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CORPORATE CRIMINAL LIABILITY FOR HOMICIDE: CAN THE CRIMINAL LAW CONTROL CORPORATE BEHAVIOR?

by John E. Stoner

ON September 14, 1984, a New Jersey grand jury indicted the Six Flags Corporation on charges of aggravated manslaughter stemming from the deaths of eight youths killed in a fire while trapped in one of the park's amