one commentator,[113] this would mean that when an officer acts in behalf of the corporation for the benefit of the corporation, his intent becomes the intent of the corporation with respect to the transaction. Since he personifies the corporation, and he being the punishable human entity, he is liable. However, there is a caveat: the officer is liable only when the law specifically makes him so, implying that if the law was silent, the separate entity of corporations would not be disregarded, doing away with officer liability.[114] The Court would then seem to be saying that where no

[109] *Id.* at 662.

[110] TRUST RECEIPTS LAW.

[111] *Sia*, 121 SCRA at 663.

[112] *Id.* at 663.

[113] CESAR L. VILLANUEVA, Legal Regimes For Economic Regulation and Redistribution: The Legal Theory of Corporate Personality 17 (unpublished manuscript).

[114] *Id.* at 17.

law specifically penalizes a corporate officer who acts in behalf of the corporation for a felony, the acting officer cannot be held liable.

A corporate officer does not become liable *ipso facto* because of his position. In this jurisdiction, criminal liability is incurred by being a principal by direct participation, inducement, by indispensable cooperation, an accomplice or an accessory.[115] Our jurisdiction does not recognize automatic criminal responsibility nor vicarious liability for the acts of one's employees. In *Tan Boon Kong*, the defendant was directly responsible for the false returns as he was the person who failed to file them. He was not held liable simply because he was president but because the law required him, the responsible officer, to discharge certain duties which he failed to do. As a result, he was held criminally liable. When the Supreme Court said in *Sia* that:

> In the absence of the express provision of law making the petitioner liable for the criminal offense committed by the corporation of which he is the president... the existence of criminal liability on his part may not be said to be beyond any doubt.

As a basis in part for exculpating Sia, the court was making a distinction between the two cases, but in a manner that would give rise to mistaken assumptions. Had the violation of the a trust receipt transaction given rise to criminal liability,[116] who then would be criminally liable if the law had not identified liable officers?

In both *Tan Boon Kong* and *Sia*, the answer should be the actor—whether he be one by direct participation or one by inducement. When an actor commits a crime for his own personal benefit, regardless of its effect on the corporation, he obviously would be criminally liable.[117] Under our laws, when one acts on behalf of a corporation, that the law does not specifically identify a responsible position or officer should not be a bar for criminal prosecution. If this were the case, then unscrupulous individuals who take advantage of the lapse in the law may form corporations, then violate the laws with impunity, all the while hiding behind the corporate fiction.

In the case of *United States v. Kyburz*,[118] the United States Supreme Court made use of the "master-servant" rule. In this case, the proprietor of a jewelry store, engaged in the sale of watches, was charged with the violation of Section 6 of Act No. 666 of the Philippine Commission, which defines and penalizes the fraudulent use of trademarks and trade-names. He was found guilty. On appeal, the defense claimed that the defendant should not be held criminally liable for the acts of his employees who were the ones actually soliciting and misinforming the public as to the brand of their watches.[119] The employees even corroborated

[115] Act No. 3815, art. 17-19.

[116] The Court ruled that the liability was merely civil, thus falling upon the corporation.

[117] Samo v. People, 5 SCRA 354, 358 (1962).

[118] 28 PHIL 475 (1914).

[119] They used the name of their competitor who imported the same model watch from a common manufacturer.

the denials of the defendant that he had not authorized them to use the said tradenames. Yet, the court held that the evidence showed that the sale of the watches was made with the knowledge and consent, if not by the express direction of the defendant.[120]

The Court said:

> While it is true that in cases of this kind the master cannot be held criminally responsible for the acts of his employees unless they are done by his direction or with his consent, nevertheless, there can be no question that he is amenable to the criminal law when he assents, either expressly or impliedly, to the commission of the act, whether he is present or not.[121]

The doctrine, supported by authority, is set forth as follows in 7 Labbat's Master and Servant, Section 2566 which the Court cited:

> So the master is criminally responsible if he causes the illegal act to be done, or requests, commands, or permits it, or in any manner authorizes it, or aids or abets the servant in its commission. He cannot, without rendering himself amenable to the criminal law, participate in the offense, or have knowledge of it whether he is present at the time the unlawful act is committed.[122]

D. Liability Of Corporate Officers Under Philippine Statutes

Kyburz made an important doctrinal pronouncement as to the liability for indirect involvement of corporate actors. It is important because it makes use of the master-servant rule that finds its origins in tort liability. This master-servant theory, however, does not call for the vicarious liability on tort liability wherein injury caused by the negligence of the servant or employee gives rise to a presumption of law that there was negligence in the selection and supervision of the employee or both.[123] There is liability where the master "[c]auses an illegal act to be done, requests, commands or permits it... authorizes it, or aids or abets the servant in its commission"[124] and the authorization may be shown "expressly or impliedly".[125]

This pronouncement was seemingly culled from the basic principle of accessorial liability as stated in 18 U.S.C. Section 2 which provides in part:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

[120] *Kyburz*, 28 Phil. at 479.

[121] *Id.*

[122] *Id.* at 480.

[123] SANGCO, *supra* note 98, at 553.

[124] *Kyburz*, 28 Phil at 480.

[125] *Id.* at 479.

A person is liable as an aide or abettor if he willfully associates himself with and participates in the criminal venture in some manner. He is not required by law to know all the details of the crime nor is he required to participate in all the phases of a criminal scheme.[126] Unlike a conspiracy, aiding or abetting does not require as proof the agreement to carry out a crime.[127] Criminal liability has been incurred for their acquiescence in or tacit approval of their subordinate's criminal activities.[128]

This author opines that the Supreme Court had made a general pronouncement that would find difficulty in its legal application under Philippine criminal law. First, it must be remembered that it was made by the United States Supreme Court that tended to apply American common law. Secondly, this particular case dealt with a small business enterprise. The defendant Kyburz, who was the proprietor of the jewelry shop, was shown to have been visiting his shop several times a week. He had direct control and supervision over his shop. The sales were not isolated instances. Though there was no evidence that he ever physically handed over the fraudulently marked watches to a customer, the Supreme Court decided that there could have been no way the defendant was ignorant of it. He handled all aspects of the business, and he only had two shops. The question may be asked: How would the same pronouncement be applicable in a modern day corporate setting where many corporations have evolved from small mom and pop operations to the huge conglomerates we have today?

The Revised Penal Code and our special penal laws recognize that corporations can "commit" crimes, but only insofar as it acts through particular agents who are charged with criminal liability for their actions. The provisions on liability do not even state that they are *prima facie* presumed to be guilty for the unlawful acts. That is because they must be proven to have been performed directly by the responsible officers or at least authorized and, in a few cases, carried out with their consent and knowledge. It is only then that a corporation is deemed to have performed the act – because they are responsible agents who can bind the corporation. When a law considers a corporation to have "performed" a criminal act, it is rare that an employee is listed among those liable for corporate crimes. Their acts are not corporate acts. When they seemingly act independently and not upon the orders of their higher-ups, any resulting criminal case is brought against them in their personal capacity. There are also cases when their acts would instead give rise to civil liability for the corporation under quasi-delicts or damages under the Civil Code.

Corporate officers[129] or directors, in order to be held criminally liable, must act in a criminal manner as defined by law. There are those officers who must have been

[126] David R. McCormack, *The Tightening White Collar: Expanding Theories of Criminal Liability for Corporate Executives, Directors and Attorneys*, Tex. Bar J. 494, 495 (1986).

[127] *Id.* at 495.

[128] *Id.* at 495-496.

[129] In the case of PSBA v. Leano (127 SCRA 776, 781 (1984)), the Supreme Court made a distinction between officers and agents or employees: an office was created by the charter or by-laws while employment was created by the officers, employees being subordinate to and under the control of the officers. The distinction is important in criminal law for mere employees are hardly considered as persons capable of binding the corporation through their illicit acts.

"responsible for or guilty of" the crime. There must be direct participation by them.[130] In the case of *People v. Montilla*,[131] the Supreme Court said that:

> As a general rule, a director or other officer of a corporation is criminally liable for his acts, though in his official capacity, if he participates in the unlawful act either directly or as an aider, abettor or accessory, but is *not liable criminally for the corporate acts performed by other officers or agents thereof.*[132]

The Court further added that:

> [t]he general rule on the criminal liability of officers of corporations... (is) that it is the *particeps criminis* of a corporate officer in a certain act punishable by law that makes him liable as such officer.

It must be proven conclusively that the crime was committed. Where it is proven that the director, president, manager directly committed the crime in order to defraud the corporation, they are individually liable. Direct participation is called for, and there is no conviction for the acts of others who fall under one's supervision. This is because the law names several officers who may be held liable for an offense: it is either the responsible President, manager, officer – the person responsible for the direct commission of the offense. Unless the prosecution is able to prove conspiracy, only the direct actors will be liable. The Court of Appeals made this pronouncement in the case of *People v. Dichupa*.[133] The *Dichupa* case involved the criminal prosecution of the president of a bonded warehouse who was charged with violating Section 54 of R.A. No. 2137.[134] The lower court convict-

[130] 1) Batas Pambansa Blg.178, §56: "officer or officers... responsible for the violation".
2) Batas Pambansa Blg. 68, §144: "director, trustee or officer of the corporation responsible for the violation".
3) National Pollution Control Decree, Presidential Decree No. 984, §9(e) (1976): ."managing head responsible for the violation".
4) Presidential Decree No. 114, §18: "director, officers, employees or persons therein responsible for the offense".
5) Presidential Decree No. 115, §13: "directors officers, employees or other officials or persons therein responsible for the offense".
6) Executive Order No. 226, §57(3): "president and/or other officials responsible therefore".
7) Republic Act No. 7642, §255: "responsible corporate officers, partners or employees".
8) Price Act, Republic Act No. 7581, §17 (1992): "its officials or employees... who are responsible for the violation".

[131] 52 O.G. 4327 (1956).

[132] *Id.* at 4328 *citing* §1348, 877, FLETCHER CYCLOPEDIA CORPORATIONS.

[133] 19 CAR 401 (1974).

[134] §54 of the Warehouse Reciepts Law holds criminally liable a warehouseman, or any officer, agent or servant of a warehouseman who should tranfer the possession of goods without obtaining the possession of the outstanding warehouse receipt.

ed Dichupa, the president of the corporation, despite his protestations that he was not the one discharging the duties of warehouseman and had no knowledge of the fraudulent conveyance.[135] The lower court said:

> "What was he a warehouseman for?" if he did not know these facts *** Was he a mere figurehead, without responsibility, without duties to perform? He has proved himself unworthy and undeserving of the trust reposed upon him by the members of the Pavia Facoma. He had no sense of duty and responsibility.

The Court of Appeals reversed the decision of the lower court saying that the court erred when it convicted Dichupa without proving all the elements of the offense beyond reasonable doubt.[136] The Court went on to say:

> The criminal responsibility punished by the law is individual, not attributive, so that the warehouseman should be punished even for violations which some other officer, agent or servant of the warehouseman may have committed. And this is fundamental in criminal law: unless conspiracy be shown, no one should be made to suffer for offenses committed by another.

This must also be differentiated from those persons who knowingly tolerate, authorize or fail to prevent the commission of an offense.[137]

The fact that an officer knowingly permitted or failed to prevent the crime committed by the subordinate on behalf of the corporation must be shown. Where an act was committed, the mere commission and thus failure to prevent it on the part of the director, president, general manager or officer is not conclusive. "Knowing" can be construed to modify "failure to prevent". Since knowledge is internal, one can only depend on external acts to know that the act was done upon the superior's order. To "knowingly fail to prevent" is akin to one "knowingly tolerating" a criminal action. There are only a handful of laws that adopt this standard.[138] Their application in this jurisdiction is unclear. The Supreme Court mentioned by way of *obiter* in the case of

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[135] 19 CAR, at 406.

[136] *Id.* at 409.

[137] 1) Presidential Decree No. 1460, §225: "the executive officer or officers of said corporation... who shall have knowingly permitted or failed to prevent said violation shall be held liable as principals."
2) Republic Act No. 6425, §23: "the... president, director or manager who consents to or knowingly tolerates such violation shall be criminally liable as co-principal".
3) TOXIC SUBSTANCES AND HAZARDOUS AND NUCLEAR WASTES CONTROL ACT OF 1990, Republic Act No. 6969, §14(a)(ii) (1990): "president, director or manager who shall consent to or knowingly tolerate such violation shall be directly liable and responsible for the act of the employees and shall be criminally liable as co-principal"
4) Consumer Act of the Philippines, Republic Act No. 7394, §19(c): "any director,officer, agent of the corporation who shall authorize order or perform any of the acts or practices constituting in whole or in part a violation of art. 18, and who has knowledge or notice of non-compliance recieved by the corporation from the concerned department". (1992)

[138] *Supra, see* note 137.

People v. Torres[139] that liability may attach without having to prove direct participation when the law specifically provides for it.[140] The example of liability of officers in cases of monopolies and combinations[141] was cited as an exception to the general rule that "[c]riminal liability in this jurisdiction is personal and circumscribed to acts or omissions of the person of the offender, not of other persons, natural or juridical, whom he might represent in his capacity as president or officer of a corporation."[142] However, the Court did not specify the quantum of evidence necessary to show knowing permission or failure to prevent.

Our laws have also defined officer responsibility in more explicit terms than "responsible" or "guilty" officer. In the Forestry Reform Code of the Philippines,[143] in order that officers are held liable for illegal logging activities, the officers must be shown to have directly ordered the act, quite a stringent standard.[144]

There are some statutes that seem to deviate for the norm. In cases of libel, for example, the editor and business manager of daily newspapers that publish libelous articles are liable to the same degree as the actual author. This is because what the law seeks to penalize is not only the writing of the libelous article but also its publication. Knowledge or complicity need not be proven on the part of the editor or business manager. There are also statutes that seemingly impute upon certain officers liability for the criminal "acts" of a corporation by simply naming them.[145] The Court of Appeals in the *Dichupa* case, however, interpreted the disjunctive use of the word "or" in Section 54 of Republic Act No. 2137[146] to evidence the intention of the lawmakers to hold the actual perpetrators liable — for it would not have named several possibilities if liability was conclusive upon one particular person. It cannot be categorically said, though, that this interpretation would hold true for other statutes similarly worded.

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[139] 51 O.G. 6280 (1955).

[140] *Id.* at 6286.

[141] Under art. 186 of the Revised Penal Code, the president and each one of the directors or managers are liable if they shall have knowingly permitted or failed to prevent the commission of the offense.

[142] *Torres*, 51 O.G. at 6285.

[143] Presidential Decree No. 705, §68 (1975).

[144] In Republic Act No. 7694, art. 19(c), a director, officer or agent of a corporation shall be liable for violating chapter 1 of the said Act on consumer product quality and safety if he shall "authorize, order or perform any of the acts or practices constituting... a violation of art. 18, and who has knowledge or notice of non-compliance received by the corporation from the concerned department".

[145] This is seen in the following statutes:
1) Presidential Decree No. 772, §1: "If the offender is a corporation or association, the... penalty... shall be imposed upon the president, director, manager or managing partners thereof."
2) Republic Act No. 7394, art. 107: "In case of juridical persons, the penalty shall be imposed upon its president, manager or head."

[146] Republic Act No. 2137, §54: "A warehouseman, or any officer, agent or servant, of a warehouseman...".

The examples mentioned are the exceptions to the rule of *particeps criminis* followed by our jurisdiction. There are only a few laws that provide for "knowing toleration"[147] and "strict liability"[148] as standards of complicity, and the proponent finds no clear basis for the different standards chosen and used by the legislature. Even within the same statute, such as the Consumer Act of the Philippines, differing standards of complicity may be found.[149] Save for the exceptional cases, if the requisite burden of proof for showing active participation is not met, there can be no conviction. After all, passivity as a general rule is not criminal.[150] Meeting the different burden of proof requirements is a difficult task. It is made more difficult in a corporate setting.

IV. A LOOK AT THE SYSTEM

A. Checking For Clues

Corporate wrongdoing and the criminal liability of its agents[151] is one of the least explored areas in Philippine jurisprudence. Unlike in other jurisdictions such as the United States and England where the growth of corporations and the criminal activities capable of being "committed" by them through their agents have been closely followed by the development of a set of laws more adept in dealing with "crimes" peculiar to corporations, the same cannot be said for the Philippines. Our system tends to insulate corporate wrongdoers from the consequences of their actions.

It is not the statistics, but rather, the lack of it, that tell an interesting story. A search through the Supreme Court cases will reveal nothing substantial in the area of "corporate crime". In our jurisdiction, that would amount to cases where the penal statutes applying to corporations scattered in our Revised Penal Code and special penal laws are applied to punish corporate agents. Aside from the cases already cited in the preceding section where the criminal liability of corporate agents for crime committed on behalf of the corporation is at least discussed, there are no more decided Supreme Court cases clarifying the criminal liability of agents who act in behalf of the corporation. The existing cases deal with corporate agents who defraud the corporation.[152]

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[147] *Supra*, see note 137.

[148] *Supra*, see note 145.

[149] Art. 18 requires that the prohibited act be authorized, ordered or performed; art. 41, relating to the adulteration and mislabeling of products, is concerned with the "persons directly responsible"; art. 107, referring to liability for product and service simply states: "In case of judicial persons, the penalty shall be imposed upon its president, manager or head."

[150] There are a few exceptions: misprision of treason (Act No. 3815, art. 116), abandonment of persons in danger (Act No. 3815, art. 275).

[151] For example, directors, officers, employees.

[152] Erlindo Ponce v. Legaspi, 208 SCRA 337 (1992); Marieta Saldana v. CA, 190 SCRA 396 (1990); Hayco v. CA, 138 SCRA 227 (1985).

The penal provisions dealing with corporations are rarely tested, since there is insufficient jurisprudence to show how they work. This dearth of information can only mean one of two things: 1) corporate criminal activity is virtually non-existent in the Philippines or 2) while there exist laws imposing criminal penalty for some corporate actions, there is a lack of knowledge, legal mechanisms and incentive to apply them. The second alternative is the more logical one and will be discussed in the following section.

B. The Difficulty Of Individual Liability

Holding any individual liable for a criminal offense is a difficult task. The difficulty is multiplied tenfold when liability of a corporate agent is involved, there existing a host of other difficulties to be hurdled: enforcement overload, the opacity of internal corporate accountability, individual expendability within an organization, separation of responsibility of those who committed past offenses and those responsible for the prevention of new ones, and corporate protection of individual suspects.[153]

1. ENFORCEMENT OVERLOAD

Corporate criminal investigations in the United States are tedious and take longer than ordinary criminal investigations. The difficulty is explained thus:

> [e]conomic crimes are far more complex than most other Federal offenses. The events in issue usually have occurred at a far more remote time and over a far more extensive period. The "proof" consists not merely of relatively few items of real evidence but a large roomful of often obscure documents.... Furthermore... (there must be resolved)... a threshold question that has already been determined on most other cases: was there a crime in the first place?[154]

2. OPACITY OF INTERNAL CORPORATE ACCOUNTABILITY

The complexity of a business crime is further compounded by the difficulty in obtaining sufficient documentary and testimonial evidence to back up a case:

> [c]ompanies have two kinds of records: those designed to alleviate guilt (for internal purposes), and those for obscuring guilt (for presentation to the outside world)... [o]ne might say that the courts should be able to pierce this conspiracy of confusion. Without sympathetic witnesses from within the corporation who are willing to help, this is difficult.[155]

Investigations would face many handicaps in pinpointing authority. Outsiders do not have the technical knowledge of the employees who may know exactly where the illegality lies but would prefer to keep their silence.

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[153] Braithwaite, *supra* note 23, at 494.

[154] *Id.*

[155] *Id.* at 496 *citing* John Braithwaite, Corporate Crime in the Pharmaceutical Industry at 324 (1984).

3. EXPENDABILITY OF THE INDIVIDUAL

There are many statutes which contain the token provision stating that "where the corporation violates any provision of this act, the following shall be held criminally liable... ." It is unclear as to what degree of participation must exist and, more importantly, how this participation is to be proven. Directors do not make it a habit of passing a board resolution authorizing an employee to commit a criminal act. Secrecy characterizes the operations such that corporate "higher-ups" could put up "lack of knowledge" as a defense. It would not be unlikely that expendable subordinates would be left holding the empty bag -- they committed the acts, and there is not enough proof to link their actions with the "higher-ups." An example would be the rampant practice of bribery for "[b]y offering an attractive sacrifice, the hope is that prosecutors will feel sufficiently satisfied in their efforts to refrain from pressing charges against... members of the managerial elite."[156]

On the other hand, corporations may sometimes be willing to provide individual suspects with safe harbor. Because of corporate protection, it is be difficult to bring them to justice.

4. FEIGNED OR REAL IGNORANCE: SEPARATION OF RESPONSIBILITY

There are times when this assertion is not merely an excuse: it is the truth. Corporations, especially those which are mammoth in size, delegate decision-making and disperse their operation procedures in order to promote efficiency. There are hierarchies established based on authority and duties. The factors of size delegation and specialization has this effect:

> (They) combine to produce an organizational climate that allows the abdication of a degree of personal responsibility from almost any type of decision, from the most inconsequential to one that may have a great impact on the lives of thousands.[157]

Since executives holding positions of responsibility can escape liability, such situation makes them almost untouchable by the law:

> Directors and higher-up officers of a corporation could not know everything their organizations are doing even if they tried and often, preferring not to know. They arrange patterns of reporting so they cannot find out (or, at least, if they do find out, they find out only in such a way that it cannot be proved).[158]

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[156] *Id.* 497.

[157] CORPORATE CRIME, *supra* note 1, at 44.

[158] "Middle managers... are the most likely members of the corporate hierarchy to confront the ethical dilemmas that can arise when a dictum goes out to meet company objectives. Unlike top executives, these managers often have little say in how such goals are set; yet, unlike production line workers, whose unions protect them from retributions and shortcomings, a middle manager's future rides solely on his ability to serve up whatever the boss demands. *Id.* at 45.

It would not be unlikely that lower level employees may lie and cover up for the true perpetrators if they are adequately compensated or fear losing their jobs. Also to be considered are cases where lower level employees did act without the authorization of their superiors in order to meet the required profit levels or targets set. This, of course, is the tendency in result-oriented corporations where promotions are measured by output. Employees and officers may begin to take unethical, then illegal short cuts.

There lies another problem in accountability. The original perpetrators may long be dead. Another possibility to look into is that the real person in charge of machinations and on whose account the illegal acts are done are not the "responsible officers" named in the law. It is possible that those persons who really control the corporation may not even occupy a seat on the board of directors. The very nature of the organizational setup may facilitate cloaking the guilty party with immunity.

There is a question of which officer or director to prosecute. Do you prosecute one, two, all? Except in cases where a finger is actually pointed at a particular person, or where an individual is shown to be practically running the business, making sure that the proper guilty individual gets his just desserts is a difficult task.

There are other difficulties that those prosecuting corporate officials have to face. Corporate by-laws may provide that suits brought against corporate officers are chargeable to the corporation's expense account, and shall be reimbursed only upon a showing that the officer is guilty and that he had defrauded the corporation. In the meantime, the officers enjoy the full backing and support of the corporation's best legal counsel.[159] The fact that these perpetrators do not seem to be getting their just desserts does not seem to be a major concern for law enforcers. One authority points to several factors as causing the indifference.[160]

First of all, some acts are more likely than others to be considered as criminal. In the Philippines, for example, there is a tendency to view acts of hoarding basic commodities or manipulating prices during periods of calamity as criminal because the impact on the public is felt immediately. Other criminal offenses such as insider trading or polluting the environment are not seen in the same light and to date, there have been no convictions for insider trading.[161] As for environmental law violations, perpetrators are at most fined for their misdeeds.

Second, the use of criminal sanctions, particularly imprisonment against corporate officers, is limited by the fact that society and culture view them in a more favorable light than traditional criminals, except where bad faith is clearly unde-

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[159] Interview with Atty. Eduardo de los Angeles, President of the Philippine Stock Exchange, Makati, 6 November 1995.

[160] CORPORATE CRIME, *supra* note 1, at 284.

[161] Interview with Glen U. Sumague, Chief of the Record/Docket Division of the PED, Quezon City, 5 November 1995.

niable. The officers are usually leaders of the community, of high educational attainment and status.

Another argument professed is that corporate executives should not be subjected to sanctions for violating legal standards for they are responsible for industry advances, more jobs and a higher standard of living.[162]

Some offenses are committed also because of mistake. Although ignorance of the law should ideally excuse no one, that is not the case with corporate offenders/officials. Further, the difficulties of criminal prosecution were observed to have remained biased in favor of the corporate offender. The complexity of the offenses involved make it difficult to come up with the requisite evidence to meet the burden of proof requirements.

As a result of these factors, criminal sanctions, if imposed, are lenient either resulting only in a fine or short prison sentence. It is viewed as a "product of judicial discrimination in favor of the powerful, the supposedly respectable corporations and their management personnel."[163]

5. PROFIT MAXIMIZATION

The bottom line in business crime is net profit. Though there are other non-monetary concerns which a corporation may also deem important such as power, prestige, reputation and goodwill, money is still the primary concern. Other reasons may be professed as justification for corporate wrongdoing: that the acts are necessary to stay in business, that it has become standard industry practice so much so that going strictly by the book is regarded as a crippling liability.

It would be logical to suppose that as long as the lure of profit remains, deterrence will not be achieved. Indeed, most businessmen are gamblers. Corporate crimes are not crimes of passion. On the contrary, they are well thought out and deliberately engaged in with the hope of beating the odds. U.S. economists have agreed that an actor who contemplates the commission of a crime will be effectively deterred only if the "expected punishment cost" of a prohibited action exceeds the expected gain.[164]

The "expected punishment cost" is not simply calculated according to profit. It is measured against the probability of apprehension and conviction in order to yield the expected punishment cost. *Coffee* gives this example: if the expected gain was one million dollars and the risk of apprehension was 25%, the penalty would have to be raised to $4M in order to make the expected punishment cost equal to the expected gain.[165] Of course, this formula does not take into consideration factors

[162] CORPORATE CRIME, *supra* note 1, at 285.

[163] *Id.* at 286.

[164] Coffee, *supra* note 22, at 389.

[165] *Id.*

other than monetary gain and risk of apprehension. There may be other matters which a corporation would wish to avoid such as the loss of good reputation[166] but the example above just illustrates how monetary penalties may be seen as an absorbable cost of doing business when they are too small. In another example, the $437,500 fine against General Electric in 1961 is equivalent to a $3 fine for a man earning $175,000 a year.[167] Thus, where there is low risk of apprehension or, if apprehended, "painless punishment" is expected, engaging in wrongdoing becomes profitable.

Sometimes, the corporations are not burdened with the fine at all. Where the fine is not too much, the corporation can easily pass it on to its consumers. It becomes ironic that the consumers, whom the law is trying to protect, ends up paying for a fine which was imposed upon the violators in order to protect them in the first place.

C. A Sampling of Corporate Crime

1. BUSINESS CRIMES

The observation that the system as it now stands is ineffective in deterring corporate wrongdoers is validated by the data at hand, scant though they may be. The author should ideally be able to list an array of statistics showing documented corporate offenses, the penal statutes violated, the success rate of conviction. Unfortunately, what there is more of are data, or rather, non-data, implying a dismal detection and conviction rate. Since the creation of the Prosecution & Enforcement Department (PED) in the SEC in 1983, there have been no criminal convictions obtained against any erring corporate officer of big, publicly held corporations.[168] Either the cases are still pending in the lower courts, have died a natural death over time or have been dismissed due to lack of evidence. Of the cases recommended filed by the PED against corporate officers, none of the defendants belonged to the top 1000 corporations.[169]

The nature of the offenses investigated by the PED are limited as well. They range from the simple cases of falsification of bank certificates whereby compliance with Section 13 of the Corporation Code is evaded, such act being punishable under Section 144 of the same code as well as Articles 171[170] and 172[171] of the Revised

[166] This will pave the way for a discussion on Chapter V on various sanctions that may be imposed upon a corporation that doesn't merely address its monetary concerns.

[167] Coleman, *supra* note 34, at 922.

[168] Interview with Glen U. Sumague, Chief of the Docket/Records Control Division of the PED, Quezon City, 5 November 1995.

[169] *Id.*

[170] Falsification (of public document) by (a) public officer, employee or notary or ecclesiastical minister.

[171] Falsification (of public and/or private documents) by private individuals and the use of falsified documents.

Penal Code to the more complicated pyramiding[172] and futures commodities sales schemes.

The SEC is currently investigating its first insider trading case. It is significant to note that this case was initially investigated by and eventually referred to the SEC by the Philippine Stock Exchange (PSE). In recent years, the PSE has been at the forefront of growing interest in the investigation of "corporate crime"[173] or fraudulent business schemes as part of its internal security system. They have begun to understand "price manipulation,"[174] "front running",[175] and the practice of releasing false and misleading advertisements and tips to artificially drive up the price of a corporation's stock.[176]

While the SEC has virtually no control over the outcome of a criminal action,[177] they do resort to administrative sanctioning in advance of and without prejudice to the criminal or civil actions against corporate officers. While there

[172] The pyramiding scheme is one where representations are made by corporation involved in the sale of investment contracts through its agents that huge returns stand to be made at minimal investment. The sales agents misrepresent the benefits or give the customers false information. The salesmen are oftentimes not registered as required by law. These practices are fraudulent and deceptive as unsuspecting investors are induced by false promises and are often made to part with their investment with the promise of immediate returns. The operators merely borrow money from another customer in order to come up with an initial return which encourages other investors to put in more money. As the investment is not supported by any real value, the last investors on the top of the "pyramid" end up losing their investment. These acts are constitutive of estafa as well under Art. 315 of the Revised Penal Code.

[173] The Philippine Stock Exchange discovered that certain directors and officers of the corporation had been buying heavily into the corporate stock prior to announcing that a material contract with a Malaysian firm had been entered into. The case is still currently being investigated by the PED. Interview with Atty. Eduardo de los Angeles, President of the Philippine Stock Exchange, Makati, 6 November 1995.

[174] The PSE is currently investigating a case of possible conspiracy between a listed company and a broker who was suspended for pegging the price of the listed company. It was noticed that every few minutes before the close of the trading day, the broker would purchase minimal amounts of a certain stock at a high offering price. The prices then artificially increased. Interview with Atty. Eduardo de los Angeles, President of the Philippine Stock Exchange, Makati, 6 November 1995.

[175] Front running takes place when the brokers use their personal funds to purchase stocks which, in order to make a profit, they make appear to have been bought at a higher price using their clients funds in case the transaction proves to be unfavorable. Interview with Atty. Eduardo de los Angeles, President of the Philippine Stock Exchange, Makati, 6 November 1995.

[176] In another case that the PSE is currently investigating which involves a corporate vice-president who informed the PSE that the company had hit an oil well and to please announce it to the public. Some checking led to the discovery that no such oil well existed. The PSE is trying to determine whether or not the officer acted with the consent of his superiors or if he acted alone. Interview with Atty. Eduardo de los Angeles, President of the Philippine Stock Exchange, Makati, 6 November 1995.

[177] The purpose of the PED is merely to investigate and file the case, with the responsibility of prosecution falling in the hands of the public prosecutors.

are sanctions imposed such as monetary fines, suspension or revocation of licenses, they do not prove to be much of a deterred either, given the gravity of the sanctions and the limited instances when applied.

The fines imposed are small enough to be considered a cost of doing business.[178] Though the SEC has been imposing the penalty of suspension, there being, from August 1991 to November 1994, about 61[179] suspensions meted out[180] as well as revocation in cases where fraud was employed in procuring the certificate of registration, this data should not be a cause for celebrating the system. Almost all administrative sanctioning has been directed against corporations that have either just been newly incorporated and have procured registration in a fraudulent manner[181] or are small in size.[182] From an economic standpoint, these corporations do not have that much to lose. Further, since the SEC does not have a system by which erring incorporators or officers are successfully prevented from reincorporating, the revocation of the certificate of registration is not much of a threat.

2. NON-BUSINESS CRIME

Corporations do not only commit "business or economic crimes" though they tend to be viewed in that context. Corporations and their agents are rampant violators of environmental laws as well, and the prosecution of officers in the area of law has been just as dismal.

One prime example is the case of illegal logging. From 1987 to 1995, the Department of Energy and Natural Resources (DENR) has seen only 36 cases archived, 195 cases dismissed but 180 convictions won in the Regional Trial Court level.[183] Of the 180 convictions, none of the convicted were corporate officers of logging companies who have been known to be engaging in illegal logging activities.[184] This is due to the fact that the persons that may be held liable for illegal logging are the cutters, gatherers, collectors, removers and possessors of the illegal

[178] Where corporations engaged in commodities futures trading have been engaging in those activities without the proper license as required by the Revised Securities Act, the SEC has merely avoided the contract between the corporation and the complainant, directing the return of the money invested.

[179] Interview with Glen U. Sumague, Chief of the Docket/Record Control Division of the PED, Quezon City, 5 Nov. 1995.

[180] Common causes for suspension were the following: misrepresentation as to the paid-up capital, engaging in business outside their primary purpose, failure to comply with a department order, filing spurious bank certifications or submitting a bank accommodation as paid-up capital.

[181] The misrepresentation lies in the amount or nature of paid-up capital, the composition and nationality of the incorporators or the nature of the business to be engaged in.

[182] In these small corporations, the shareholders are usually the directors and officers.

[183] 1995 DENR Reg. Rep.

[184] The DENR has no official tally as to who the convicted persons are but to date, none of the convicted have been corporate officers. Interview with Atty. Art Castillo, Chairman of Task Force TAGA-USIG for illegal logging in the DENR, Quezon City, 7 November 1995.

logs as direct actors. As for corporations, partnerships and associations, the persons liable are the officers who ordered the cutting, gathering, collection or possession.[185] Thus, the statistic referred to actually tells us that out of the 180 convictions, none have been corporate officers or directors. This set-up strengthens the theory of expendability of the individual in a corporation. It makes it easy for those on whose behalf the activities were carried out to hide behind the protective mantle of corporate layering. However, because environmental law violations leave traces of evidence that are more easily detected than those of business crimes, the DENR has encountered less problems in imposing administrative sanctions on those erring corporations, particularly when the violations are blatant and repeated. In 1976, the government revoked the license of three major logging firms.[186] Further, the machinery and equipment as well as the logs may be confiscated in favor of the government.[187]

V. CORPORATE CRIME

The problems besetting the Philippine legal system with respect to the apprehension of corporate offenders, viewed by our jurisdiction as corporate actors, are not new. As discussed in chapter one, there still exists a vast gap in the treatment by the law of white collar criminals and blue collar criminals —"common criminals". The approach taken by other jurisdictions, notably the United States, England and other European countries is novel — in fact alien — to our jurisdiction. Aside from simply viewing corporations as aggregates of individual acts responsible for his individual acts, these jurisdictions have begun to view corporations as organizations in terms of certain aspects of liability. Thus, corporate crime in other jurisdictions can be considered as having twin heads: the corporate officers are criminals and the corporation itself as a criminal.

This section will attempt to discuss these two aspects of corporate criminal liability as culled predominantly from American jurisprudence.

A. Individual Liability

1. *DIRECT ACTORS*

Corporate officers and employees may be held criminally liable for their own acts even if performed in their official capacities as such officers or employees.[188] An officer cannot plead innocence by saying that he acted for the benefit of the

[185] Presidential Decree No. 705, §68.

[186] These firms are Aldymac Incorporated, Super Veneer Incorporated and Catanduanes Mahogany Incorporated.

[187] Presidential Decree No. 705, §68(2).

[188] FLETCHER'S CYC. CORP. §1348, 1126.

corporation.[189] The corporate entity acts only through its human agents and thus, it is the agents' individual actions which the law seeks to curb. It is no defense either that the officer was ordered by management to perform the criminal act.[190] Congress usually specifies an intent standard: knowledge, willfulness, recklessness or strict liability. Strict liability offenses[191] are strictly construed.

2. INDIRECT ACTORS

Those who authorize the commission of corporate crime are held liable as principals. The Federal Criminal Code states that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[192] Corporate officers may be held liable for failing to exercise the proper measures to prevent the commission of an offense when it is their legal duty to do so.[193] Developing standards for holding such officers liable for subordinate criminal conduct encourages them to run a "tight ship" by seeing to it that their subordinates are aware of and comply with the law.

The standards of liability are statutorily fixed. Where the law does not specify what acts constitute criminal liability of indirect actors, the intent standard is governed by the degree of intent required to convict indirect actors.[194] However, this must not be taken literally. The activities carried out by direct actors are usually different from those carried out by indirect actors. Thus, courts must be careful in defining what acts indicate complicity on the part of the indirect actors.

a. Strict Liability

There are a few U.S. statutes that impose strict criminal liability such as the Food, Drug and Cosmetic Act. For the direct actor, there is no need to look into his intent, be it malicious, or mere mistake. The legislature's concern is the damage caused by the acts done. Therefore, imposing liability on the direct actor is not very complicated. Strict liability, though, cannot be applied in the same manner to officers in positions of responsibility.

The case of *United States v. Park*[195] laid down two principles in assessing criminal responsibility of indirect actors in strict liability statutes. First, the superior must occupy a position of authority with regard to the act constituting the crime.

[189] Model Penal Code, §2.07(6)(a) (1962).

[190] FLETCHER CYC. CORP. §1348, 1126.

[191] Strict liability offenses are akin to *mala prohibita* offenses. The statutes usually identify certain officers within a corporation as liable for certain crimes committed by it.

[192] 18 U.S.C. §2.

[193] Model Penal Code, §2.06 3(a)(iii).

[194] 18 U.S.C. §2(b)(1976).

[195] 421 U.S. 658 (5th circ. 1975).

Thus, an officer is held liable for violations taking place within his area of responsibility. Second, the accused must have had the power to prevent it through the exercise of the highest standards of foresight and vigilance. In this case, Park, the chief executive officer of Acme Markets, Inc., was criminally charged with the sale of contaminated food in violation of various food and drug laws. Even if Park claimed that, due to compartmentalization and delegation, daily activities escaped his supervision, the Court held that:

> [R]equirements of foresight and vigilance imposed upon responsible corporate agents are demanding, and perhaps onerous, but they are no more stringent than the public's right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.[196]

This can only be rebutted by the impossibility defense which states that despite the highest standards of vigilance, the corporate officer was unable to stop it. He would have to show, however, that he had taken pains to identify this problem area and acted promptly in trying to remedy it. This defense is rarely successful.[197]

The officer's claim that he exercised the highest standard of foresight and vigilance can be rebutted by showing that the defendant was aware, perhaps through notice of existing violations by the proper enforcement agency, or should have been aware, that violations of conditions under his direct supervision have been existing for a considerable length of time, and he failed to take the necessary steps consistent with extraordinary care to remedy the situation.[198]

b. Specific Intent

Most regulatory statutes[199] require a finding of knowledge or willfulness, or a showing that the defendant had acted deliberately despite knowledge of the legal

[196] *Id.* at 672. Under Philippine Law, this would fall under strict liability in torts. The Philippines does not have strict liability criminal statutes in the realm of food and drug and environmental protection.

[197] Note, *Developments in the Law-Corporate Crime: Regulating Criminal Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227,1264 (1979) [hereinafter *Developments*].

[198] *Id.*

[199] Regulatory offenses are not like "true human offenses" such as rape and bigamy. Rather, they are offenses aimed at regulating corporate behavior. In the Philippines, these would refer to offenses falling within the realms of, among others, securities, health, safety and environmental control. The U.S. Anti-Trust law as well as laws on corporate bribery are also considered as falling within the ambit of regulatory offenses. They may be *mala prohibita*, without any intent requirement. They may also possess a specific intent requirement, though there is some apprehension in terming them *mala in se* because the acts are not necessarily morally reprehensible. Strict liability as well as offenses with a minimal specific intent requirement are usually applied in public welfare offenses. These offenses refer to those involving environmental and consumer product safety.

consequences.[200] Where a statute provides for a specific intent requirement for the direct actor, the liability of the indirect actor is determined by the same standard.

An officer who commands another to commit an offense acts with specific intent. The Model Penal Code of the United States says that a person is legally accountable for the conduct of another when, acting with the kind of culpability that is sufficient for the commission of an offense, he causes an innocent or irresponsible person to engage in such conduct.[201] Thus, a director who orders a subordinate to bribe a foreign official is liable under the Foreign Corrupt Practices Act[202] even if the money is not personally delivered by him.

Direct authorization is unnecessary. There is complicity when an official is aware of a crime being committed or about to be committed within his realm of authority but fails to prevent it, in effect, approving of the crime. While there can be no tacit approval of crimes committed by subordinates, toleration by a corporate officer can encourage subordinates to continue their conduct.[203] In these instances, the officer's inactivity may be taken as evidence of encouraging the conduct.[204] Acquiescence is an important element of complicity because there are times when subordinates or corporate middle management know what top management wants them to do without them having to ask. This is called the "rule of anticipated reactions".[205] Corrupt executives would be impossible to convict if acquiescence were not treated as willful participation in a crime.[206]

To have any chance of success in prosecuting a top official, it must be shown that he had the authority to prevent or correct the alleged violation,[207] and that he knew of the existence of the offense. In order to rebut the allegation of acquiescence, he may be shown to have made an effort in good health to correct it or to implement procedures to ensure that the violations cease.[208] Because acquiescence as criminal conduct requires the element of knowledge and inaction, an officer is not held liable by virtue of his position in the corporation.[209]

[200] Willfulness differs from knowledge in that in willfulness, it is not required to show that the offender knew he was committing a crime. Its enough to show that he knew he was committing an immoral act. However, most authorities discuss willfulness and knowledge together when dealing with indirect actors.

[201] Model Penal Code, §2.06(2)(a).

[202] 15 U.S.C.A. 78dd-1 to 2.

[203] *Developments*, *supra* note 197, at 1266.

[204] Passivity has been recognized as evidence of complicity in anti-trust violations, particularly in the case of United States v. Gillen, 599 F.2d. 541 (3rd Circ. 1979).

[205] MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME 157 (1985) [hereinafter CLINARD].

[206] *Developments*, *supra* note 197, at 1267.

[207] CLINARD, *supra* note 205, at 157.

[208] *Developments*, *supra* note 197, at 1267.

[209] *Id.* at 1267-68.

Acquiescence as an element of complicity is rarely applied by U.S. lawmakers outside the corporate realm. For "normal" offenses, knowledge of the commission of an offense coupled with non-participation is not enough to constitute a felonious act. For example, witnessing the planning of a bank robbery without taking active steps to warn the bank is not a crime. United States lawmakers see toleration by a corporate official as more than mere non-blameworthy passivity. When a corporate official is aware that subordinates are engaged in an illegal activity within his realm of authority, the official is actually knowingly permitting his authority to be used in the commission of an offense.[210] For example, a superior official, in charge of negotiating with the government for contracts, who gives his manager the responsibility of entering into negotiations, knowingly tolerates the use of his authority in order to violate the law, when he knows that the manager bribed a government official to get favorable terms for the country. Holding the superior liable for knowingly tolerating the commission of offenses within his realm of authority serves as a powerful incentive to take positive steps to correct violations which are well within their power to correct. Also, subordinates, knowing that their activities will not be so readily condoned, will refrain from committing acts which will no longer be as pleasing to their superiors.[211]

The main restriction to the use of the acquiescence standard is showing that the corporate officer knew of the commission of the offense. Corporations, have a way of keeping corporate documents for public consumption spotlessly clean. Executives may "take pains not to learn of a subordinate's offenses once they realize that they can escape criminal liability so long as they remain ignorant."[212]

The "willful blindness doctrine" has been availed of to somehow lessen the difficulty of showing knowledge in order to prove acquiescence. This doctrine is most often invoked in violations of public welfare statutes, most notably in the realm of environmental law.

It has been commonly used in public welfare offenses with a *mens rea* requirement.

The doctrine developed in modern criminal jurisprudence as an important exception to the general rule of direct proof of personal knowledge to show complicity.[213] The doctrine is based on the notion that "deliberate ignorance and positive knowledge are equally culpable"[214] and that a "person knows of facts of which he is less than absolutely certain" when the person knows of a high probability of the existence of such acts.[215]

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[210] *Id.* at 1268.

[211] *Id.* at 1268.

[212] *Id.* at 1269.

[213] *Id.* at 1469.

[214] United States v. Jewell, 532 F2d 697, 700 (9th Circ. 1976).

[215] *Id.*

The doctrine permits the court to infer guilty knowledge where there is evidence that the defendant purposely avoided the discovery of illegal activity.[216] Circumstantial evidence is sufficient to establish willful blindness to the facts constituting the crime.[217] Some statutes spell out what acts constitute willful blindness.[218]

However, "mere knowledge or mistake in not learning the facts is not sufficient to satisfy the element of knowledge."[219] The government must present evidence indicating that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. Absent such evidence, the jury might infer guilty knowledge on the basis of mere negligence without proof of deliberate avoidance. Thus the evidence, direct or circumstantial, must be able to show that: "(1) the defendant was subjectively aware of a high probability of existence of the illegal conduct; (2) the defendant purposely contrived to avoid learning of the illegal conduct";[220] and that (3) "the defendant's involvement in the criminal offense was so overwhelmingly suspicious that his failure to question the suspicious circumstances establishes the purposeful contrivance."[221]

Despite the presence of these doctrines, prosecutors still find the task of proving knowledge in regulatory offenses with a specific intent requirement a difficult task, especially in non-public welfare statutes.[222] Courts cannot increase the level of deterrence by disregarding proof of actual knowledge in specific intent statutes; they are bound by the Congressional requirement,[223] though the courts may relax the burden of proof necessary to convict.[224]

c. Reckless Supervision

A compromise has been eyed by several commentators as a balance between two extremes — that of strict liability, which has a tendency to overdeter "socially beneficial conduct"[225] and specific intent, which poses a problem for many

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[216] Stefan A. Noe, *"Willful Blindness":A Better Doctrine For Holding Corporate Officers Criminally Responsible For RCRA Violations*, 42 DEPAUL L. REV. 1461, 1469 (1993) [hereinafter Noe].

[217] United States v. Macdonald and Watson, 933 F2d 35, 54-55 (1st Circ. 1991).

[218] Resource Conservation and Recovery Act, 42 U.S.C.. §6901-6902.

[219] *Macdonald*, 933 F2d 35 at 49.

[220] United States v. Lara-Velasquez, 919 F2d 941,952 (5th Circ. 1990).

[221] Noe, *supra* note 216, at 1472.

[222] For instance, in anti-trust cases, indictments have been lodged only against the top management of small corporations. In larger corporations, indictments are generally lodged against the second or third managerial tier such as district sales managers and marketing directors. *Developments*, *supra* note 197, at 1269.

[223] *Id.* at 1270.

[224] *Id.*

[225] *Developments*, *supra* note 197, at 1270.

prosecutors in the difficulty of proving knowledge of the crime. "Reckless Supervision" is a new legislative standard that has been proposed, although it has yet to be codified in American criminal statutes.[226]

It has been proposed that since the standards of culpability would be made to rest on a lesser degree of complicity than direct authorization or acquiescence, then such violations should only constitute a misdemeanor.

The standard of reckless supervision was proposed in the revised version of the Federal Criminal Code adopted in 1978 by the United States Senate which made it a misdemeanor for a person who is responsible for supervising particular activities to contribute to or permit the commission of an offense by his reckless failure to adequately supervise those activities.[227] To prove guilt under the standard, one must show that a corporate crime was committed and that the supervisor, due to his reckless supervision, contributed to or permitted the offense.[228]

This is more akin to the willful blindness standard in that there exist facts that should alert one to the existence of criminal activities, yet one fails to inquire about them and take remedial measures.[229] Unlike willful blindness, the defendant is charged with a misdemeanor the penalty for which is much lower in severity than that meted out upon the direct actor.[230]

While the acquiescence standard calls for a showing of knowledge of the existence of the actual offense being committed; in reckless supervision, it is enough that superiors are aware of the existence of irregularities that may potentially lead to violations of the law. Thus, this removes the incentive to be ignorant of the goings-on in one's division, especially as to matters which a responsible officer of a division should be aware of. Under this standard, averring ignorance could be considered a factor of recklessness. The quality of supervision provided by an official who closes his ears to all incriminating information may be so poor and amount to indifference and recklessness.[231] The failure to follow-up, when performed by responsible officers of higher levels, may also be considered recklessness when such officers are made aware of the irregularities.

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[226] *Id.* at 1270.

[227] *Developments, supra* note 197, at 1272.

[228] *Id.* at 1272.

[229] Such remedial measure could consist in employing outside audits, requiring periodic reports from subordinates, regular inspections and close supervision of suspect subordinates. *Id.* at 1275.

[230] For example, if an officer is aware that a broker has been reporting unusually large sums of profit in a down market, he should inquire into the possibility of frontrunning. If a superior is aware that his subordinates are meeting regularly with competitors, he should look into the possibility of price-fixing. If he does, however, discover that the illegal activity is taking place and he fails to put a stop to it, this would be equivalent to acquiescence calling for the imposition of the penalty for the crime committed, and not just a misdemeanor.

[231] *Id.* at 1274.

B. The Corporation as Criminal

1. PHILOSOPHICAL RATIONALE OF CORPORATE BLAMEWORTHINESS

According to methodological individualism, only individuals are real in the social world while corporations are abstractions that are incapable of being directly observed.[232] However, *Fisse* says that this ontology is spurious.[233] There are many features of a corporation that are observable, such as their assets and decision-making procedures while many features of individuals are not observable, such as their personality and intent.[234]

Psychological reductionists say that the behavior of organizations can only be understood by analyzing the behavior of the individuals who comprise the corporation.[235] However, this fails to take into consideration the fact that while individuals do make up a part of an organization, they are not its entirety.[236]

The collective action of the group is different from the action of each person individually.[237] Further, while it can be said that corporations cannot posses a mental state, making this sort of statement would be treating two entities in a like manner that is not actually possible. Corporations exhibit their own special kind of intentionality through corporate policy, which does not reflect the current goals of directors, but those of its incorporators and other individuals in the corporation who come and go.[238]

Its mental state can also be attributed to the various mental states of a collectivity, be it one person acting on behalf of a corporation or more than one.[239]

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[232] Brathwaite, *supra* note 23, at 476.

[233] *Id.*

[234] *Id.*

[235] *Id.* at 478.

[236] " Organizations are not just aggregations of individuals. More crucially, however, organizations consist of sets of expectations about how different kinds of problems should be resolved. These expectations are a residue of the individual expectations of many past and present members of the organization. But they are also a product of the interplay among the individuals' expectations which distinguish shared meanings from individuals views. The interaction between individual and shared expectation, on the other hand, and the organizations environment, on the other, constantly reproduces shared expectations. In other words, an organization has a culture which is transmitted from one generation of organizational role incumbents to the next. ndeed, the entire personnel of an organization may change without reshaping the corporate culture; this may be so even if the new incumbents have personalities quite different from those of the old." *Id.* at 479.

[237] This collective action can be likened to that of a government. When the President of a country makes a decision, he does not do it alone. The groundwork has been laid by so many other individuals making smaller but vital decisions. *Id.* at 483.

[238] *Id.* at 483.

[239] This has been classified into three theories of *mens rea*: the managerial *mens rea*, where the *mens rea* is based on the mental state of a person acting on behalf of a corporation on a senior

Blameworthiness requires two essential conditions: first, the ability of the actor to make decisions and second, the inexplicable failure of the actor to perform an assigned task.[240] The corporation, unlike an inanimate object or an animal, can give moral reasons for its decision-making and has the capability to change its policies to achieve a desired end.[241] Corporate intelligence is on a different magnitude: "Corporations can and should have access to practical and theoretical knowledge that dwarfs that of individuals."[242] While corporations do not have feelings or emotions, this does not exclude them from possessing the quality of autonomy whereby choices are made for which they are properly to blame.[243]

2. STANDARDS OF CORPORATE LIABILITY

a. Respondeat Superior

The *respondeat superior* doctrine of corporate criminal liability which is derived from the vicarious liability and agency liability of tort law, is the common law rule in the federal courts of the United States. Under this doctrine, a corporation may be held liable criminally for the acts of any of its agents if the agent: 1) commits a crime; 2) within the scope of his employment; and 3) with the intent to benefit the corporation.[244]

First, the illegal act must have been committed by the agent with the specific intent required by statute.[245] The proof of intent of the corporation would follow the same manner of proving the intent of the agent because under *respondeat superior*, the intent of the offending agent is imputed upon the corporation.[246] Since the corporation is an aggregation of all the individuals comprising it, it is enough to show that some individual did the act without identifying the particular individual.[247] The wrongdoing of a particular agent may be attributed to the corporate entity which may or may not be completely ignorant of the acts for which it is ultimately held liable.[248] Therefore, proving corporate responsibility for a crime is

managerial capacity; composite *mens rea*, where the *mens rea* is constructed upon the knowledge of various individuals within an organization, also known as the "collective knowledge theory," and the strategic *mens rea*, where it is based on the express or implied organizational policy. Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141, 1186 (1993) [hereinafter Fisse].

[240] Braithwaite, *supra* note 23, at 483.

[241] *Id.* at 485-486.

[242] *Id.* at 486.

[243] *Id.* at 487.

[244] *Developments*, *supra* note 197, at 1247.

[245] Boise Dodge, Inc. v. United States, 406 F.2d 771, 722 (9th Circ. 1969).

[246] *Developments*, *supra* note 197, at 1248.

[247] *Id.*

[248] Patricia Bennet Ball and Martin Weinstein, *Criminal Law's Greatest Mystery Thriller: Corporate Guilt through Collective Knowledge*, 29 NEW ENG. L. REV. 65, 68 (1994) [hereinafter Ball].

substantially easier than proving individual liability.[249] This is a departure from traditional criminal liability which requires both intent and misconduct on the part of the employer. Vicarious liability requires neither.[250]

Next, the illegal act must be shown to have been committed within the scope of employment of the agent. Scope of employment has been traditionally defined as conduct that is "authorized, explicitly or implicitly by the principal or that is similar or incidental to authorized conduct."[251] Currently, however, courts may find that acts committed, even if specifically forbidden by a superior or despite some effort to prevent them, can cause a corporation to become liable.[252] Therefore, "scope of employment" in practice means little more than that the act occurred while the offending employee was carrying out a job-related activity."[253] Of course, it also depends on who committed the act.

1) *Officers*

The corporation is closely identified with its officers. This is especially true for small corporations where oftentimes the owners are both the officers and stockholders. Whether the corporation be large in size or not, the acts of its officers occupying the higher reaches of the corporate hierarchy can subject the corporation to liability under *respondeat superior*.[254]

In the case of *United States v. Empire Packing Co.*,[255] the Court held that the president of the corporation "acted not as an individual, but in the role of president and representative of the corporation within the scope of his corporate authority with which he was clothed."[256] A single act is sufficient to hold the corporation liable.

2) *Managers and Supervisors*

In the case of *United States v. Armour and Co.*,[257] a corporation was charged with the violation of the Emergency Price Control Act of 1942 due to acts of its

[249] *Developments*, *supra* note 197, at 1248.

[250] Of course, different degrees of difficulty are met on the basis of which particular agent committed the act. When a low level employee acts contrary to corporate policy, courts are not quick to convict.

[251] *Developments*, supra note 197, at 1249.

[252] *Id.* at 1249-1250.

[253] *Id.* at 1250.

[254] James R. Elkins, *Corporations and Criminal Law: An Uneasy Alliance*, 65 Ky. L.J. 73, 101. [hereinafter Elkins]

[255] 174 F.2d 16 (7th Circ. 1949).

[256] *Id.* at 20.

[257] 168 F.2d 342 (3rd Circ. 1948).

managers, assistant managers and salesmen. The acts of middle-level management were imputed to the corporation. Since these class of officers are given discretionary power, it can be said that the power to bind the corporation adversely may be delegated to such managers. Again, the court did not experience difficulty in imputing the acts of this class of employees to the corporation.

3) *Subordinate Employees*

Where the acts of subordinate employees may be linked to high-ranking officers, the corporation is liable.[258] The link may be in the form of authorization or approval given by the member of this inner circle. Once this is established, the corporation can be said to have committed a crime through its agent.[259]

Where direct authorization has not been proved, it has been held that it is "enough to show that agents of the corporation acting within the area entrusted to them had violated the law."[260] For reasons of public policy, the fact of direct authorization and linkage is foregone when the statute involved could only be violated by subordinate employees and not by officials.[261]

The last element of the *respondeat superior* doctrine is that, it must be proven that the agent committed the crime with the intent to benefit the corporation.[262] Even if no actual benefit was acquired from the offended party, what is important is the intent to benefit.[263] This intent may be shown by subsequent ratification by the corporation.

b. *Model Penal Code*

The Model Penal Code was adopted by the American Law Institute in 1962. Various states have adopted provisions founded on the liability of corporations to a certain degree. The code differentiates between three systems of corporate criminal liability.

Section 2.07 provides:

(1) A corporation may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on Corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agent for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the Board of Directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

[258] Elkins, *supra* note 254, at 103.

[259] *Id.*

[260] United States v. Steiner Plastics Manufacturing Co., 231 F.2d 149, 151 (2d Circ. 1956).

[261] Elkins, *supra* note 254, at 105.

[262] *Developments*, *supra* note 197, at 1250.

[263] *Id.*

1) *Overview*

Subsection (1) provides for three situations in which a corporation can be held criminally liable. First, liability can be incurred as a consequence of an agent's conduct acting on behalf of the corporation and within the scope of his employment, and is limited to violations defined by the statute outside the United States Federal Criminal Code, where the legislative purpose to impose liability on the corporation is plainly evident. Where the law provides for a particular agent for whose conduct a corporation is made liable, the law will control

The second basis for corporate criminal liability consists in the omission to discharge a particular duty of affirmative performance imposed on corporations by law. This section applies where, for example, there is a failure to file required reports or maintain specific records required by law.

In the third basis of liability a corporation can be held liable only if the offense was performed, authorized or recklessly tolerated by the board of directors or a high managerial official. It governs the general liability of corporations for crimes defined by the criminal code. It describes and defines the type of conduct engaged in by corporate officials that will result in imputing liability to the corporation and in a more restricted basis of liability for cases not included in 1(a) and 1(b). The *respondeat superior* approach is not followed and the corporation is held liable only for those criminal acts performed, participated in or recklessly tolerated by the board of directors or corporate officers who have "duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association."[264] This section creates a distinction among strict liability offenses, regulatory offenses with a scienter requirement, and common law offenses.[265]

The Model Penal Code also provides for the liability for strict liability offenses.[266] In such cases, there is no problem in holding corporations liable,

[264] Model Penal Code, §2.07(4)(c).

[265] These common law offenses which have resulted in criminal responsibility are theft, fraud, involuntary manslaughter, mail fraud and larceny but it does not cover crimes generally committed by corporations such as price-fixing and securities fraud.

[266] §2.07(2).

because there would be no need to show specific intent, or that the actor intended to benefit the corporation.

2) *Attribution of Fault*

The Model Penal Code employs the theory of vicarious liability in varying degrees. For strict liability offenses, the act of any agent, acting within the scope of his authority, whether with evil intent or not, resulting in a violation of strict liability penal statutes, results in the imposition of criminal liability in a straight forward *respondeat superior* manner.

Corporate criminal liability is most easily avoided under Section 2.07(1)(c). In this system, liability rests solely on the conduct of top corporate officials. What is required is authorization, request, command, performance or reckless tolerance by the board of directors or by a high managerial agent. This proponent has earlier discussed the difficulty in proving such complicity as well as the difficulty in tracing knowledge or complicity. Since larger corporations have more layers of responsibility and authority, top officers can insulate themselves, and consequently the corporation, from liability by delegating to their subordinates responsibility for activities which might result in criminal violations. Moreover, there is the problem of determining who these high managerial officials are. This standard may differ from corporation to corporation, it being dependent on actual duties rather than title.

The use of the willful blindness doctrine might not be of much help here as it is used most often in the area of public welfare statutes. The appreciation of the proposed reckless supervision standard would fare better because recklessness in supervision, more easily shown by the existence of blatant conditions that remain unchecked, is itself a misdemeanor or criminal act for which a corporation can be punished.

Under the other systems, corporate liability is less difficult to prove.

Under the system of *respondeat superior*, all that is necessary to prove is that a crime was committed by some agent within the scope of his authority and for the benefit of the corporation. A *prima facie* presumption of liability is raised when a corporate agent — defined as any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association — commits a crime acting within the scope of its authority. There is no need to prove which official or agent performed the act for it is up to the corporation, in order to rebut the *prima facie* presumption raised, to show that the crime was committed within the scope of authority of a particular official who exercised due diligence in trying to prevent the act. Also, there is no need to refute the defense of due diligence beyond a reasonable doubt for all that would be necessary is to offer sufficient evidence to prevent a corporation from establishing its defense by a preponderance of evidence.

3) *Collective Knowledge*

Because of the limits of individual liability, corporate criminal liability has been increasingly resorted to. It is imposed with a view to encourage companies

to develop and undertake internal disciplinary action and impose individual accountability as a policy of private policing. A problem exists when no individual or group of individuals can be shown to have committed all the elements of a crime. The question of holding a corporation liable even if no employee or officer could be convincingly charged with a crime has been raised.

In the United States, courts have begun to recognize that corporations have a unique capacity to compartmentalize information within a hierarchy of descending levels of authority. It has become more and more acceptable to hold a corporation liable for the collective knowledge of its agents and employees.[267] Imputing the act and mental state of a corporate agent upon the corporation was met with hesitation because of the difficulty in accepting corporate liability without an identifiable wrongdoer. Thus, the first cases involving collective knowledge were limited to those dealing with violations of regulatory offenses by common carriers.

In the case of *Inland Freight Lines v. United States*,[268] the defendant motor carrier was charged with the statute punishing as a misdemeanor the act of a motor carrier of knowingly and willfully preparing, keeping and preserving false records in the operation of its business. It was alleged that certain drivers had falsely documented their travel time in the logbooks and travel reports. While no single agent or employee was shown to have had actual knowledge of the discrepancies between the logbook and the reports, the court said that if at least one employee knew of the contents in the trip reports; the corporation could be held liable because the knowledge of the employees held collectively could be imputed to establish corporate guilt.

The scope of the doctrine, however, has subsequently been expanded.

In the case of *United States v. Bank of New England*,[269] the bank was found guilty of violating the Currency Transaction Regulatory Act which makes it a felony to fail

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[267] The necessity of "collective knowledge" is shown in this example:

"...suppose, for example, the case of an electric utility company that maintains a nuclear power plant. We can readily imagine that there might be knowledge of physics, evidence of radiation leakage, information regarding temperature variations, data related to previous operation runs in this and other plants, which, if gathered in the mind of one single person, would make his continued operation of that plant, without a shut down, wanton and reckless — that is, if an explosion resulted, strong civil and criminal liability could and would be brought to bear on him — and/or by the process of imputation... on his corporate principal.

But let us suppose what is more likely to be the case in modern corporate America: that the information and acts are distributed among many different employees engaged in various functional groups within the corporation. The nuclear engineer can be charged with a bit of information: (a)the architect knows (b) the night watchman knows (c) the research scientist task force knows. Conceivably, there will not be any single individual who has, in and of himself, such knowledge and intent as will support a charge against him individually." CORPORATE CRIME, *supra* note 1, at 46.

[268] 191 F.2d 313 (10th Circ. 1951).

[269] 821 F.2d 844 (1st. Circ. 1987).

Acts undertaken subsequent to the commission of the offense may even be helpful in identifying corporate fault and crystallizing corporate blameworthiness. Reactive corporate fault may be broadly defined as "a corporation's failing to undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offense by personnel acting on behalf of a corporation."[276]

Some American courts have considered the corporation's subsequent actions as a gauge by which their original exhortations of diligence may be tested. A corporation guilty of polluting the environment, for instance, might try to show the existence of a sophisticated means of detecting and penalizing errant and careless employees. If subsequent to the commission of the offense, the corporation fails to initiate an immediate clean-up operation, discipline erring personnel or enact new policies that would tighten control and detection, it would indicate a non-compliant corporate policy. Blameworthiness is then to be measured on the basis of pre-commission and post-commission corporate policy and behavior, with the breadth of the period to be relative to the illegal behavior. Where there is difficulty in identifying particular perpetrators, reactive fault, like the theory of collective knowledge, assists in defining corporate fault. It distinguishes between genuine corporate policy and mere lip-service. Constant repetition of the same or similar offenses may aggravate the penalty, in the same way recidivism would aggravate the penalty for the individual criminal.

4. CORPORATE SANCTIONS

Traditionally, criminal sanctions have been imposed with the end of achieving one or more of the following purposes: rehabilitation, incapacitation, deterrence and retribution.[277] In rationalizing the imposition of criminal sanctions for illegal corporate activity, various commentators have cited deterrence as the primary object due to the inapplicability of the other purposes in certain situations.[278] Retribution, for example, is not apt when the offense proscribed is a morally neutral, *malum prohibitum* offense.[279] Further, deterrence by threat of punishment becomes necessary when the actor carefully calculates the cost and benefit of illicit activities.

Theoretically accepting that corporations are blameworthy entities, whether *mala prohibita* or *mala in se* offenses are committed, the next question one should ask is this: Is there any effective way to punish corporations in a just and effective manner in order to achieve the principal goal of deterrence? Moreover, are these

[276] *Id.* at 1196-1197.

[277] *Developments*, *supra* note 197, at 1231.

[278] *See Id.* at 1235; Fisse, *supra* note 237, at 1145; Sanford H. Kadish, *Some Observations On The Use Of Criminal Sanctions In Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423,425 (1963) [hereinafter Kadish]; Stephen A. Yoder, *Criminal Sanctions For Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40,44 (1978) [hereinafter Yoder].

[279] Kadish, *supra* note 278, at 435.

sanctions only imposed in a criminal setting? In other words, in the realm of corporate deterrence, is the criminal sanction the only practicable form of sanction against the corporation?

a. Fines

Monetary fines are the most commonly imposed sanctions – whether in civil, administrative or criminal cases. The advantages are obvious: ease of administration, generation of enforcement funds, preservation of corporate freedom to manage corporate internal affairs, as well as deprivation of the economic fruits of the crime.[280] The use of monetary fines alone in a corporate criminal setting, however, has been criticized as this policy does not take into consideration the fact that corporations have both monetary and non-monetary goals. Together with profit maximization, power, prestige and good reputation figure in the agenda as well.[281] Fines, when too low in relation to the corporation's assets, serve little or no deterrent purpose for they may be considered merely as a reasonable cost of doing business.[282] This, of course, presupposes that fines are so negligible as to be insignificant to the corporation.

Where fines are raised to draconian amounts, the problem of "spill-over effects" affecting stockholders, creditors, employees and consumers, could occur. It has been noted:

> But on whom does the burden of the fine fall? Certainly not directly on the guilty party within the corporate structure. On the contrary, it falls directly on the owners, the stockholders who ordinarily will have had no part in the commission of the offenses, will have been unaware that criminal acts were being committed, and, even if suspicious of criminal activity, will often have lacked the means to do much about preventing it.[283]

Employees may also be laid off to soften the blow of economic reverses and the cost[284] may even be passed on to consumers.

Increased stockholder liability has been justified in two ways: First, punishment via monetary fine does not only involve recompense but also the imposition of social stigma, with stockholders not being directly subject to the latter.[285] Second, stockholders who accede to a distribution scheme of profits and losses from

[280] Fisse, *supra* note 237, at 1216.

[281] *Id.* at 1217.

[282] *Id.*

[283] *Id.* at 1219.

[284] When a corporation is made to comply with government regulations, it would involve expenses. Maintaining a certain standard of compliance costs money. Non-compliance would cost too when the corporation is fined. When the industry is not very competitive, the corporation can factor in it's monetary outlays as costs of production and increase their prices to compensate for lost profit.

[285] Braithwaite, *supra* note 23, at 507.

to file currency transaction reports of customer currency transactions in excess of $10,000 within fifteen days. The bank was found to have not reported transactions made by a single customer of amounts broken down into $10,000 per transaction, involving several transactions. The court imputed the knowledge held by the bank employees to the bank saying that the sum total of what the separate employees knew amounted to knowledge that a violation was being committed.[270] It further instructed the jury to look at the conduct of the employees, as well as the bank's actions as an institution in informing it's employees of the law or preventing violations of it.[271]

Because of this doctrine of collective guilt, it is not always necessary for the prosecutor to identify the particular individual who committed all the requisite elements of the crime while acting on behalf of their employer. Where there is such decentralization of authority, the corporation may turn out to be the only viable defendant. Specific intent is imputed upon the corporation, even if no individual can be shown to possess the specific intent. This operates in the same manner as the willful blindness doctrine, but on a corporate level. The sum total of the acts of a corporation's employees becomes the specific intent of the organization.

3. EXCULPATION AND MITIGATION

Corporate criminal law attempts to approximate the standards of exemption, mitigation and aggravation employed in conventional criminal law. This, however, is not based upon the mental state of the corporate agent at the time of the commission of the offense. To attribute the exact mental states of persons and penalize the corporation accordingly, without taking into account possible defenses to show that the agents' actions did not accurately reflect corporate policy, is to stretch the fiction too far. The corporation is first and foremost, an organization; the acts of the individuals who comprise it are collectively capable of expressing its *mens rea*. Mitigation and aggravation of corporate penalty is viewed along the lines of corporate action and reaction.

a. Corporate Acts in Exculpation

The Model Penal Code does not provide any exculpatory relief in this case. It does, however, spare the corporation from any liability where, in the commission

[270] "In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all the employees... the bank's knowledge is the totality of what all the employees know within the scope of their employment. So if Employee A knows of one facet of the currency reporting requirement, B knows another facet of it..the bank knows them all." *Id.* at 155.

[271] "In deciding whether the bank acted wilfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not do as an institution. The bank is deemed to have acted wilfully if one of its employees in the scope of his employment acted wilfully... Alternatively, the bank as an institution has certain responsibilities;... And you will have to determine whether the bank as an organization consciously avoided learning about and observing CTR requirements. The government to prove the bank guilty on this said theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the evidence as the bank's efforts, if any, to inform its employees of the law; its efforts to check on their compliance; its response to various bits of information... its policies." *Id.*

of regulatory offenses, it is shown that a high managerial agent having supervisory responsibility over the subject matter of the offense, employed due diligence to prevent its commission, unless the law states otherwise.[272] In such a case, the individual wrongdoer would be deemed to be a lone agent – his actions not imputable upon the corporation.

Defenses are also available in common law offenses involving a certain degree of moral turpitude. These usually involve crimes of economic conspiracy and fraud.[273] When what is sought to be proscribed is not only the physical act but also the suppression of a willful intent to reject society's values, the corporation can rebut the presumption of liability by "showing that it had no knowledge of the crime, had issued instructions against the illegal conduct, and had taken precautions against its omission."[274]

Allowing corporations to put up the defense of good faith in these cases is only in keeping with the acceptance of the concept of corporate moral blameworthiness. If an organization condoned illegal behavior, it should not be allowed to profit from it. If the opposite is true, however, the object of punishment would be superfluous, for it is its object to compel corporations to police and reform themselves. If the right to proof of exculpation would not be allowed, it would render the burden already shouldered by the corporation too onerous. Corporations already diligent in policing themselves would be discouraged from continuing to do so, for the outcome, as between a self-policing and a non-self-policing corporation, would be the same. To allow them to put up these types of defenses would not make criminal prosecution of corporations more difficult but rather, more fair. The prosecution would still be relieved of the burden of showing that the board of directors or managerial officers tolerated the offense. The burden would lie upon the corporation to show that the act committed was in complete contravention of corporate policy and that none of the management or board of directors participated in the offense or were remiss in their duties.

b. Corporate Reaction As Mitigation

When a corporate offender's reactions are emphasized in the mitigation of the sentence, the focus is shifted from the acts and mental states of the individual agents to the adequacy or inadequacy of the corporation's reactive program, which reflect acts and policies not necessarily attributable to any individual.[275]

[272] Defenses rarely prosper when strict liability offenses are involved.

[273] *See* United States v. Milton Marks Corp., 240 F.2d 838 (3rd Cir. 1957).

[274] James V. Dolan and Richard S. Rebeck, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 Geo. L. Rev. 547,564 (1962) [hereinafter Dolan].

[275] Fisse, *supra* note 237, at 1196.

corporate activities cannot complain;[286] they must now share in the losses. Financial returns must reflect the social cost of breaking the law.

It is difficult to justify the spill-over effect upon the employees and consumers who, unlike the stockholders, do not receive the fruits of the crime.[287]

b. Equity Fine

In order to reduce the spill-over effect of corporate fines, some commentators have explored the feasibility of an equity fine, *i.e.* a fine upon the equity securities of a corporation to be issued to a state compensation fund which could be then liquidated at any time to maximize its returns.[288] A fine could also be taken against a percentage of the corporation's gross sales receipts beginning from the period of indictment, thus equalizing the position of small and large corporations.[289] The equity fine would not prejudice the employees or creditors because the capital would not be reduced.[290] While its effect on the shareholders' stockholdings is inevitable, it will be less prejudicial than an actual capital outlay. In sum, the propensity to pass on the cost to the consumer may be controlled.

c. Other Sanctions

Regarding the possibility of imposing non-monetary sanctions, managerial intervention by means of punitive injunctions could serve as an alternative. Internal discipline orders would require a company to undertake appropriate disciplinary proceedings and submit a compliance report to the court which issued the order.[291] Non-compliance could mean liability for the corporation and the responsible officers. This, however, has been criticized as sacrificing corporate efficiency by excessively intrusive government intervention.[292]

d. Community Service

Community service orders have been explored both as a sanction and as a factor for penalty mitigation. This would require a corporate offender to perform

[286] *Id.* at 508.

[287] However, it can also be argued that, while stockholders do not have any significant direct control over corporate policy in a modern publicly-held corporation, consumers may have that control, though indirectly. Where there is competition in a particular industry, the prices of its goods and services cannot rise too high to absorb the fine thus causing profits to go down, debt and equity financing to become more stringent, stunting expansion and causing investors to look for a more law-abiding corporation. Yoder, *supra* note 278, at 52.

[288] Coffee, *supra* note 22, at 413.

[289] Yoder, *supra* note 278, at 51.

[290] Coffee, *supra* note 22, at 414.

[291] Fisse, *supra* note 237, at 1222.

[292] *Id.* at 1225.

socially useful work projects in accordance with the offender's skills and resources.[293] They have been tentatively applied, however, because of the lessened stigma and impact of the sanction.[294] The possibility of abuse on the part of judges who may channel the sanctions toward pet projects or falsify compliance reports has likewise been raised.[295]

e. Adverse Publicity

The social stigma that is said to accompany a criminal conviction is concretized in court-ordered adverse publicity. A corporation which is convicted, may be required to give notice to the public of the wrongdoing for which it was convicted, in lieu of or in addition to the imposition of monetary penalties.[296] Despite its non-implementation, various commentators believe it would be an effective deterrent by serving as a threat to the non-monetary goal of maintaining goodwill. It also makes evident the stigma that a convicted felon would experience. While a corporation cannot "feel" shame, the tarnishing of a good image could translate to monetary loss.

f. Putting A Corporation In Jail

Another corporate sanction which has been put forward is the imposition of a "corporate quarantine."[297] This would serve to prohibit the corporation from engaging in particular lines of business in localized geographical areas. A corporation found guilty of securing government contracts through bribery may be barred from bidding in subsequent public auctions. A corporation guilty of price-fixing may be prohibited from manufacturing that product for a period of time.

g. The Death Penalty

Corporate dissolution is commonly viewed as the most severe form of corporate punishment. This is emphasized when a large, publicly held corporation is dissolved. If this sanction were to be imposed upon a conglomerate such as San Miguel Corporation or Petron, the ramifications would affect not only the stockholders of the corporation but the public as well. This sanction should therefore be imposed as a last resort and only in the most severe cases.

[293] *Id.* at 1226.

[294] *See* United States v Allied Chemical Corporation, 420 F. Supp. 122 (1976).

[295] Fisse, *supra* note 237, at 1228.

[296] Donald J. Meister, *Criminal Liability For Corporations That Kill*, 64 TUL. L. REV. 919,942 (1990) [hereinafter Meister].

[297] *Id.* at 946.

VI. PROPOSED AMENDMENTS TO OFFICER AND CORPORATE LIABILITY

A statute's success in attaining its objectives depends on clarity of draftsmanship and effective enforcement. The latter is a formidable problem in the Philippines where graft and corruption is prevalent. Another possible obstacle is the difficulty of presenting proof under our present system of accountability. The laws, as presently worded, save for a few exceptions, do not provide law enforcers with guidelines for proving complicity. More importantly, as most laws contain a corporate liability clause which subjects only select corporate officers to criminal liability, perpetrators are able to mask their illicit activities by using the corporate structure.

A. Clarifying Individual Liability

The aim of a general statute providing for individual responsibility for corporate agents should be twofold: the ability to deter individual conduct and second, the presence of an effective coercive factor for corporate agents to take affirmative action to prevent harmful corporate criminal activity. The statutes should be directed against both direct and indirect actors, the latter being those who have control over corporate policy and subordinate conduct. However, this in no way seeks to suggest vicarious criminal liability. Neither does it propound criminal liability merely by virtue of one's position. The basic requisites for liability – freedom, intelligence and intent for *mala in se* offenses, or negligence, for *mala prohibita* offenses – should be maintained. The amendments proposed regarding corporate criminality clauses will not attempt to derogate from those principles. They will instead attempt to describe general conduct constituting complicity – an improvement over the abstract denominations of "guilty officer" or "responsible officer," among others. It will clarify the role of the existing standard of "knowing toleration" or acquiescence,[298] giving it more importance. It will also establish a new standard of complicity – that of reckless supervision. This, of course, would not be an exhaustive account of the possible formulations the legislature may come up with, since that statute's standard of liability must fit the crime. This section will attempt to propose basic formulations for corporate officer liability in *mala prohibita* and *mala in se* offenses.

B. Proposed Amendments To Officer Liability

> "A person is criminally liable for an offense, for conduct which he engages in, in the name of or on behalf of a corporation, to the same extent as if he engaged in the conduct in his own name or on his own behalf."

This provision would clear up the confusion brought about by the pronouncement in the *Sia* case that "in the absence of an express provision of law making the

[298] In the Revised Penal Code, actors are either principals by direct participation, by inducement or indispensable cooperation (art. 17), accomplices (art.18) or accessories (art. 19). Certain provisions such as art. 186 on monopolies and combinations in restraint of trade of the Revised Penal Code and sec. 23 of the Dangerous Drugs Act of 1972 provide for "knowing toleration".

petitioner liable for the criminal offense committed by the corporation, the existence of criminal liability on his part may not be said to be beyond any doubt."[299] This, however, is not meant to advocate a corporate officer's criminal liability by virtue of his position. Criminal liability is essentially personal in nature. Laws that enumerate the particular officers who may be held liable provide that the officer must be "responsible," that is, responsible for committing the offense unless it is the intent of the Legislature to hold a particular person liable, as in libel cases.[300] Rather, this provision would preclude the defense of acting in a "representative capacity." A person cannot escape liability simply because the law did not designate him by name as the indictable officer and by alleging that he was not acting for himself but as an agent for an organization.

An officer or director who causes the commission of an offense, though he may not have directly participated in the act, must also suffer liability. This liability will be further elucidated in the following provision:

> A person may be guilty of an offense committed directly by another person for which he is legally accountable. A person is legally accountable for the conduct of another when:
>
> 1. He is made accountable by the law defining the offense;
>
> 2. He causes another person, innocent or not, to commit an offense by soliciting, aiding, agreeing or attempting to aid such other person in planning or committing it;
>
> 3. He has knowledge of a commission of an offense within his realm of authority and he knowingly facilitates, permits or tolerates or fails to prevent its commission.

Subsection (1) deals with strict liability or *mala prohibita* offenses. It would be incorporated in those statutes approximating strict liability statutes[301] in the United States that do not look into the intent of the direct actor, and would necessitate, for purposes of a conviction only, a finding that the offender's intentional or negligent act was the proximate cause of the violation. It would be too harsh, however, to set indirect or vicarious liability without any safeguards. Lawmakers could provide for particular areas where strict liability would apply, but this must be mitigated by a *proviso* stating: first, that the superior officer occupy a position of authority or responsibility with respect to the person directly responsible for the offense and second, that he must have had the power to prevent it through the highest standards of foresight and vigilance.[302] Thus, the superior

[299] *Sia*, 121 SCRA at 663.

[300] Under art. 357 of the Revised Penal Code, the editor or manager of a newspaper, daily or magazine shall be liable for any prohibited publication.

[301] An example would be its use in the Food, Drug and Cosmetic Act.

[302] This *proviso* borrows from the language used in United States v. Park, 421 U.S. 658, 672-674. (5th Circ. 1975).

would be able to allege as a defense, correcting or preventing the commission of the illegal act, despite the use of extraordinary care or due to the nature of his position within the corporation. Because the use of strict liability is a departure from criminal law, the legislative intent to utilize it must be clear. This standard of liability would be suitable for areas involving environmental protection and consumer safety, where the acts proscribed are those that may immediately affect the public adversely.

The second subsection deals with offenses which provide for specific intent as one of its elements. This subsection provides for the complicity of a principal in the commission of an offense. It is a standard of liability already present in our laws using the words "responsible officer" or "director, president, general manager or other officer guilty of the offense." Where the superior authorizes or agrees to aid a subordinate who has committed illegal acts, he is considered a principal either by direct participation or by indispensable cooperation. This, of course, would meet the typical difficulties of proof encountered in proving the commission of illegal acts. The commission of illegal acts, however, are not usually the subject of board resolutions and thus, relying on the corporate records, may, in certain cases, be of little value. To remedy this, paragraph 3 accounts for instances where the authorization is implicit, rather than explicit. A corporate officer can therefore be said to have acted with specific intent when he knows of a planned or existing crime taking place in relation to areas within his scope of responsibility, but because he fails to prevent it, he is deemed to have acquiesced to the performance of the crime.

Acquiescence, or mere knowledge of a crime without taking an active role in its commission, constitutes a departure from traditional criminal standards of liability. Mere presence at or knowledge of a criminal scheme does not make one liable if the crime is, in fact, committed. However, in view of the material differences between individuals acting outside corporate structure and those acting within it, this departure is warranted.

When an employee is aware that his superior knows of the illicit activity but takes no steps to stop it, this may be interpreted as silent authorization. It could encourage subordinates to risk illegal activity without fear of reprisal. If corrupt officers were threatened with personal liability for their nonfeasance, it would serve as a powerful incentive on their part to prevent the commission of offenses by their subordinates. This need is addressed by a few laws like Section 389 of the Insurance Code of 1978[303] and Section 187 of the Revised Penal Code[304] on monopolies and combinations in restraint of trade, where the phrase "knowingly permitted or failed to prevent" is used. This *proviso* should be a general standard of liability in special penal laws requiring specific intent. The proponent does not suggest, however, that this standard be applied to the Revised Penal Code provisions which already provide for different degrees of liability for direct participants, accomplices and accessories. Its application would be limited to

[303] Presidential Decree No. 160.

[304] Act No. 3815.

special penal laws to which these standards do not apply and which corporations are capable of violating, such as environmental laws, laws against monopolies or anti-trust statutes. Further, the proponent is not claiming to have created a new standard of liability, because some laws do provide for it.[305] What is being suggested is that acquiescence be adopted as a general standard of liability. The standard of "knowing toleration" cannot be read into the existing statutes that name "responsible" or "guilty" officers because criminal statutes must be strictly construed. Thus, the acquiescence standard must be specifically provided for by the legislature as a standard applicable to corporate officers and as an alternative to the present ineffective standard of complicity by direct participation.

This provision, however, is not meant as a palliative that would yield immediate results. While direct participation or inducement through price, reward or promise need not be shown, knowledge must still be proved. This, therefore, is not liability by virtue of mere position. Proving the superior's knowledge also serves to limit the application of this rule. Thus, the evidence must show beyond a reasonable doubt that, given the length of time, widespread practice and level of involvement of the corporation in the offense, the superior must have known of its commission. The difficulty of proving this knowledge would be directly proportional to the size and complexity of the corporation. The doctrine of "willful blindness" can be used as a tool of evidence. It would be sufficient to show that: 1) the defendant was subjectively aware of a high probability of existence of the illegal conduct; and 2) the defendant purposely contrived to avoid learning of the illegal conduct. This will curb the "head in the sand" syndrome that many superiors prefer to adopt in order to avoid liability. This tendency of corporate officers was noted by Court of Appeals Justice De Castro in his dissenting opinion in the *Dichupa* case:

> (The) accused should not be allowed to escape responsibility for the proper conduct of the business... by the simple expedient of passing the work to others, lest the protection intended by law for the public be easily defeated.[306]

Since willful blindness would merely identify the principals in the commission of an offense, its application should be limited to cases involving offenses which, though not *mala prohibita*, are likely to cause immediate impact on health, the environment and safety. The end result is still proof of knowledge sufficient to satisfy the requirement of "knowing toleration."

The defenses set up against complicity under this subsection may consist in the following: that the superior is the victim of the offense; that he ended his complicity prior to the commission of the offense by wholly depriving the crime of its effectiveness; or that he gave law enforcement authorities timely warning to prevent the commission of the same.[307]

[305] *Supra*, see note 137.

[306] *Dichupa*, 19 CAR at 420.

[307] Model Penal Code §2.06(6)(a)(b)(c).

> "A person responsible for supervising certain activities on behalf of the corporation who, by his reckless failure to supervise adequately those activities, permits or contributes to the commission of the offense by another or the organization shall be liable for the offense, to suffer a penalty ___ degrees lower than that provided for by law and/or a fine of ___."

This provision proposes "reckless supervision" as a basis for liability. Unlike the willful blindness doctrine where the act of willfully shielding oneself from, or of at least invoking lack of knowledge of a crime, makes one liable for the same penalty as that of the direct actor, reckless supervision involves a lesser degree of knowledge on the part of the superior. It would involve only cognizance of circumstances indicating the possibility that illegal acts have been or are being committed. Failure to take due regard of these circumstances would constitute a gross deviation from the standard of care that a reasonable person would employ in such a situation. It can be proved that the superior failed to act despite the existence of facts that should have alerted him to the posssibility of taking places. It would not be sufficient to aver lack of knowledge as a defense. Admitting ignorance of activities taking place areas under his supervision, such that an ordinary person in his position would at least make some inquiry, is precisely the reckless supervision contemplated in the proposed statute. On the other hand, mere negligence, ineptness, incompetence or mistake would not be sufficient to charge an officer with reckless supervision.

Since direct culpability is not the basis of liability, the responsible officer cannot be penalized with the same penalty as the actual offender. Thus, the proposed provision would allow the legislature to fix a lower penalty.

The standard of reckless supervision would not constitute a sharp departure from traditional criminal law. The Supreme Court impliedly recognized this standard by way of *obiter* in the *Torres* case. The Court reversed the lower court's decision convicting the accused by saying that the accused officer could not be held liable for something which he could have prevented, had the accused exercised due diligence in determining the existence of illegal conditions which he should have known about.[308] However, the Court added:

> [E]ven assuming that by the exercise of due diligence appellant should have known that the taxi cabs were removed, yet he is not charged in this case with having violated the law through negligence.[309]

This implies that, had the accused been charged with negligence, he might not have been acquitted.

C. *Policing the Corporation: Is Corporate Criminal Liability Really Necessary?*

In policing corporations, it would be insufficient to penalize the individuals who comprise it. While it is true that a corporation can only act through its human agents, these human agents are not easily detected and they may not even be those who should be ultimately held responsible. For reasons elucidated in Chapter IV, the threat of individual liability is not sufficient to deter corporate criminality.

[308] *Torres*, 51 O.G. at 6285.

[309] *Id.*

1. TWO SIDES TO ONE COIN

To acknowledge that corporations possess intentionality or a mental state necessary to commit a crime would involve viewing the corporate entity from two different perspectives. This approach may even lead to conflicting results: First, the corporation as a separate and distinct entity has: a) no mental state, it being attributable entirely to the human beings who comprise it; or b) having its own kind of "mental" state not comparable with that of a human person's gray matter but manifested nonetheless through corporate policy. Second, a corporation can be viewed as an aggregate of individuals; thus: a) their intentionality can rightfully be imputed to the corporation, the entirety of it being bigger than any one individual; or b) that the same observation can be used to conclude that corporate action boils down to the individuals who comprise it, which is why corporate criminal liability might be a redundancy. The proponents of corporate criminal liability offer a very convincing argument in support of their view. According to them, if a corporation can do positive acts through its agents and reap the benefits of those acts, then logically, they must also answer for the criminal acts done on their behalf by those very same agents. Proponents of the traditional view of corporations would counter with the doctrine of *ultra vires*. Even though consistency in ideology has not been strictly adhered to in our jurisdiction, as evidenced by the hybrid principles exhibited by some areas of the law,[310] these have been brought about only by necessity. For example, the practice of "piercing" the corporate veil was eventually adopted in order to prevent individuals from using the corporate vehicle to shield illegal activity. Thus, our civil law tradition will embrace common law principles only if it will enrich the law and make it more effective. Criminal law, however, has never exhibited this tendency to integrate civil and common law because it deals with the deprivation of life, liberty and property of human persons. Any statute must be strictly construed. Criminal liability cannot evolve through case law – only liability by legislative fiat is acceptable. Thus, must legislature adapt and integrate our present system with a new legal ideology? Granting that there are commendable elements in parallel common-law legal systems with respect to corporate criminal liability, must they be embraced in their entirety? What are the practical consequences? Additional questions may be proffered: If we maintained a system of administrative and criminal penalties, what would be the limits of legislative discretion in deciding whether a penalty is administrative or criminal?[311] What would spell the difference in choosing one manner of prosecution over the other?

[310] Corporation law is a mix of both the common law and civil law traditions; though we have a code, the theory of piercing the veil of corporate fiction developed through case law, *supra*, chapter II.

[311] *Developments*, *supra* note 197, at 1300.

2. ADMINISTRATIVE OR CRIMINAL LIABILITY: A COMPARISON

The decisive element in any system of regulation is the sanction it provides in order to ensure compliance.[312] For a corporation that depends on profit to sustain itself and which cannot be incarcerated, that system of regulation would primarily be in the form of fines. What difference would it make in labelling a fine as administrative or criminal? Some authorities are of the view that the difference lies in the procedural safeguards that would or would not accompany the alternative systems of prosecution. There are two views, however, about the importance of procedural safeguards. One authority proffers:

> The civil-criminal[313] distinction is often a hazy one, especially in the area of corporate offenses... Aside from the label attached, there is often no meaningful distinction between criminal and civil fines imposed on corporate defendants and the deterrent effect of each is essentially the same... Aside from the speculative difference in deterrent effect or stigma, the one important distinction that depends on the label attached is the degree of procedural protection afforded the defendant... In the context of corporate crime, perhaps the most important are the prohibition against double jeopardy, the requirement of proof beyond reasonable doubt, and the right to trial by jury.[314]

The test for the applicability of the constitutional protections[315] has depended upon whether the sanction was "punitive" or "penal" rather than "remedial" or "regulatory".[316] Further, because the distinction between the two types of fines is not clear, compounded by the additional procedural safeguards required and the fact that the guilty individuals within a corporation are difficult to identify, prosecutors would resort to the civil or administrative alternative. This gives rise to the problem of violation of the equal protection of the laws. One offense could be proceeded against criminally while the same or similar offense could not be so treated.

In addition, *Stessens* had observed that different jurisdictions have different ways of addressing corporate criminality.[317] Some have resorted to a system of

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[312] *Id.*

[313] Though this article dwelled on the civil-criminal distinction, the same observation can apply to an administrative-criminal distinction. In the United States, regulatory statutes provide for both civil and criminal fines for the criminal violation. In addition, they may be proceeded against administratively. The presence of these three options has confused many prosecutors in deciding which route to take. In the Philippines, the only civil liability that a corporation suffers when its agents commit offenses is subsidiary criminal liability. Discussion on corporate civil liability is beyond the scope of this thesis.

[314] *Developments*, *supra* note 197, at 1301-1302.

[315] A discussion on the constitutional safeguards which a corporation is entitled to in a criminal proceeding is beyond the scope of this thesis. For an in-depth discussion, *see Developments*, *supra* note 137, at 1333-1365.

[316] *Id.* at 1303.

[317] Stessens, *supra* note 16, at 493.

civil liability for criminal fines imposed upon corporate officers. Others have resorted to a system of administrative sanctioning.[318] There are practical reasons for this:

> Legislators may think it will make law enforcement more efficient and flexible. They may consider it as unnecessary or even undesirable to impose the stigma that goes with criminal sanctions or they may even think that the matters that have to be dealt with are of such a specialized nature that they can be better handled by specialized administrative bodies.[319]

He cautions, however, that while these substitute systems of civil penalty and administrative liability may seem efficient, the lack of the same procedural safeguards that a criminal prosecution would provide makes the latter alternative the better one.[320] He adds that the imposition of criminal fines "is no more or less nonsensical than the award of civil damages"[321] and that "on an international scale, mutual legal assistance is often confined to criminal matters."[322]

3. PRACTICAL CONSIDERATIONS: MIXING THE OLD WITH THE NEW

The justification for an ideological shift from the lack of corporate intentionality to recognizing corporations as entities with their own brand of intentionality should be measured in practical terms. The first view supports our present, albeit imperfect, system of administrative regulation while the latter supports the adoption of corporate criminal liability. This proponent will evaluate the systems on the following basis: a) due process and the importance of procedural safeguards; b) implementation; and c) sanctions and resulting deterrence. Next, the retention of certain principles of corporate criminality will be examined, followed by a discussion on how to maximize deterrence through a system of administrative and criminal penalties.

a. Due Process and Procedural Safeguards

To advocate a well-planned system of administrative liability would yield some practical advantages, particularly in the area of burden of proof. A requisite of guilt determination in criminal law is "proof beyond reasonable doubt." In administrative proceedings, the evidence presented must only be substantial, *i.e.*, "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[323] Unlike proceedings in a criminal case, administrative proceedings do not require strict adherence to technical rules. The atmosphere of

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[318] *Id.* at 501.

[319] *Id.* at 502.

[320] *Id.* at 519.

[321] *Id.*

[322] *Id.*

[323] CRUZ, *supra* note, 73 at 61.

expedience and liberality is observed, more so where the administrative order has simply the effect of *prima facie* evidence and is subject to judicial review.[324]

Simply put, being able to sanction a corporation administratively would be "easier." The difficulty in overcoming the burden of proof requirement of individual criminal liability would be replicated in a criminal proceeding for corporations. If we were to consider a corporation as a person punishable by criminal statute, there would be no good reason to deny it the extension of the "burden of proof" requirement. But would it be wrong to choose one system over the other because it is "easier"?

Advocating administrative system of penalties would not be an advocacy of deprivation of property without due process of law. The requirements of fair play do not apply to judicial proceedings alone. The Supreme Court, in the case of *Ang Tibay v. CIR*,[325] laid down the cardinal rights and principles which must be observed in administrative proceedings to guarantee the parties involved of due process.[326]

The corporation is also assured of the cold neutrality of an impartial judge as an essential requisite to due process.[327] Administrative abuse is kept in check by judicial review where the Constitution or the law permits it, or when dealing with questions of law. Even if the law does not provide for judicial review, this would not militate against a corporation's "rights" because the right to appeal is not a constitutional right.

Neither will lessening the burden of proof be considered a derogation of basic rights, being a rule of evidence particular to criminal cases, and not applicable to civil or administrative proceedings. Individuals themselves may be proceeded against in two ways – a victim may choose to institute criminal charges and opt to reserve the right to file a separate civil action where damages may be proved with a preponderance of evidence.

Providing only one option, instead of two, would enable one to avoid the present difficulties experienced with corporate criminality. Allowing two actions

[324] *Id.* at 60.

[325] 69 Phil. 635 (1975)

[326] These are:

1) The right to a hearing, which includes the right of the interested parties to present their case and submit evidence in support thereof;
2) The tribunal must consider the evidence presented;
3) The decision must have something to support itself;
4) The evidence must be substantial;
5) The decision must be based on the evidence presented during the hearing or contained in the record and disclosed to the parties;
6) The tribunal must act on the basis of it's own independent consideration of the facts and the law of the controversy and not simply adhere to a subordinate's view; and
7) The decision must be rendered in such a manner that the parties know the issues involved and the reasons for the decision rendered. *Id.*at 642- 644.

[327] PHILIPPINE CONST. art. III, §14.

may cause persons similarly situated to be treated in a difficult manner. This has, in fact, occurred in the United States where the manner of sanction is often influenced by the feasibility of recovering indemnity from the erring corporation.

Concern over the procedural safeguard of *res judicata*, being an important right that a corporation would be deprived of in administrative proceedings, is unfounded in the Philippine setting. The old rule that an administrative decision is not considered *res judicata*, as to prevent its subsequent reconsideration or revocation, has been modified, such that decisions and orders of administrative agencies can have, upon their finality, the status of *res judicata*.[328]

b. Implementation

Administrative agencies may be in a better position to initiate and carry on actions against erring corporations, subject to later judicial review on questions of law. Administrative agencies have the advantage of specialized training and experience in matters which are normally beyond the scope of knowledge of a public prosecutor or judge. According to Attorney Fe Gloria, an SEC Commissioner, many criminal cases forwarded by the SEC against corporate officers do not go beyond the preliminary investigation because the fiscal does not know how to prove the offense.[329] While not all administrative agencies possess the power to sufficiently investigate and sanction a corporation in order to carry out its regulatory purpose, agencies like the SEC, DOLE and the BIR do possess ample power to ensure that corporations abide by the laws. They may establish rules of procedure. They have the power to subpoena witnesses and require the production of evidence in connection with the matter they are authorized to investigate. They possess the power to punish for contempt, and the power to sanction, a corporation on the basis of evidence of wrongdoing.

c. Sanctioning

The main difference between a penal sanction and an administrative sanction, aside from legislative intent, rests largely on the monetary nature of the latter. Noteworthy is the case of *Civil Aeronautics Board v. Philippine Airlines*[330] where the Court ruled against the objection of Philippine Airlines regarding the imposition of a fine upon them which they insisted was in the nature of a criminal penalty. The Court stated that the Civil Aeronautics Board's charter enabled it to take any action that may be necessary to prevent violation of, and ensure compliance with, its rules and regulations. An administrative penalty could be imposed without need of criminal prosecution.

[328] San Luis v Court of Appeals, 174 SCRA 258, 271 (1989); This is not true for all administrative proceedings. In the case of Nasipit Lumber Company, Inc. v. NLRC, 177 SCRA 93, 100 (1989), the Supreme Court said that the doctrine of *res judicata* does not apply to labor relations proceedings, they being non-litigious and summary in nature.

[329] Interview with Atty. Fe Gloria, SEC Commissioner, Quezon City, 5 November 1995.

[330] 63 SCRA 524 (1975).

This emphasizes another limitation of corporate criminal liability: Courts can impose sanctions up to statutory limits, and these are also limited by the nature of the remedies prayed for by the parties. In addition, courts may act only when their jurisdiction is invoked. Administrative agencies exercise more flexibility in imposing sanctions on the basis of a complaint or on its own motion. The remedies available to administrative agencies include refusal to renew, or even revocation of licenses, destruction of unlawful articles, summary closure of stores, refusal to grant clearances, issuance of cease and desist orders, and imposition of fines.[331] That agencies may *motu proprio* investigate a corporation is also important, in that these agencies would be in closer contact with the corporations they regulate.

The corporate sanctions discussed in Chapter V may be carried out administratively. There is nothing to prevent agencies from adopting the equity fine as a more effective economic sanction. Administrative agencies can impose and be in a better position to follow-up the adoption of a compliance program to ensure that the corporation is acting in accordance with its representations. These sanctions would serve the ends of deterrence and regulation as much as a criminal sanction would.

Criminal prosecution is supposed to attach a stigma which civil or administrative proceedings do not.[332] A corporation has both monetary and non-monetary goals, the latter encompassing the desire to be perceived by the consuming public in a good light. There are two views as to the role that stigma plays in corporate deterrence. One side stresses that "corporate shame" is not bolstered by empirical evidence. A corporation has no "friends" before whom he can be shamed. Another view is that loss of prestige is a distinct financial loss. This proponent opines that loss of good reputation does matter and can constitute a distinct financial loss, but it does not take a criminal sanction to make a corporation "realize" this. According to Atty. Eduardo de los Angeles, President of the Philippine Stock Exchange, that member-corporations are quick to pay the fines levied upon them for a violation of the PSE's internal rules to prevent the news of the violation from leaking to the public, is proof of the importance of a good reputation.[333] They do not contest PSE's sanctions in order to avoid publicity. That an administrative agency can expose to the public the illicit activities of a corporation is not far-fetched. While it may not be able to order the wrongdoer to publish an account of its wrongdoing for public consumption, the agency itself may do so in order to warn the public against price-fixers or alert them about environmental polluters. Such announcements would produce some degree of "shame" or damage to reputation which need not proceed from a criminal penalty.

The discussion above as to the practicality of maintaining an administrative system of sanctioning over a criminal system does not preclude the adoption of

[331] CRUZ, *supra* note 73, at 68.

[332] *See* Fisse, *supra* note 237, at 1152-1154.

[333] Interview with Atty. Eduardo de los Angeles, President of the Philippine Stock Exchange, Makati, 6 November 1995.

important principles that would serve to facilitate and maximize the former as an effective method for policing corporations.

4. BASIS FOR REGULATION, NOT CONVICTION

The concept of corporate criminal liability is not fully acceptable because one cannot perceive a fictional entity as having an evil mind. Traditionalists would find no problem in sanctioning a corporation in a criminal proceeding when the offense involved is *malum prohibitum*. Criminal liability in such a case would not entail imputing criminal intent upon the corporation. Where the legislature clearly intends to impose liability without intent, the corporation should be sanctioned in the same proceeding as its officers. It would be up to the lawmakers to provide for liability of that nature.

Barring acts considered *mala prohibita*, a corporation becomes a candidate for the exercise of disciplinary power when its directors or high-level officers commit a wrong considered *malum in se*. It is at this point that the act is viewed as a corporate act as opposed to acts of subordinates. In many of the cases where the SEC has fined or penalized a corporation through suspension or revocation of license, the acts complained of were committed by the officers themselves who happened to be the directors, majority stockholders or incorporators. To consider the acts of the board alone as reason for regulation, in the light of the difficulty involved in proving them, would unduly narrow the scope of corporate liability. In this respect, the adoption of some principles of corporate criminal liability would be advantageous.

The use of the principles of "acquiescence," "willful blindness" and "collective knowledge" can be useful in linking or imputing illicit acts of lower level subordinates to the board or to the corporation itself. The first two principles may be used when particular personnel are identified and the latter, when not all the elements of an offense can be shown to have been committed by one person alone or that the acts cut across several departments. Because the burden of proof need not be "beyond reasonable doubt," the non-conviction of corporate officers or directors would not bar administrative action, where only substantial evidence is required. In this manner, the scope of holding particular corporate agents liable for criminal acts need not limit the extent to which the corporation can be made to comply with the law. Administrative sanctions can be imposed pending the trial of its officers, subject of course to judicial review.

Since substantial evidence is sufficient to show liability, even less would be needed to shift the burden of evidence. The corporation would have to raise defenses on its behalf. If must explain corporate policy and convince the administrative authority that it has been abiding by the law once substantial evidence has shown the basis for suspected wrongdoing.

The defenses it may raise can also be taken from our discourse on corporate liability. The corporation can show that: a) the agent's act was self-beneficial and did not benefit the corporation; b) that despite the exercise of diligence in the supervision of subordinates, the corporation was unable to prevent the illicit acts;

c) that the agent's acts were in clear contravention of corporate policy and was not tolerated by management; d) that upon discovery of the illicit acts, immediate positive steps were taken to remedy the situation; and e) that the corporation has not only tried to remedy the existing situation but has taken steps to prevent future violations. These defenses, if established, may serve to mitigate the sanctions or even exculpate the corporation. What is important is that it is not enough for corporations to avoid responsibility for the acts of their agents done on their behalf and for their benefit by invoking the *ultra vires* doctrine.

Because the proceedings are administrative in character, the ideological difficulties encountered with respect to: a) whether or not a corporation can be punished; b) whether or not a corporation possesses a *mens rea*; and c) whether the stockholders deserve to be indirectly punished when they have no control over corporate agents, need not be addressed. Administrative sanctioning is justified by the agency's power to regulate corporate activity. The degree of regulation must be upgraded, though, in order that the government can more effectively regulate the corporation. The end in sight is the same: corporations eventually policing themselves.

5. A PROPOSAL TOWARDS MAXIMIZING SANCTIONS

In order to make administrative bodies more effective in policing and regulating corporations, the following areas must be looked into:

1. Administrative sanctions must be increased to such levels so as not to simply constitute a cost of doing business. Administrative fines, for example, must operate to hurt the corporation where it matters in profits. The current maximum fines must be raised to more effective levels. Further, a corporation should not be allowed to keep the proceeds of illicit activity, whether it be acquired by an agent acting alone or on orders from above. Even if the exact proceeds can no longer be accounted for, fines imposed should be sufficient to make corporations pause before engaging in similar activities in the future. More creative criminal sanctions such as the equity fine and imposition of a compliance program which do not involve incarceration can be considered by Congress.

2. Corporate directors or officers found guilty of violations, whether administrative or criminal, should be prevented from holding similar positions of authority in corporations in the same industry for a particular period of time. Corporate officers against whom there is insufficient evidence to support a conviction should likewise be administratively sanctioned.

3. Since some administrative agencies such as the SEC and the BIR can *motu proprio* investigate corporations when there is evidence of wrongdoing, this power must be exercised more assertively. As the government lacks the means to investigate and sanction every suspected wrongdoer, selective investigation and prosecution should be relied upon. This would serve to deter other corporations from violating the law.

4. Attention should be given to repeat violators, those violators who immediately try to correct their actions, and those who blatantly disregard the rules. The principles of aggravation, mitigation and exculpation adopted in corporate criminal liability can be used by administrative bodies in order to impose the appropriate sanctions.

5. The government could adopt a system of rewards and punishments: Corporations that have abided by regulations may be favored by the government in terms of tax concessions and government contracts; the violators could be barred from dealing with the government and could be subject to stricter regulation, to make sure they are complying with the law.

6. Administrative agencies would need more funding to educate its personnel and implement its programs. SEC personnel are not familiar with the more sophisticated business crimes being committed by corporations. They may not know how to prove the commission of an offense. They may lack sufficient manpower to successfully gather and analyze the evidence required. A problem the SEC experiences is the fast turn-over of attorneys it hires due to salary restrictions. Inexperienced lawyers are no match for the sophisticated law firms the corporations hire to protect their interests.

7. To have an effective administrative system, inter-agency collaboration should be emphasized. Where an administrative agency lacks the legislative fiat to sanction the corporation, the SEC could be relied on as a corporate police. Since a corporation, in its charter, professes not to engage in activities contrary to law, the violation of statutes not implemented by the SEC can still be seen as a breach of that undertaking.

VII. CONCLUSION

Traditional criminal law has been largely focused on common crimes rather than the so-called "white-collar" crimes. Whether because of the rich-poor dichotomy or the common misconception of what "true" crime is, corporate crime has been overlooked as a serious societal threat. The laxity by which the law treats corporate crime is reflected in our inadequate and rarely invoked penal provisions regarding criminal corporate actors, and in the virtual non-data on illicit corporate activity, indicating perhaps its acceptability to some quarters.

When the law focuses on the corporation, it looks to the guilty human actor for compensation. It has been shown, however, that the "guilty actor" may not necessarily be the most guilty, nor might he be financially capable of undoing the damage done.

The theory of corporate criminal liability adopted by most common law jurisdictions has simultaneously recognized the inadequacy of merely penalizing individual actors and consequently, the logic of looking toward the corporation as a morally blameworthy organization fit to be punished, as well as capable of paying for its "sins." This foreign system of enforcement does not, however, hold all the answers. The existence of alternative remedies sometimes leads to arbitrariness in the choice of remedy. Prosecutors may take the easier route and avoid criminal prosecution because of the evidentiary and procedural complexities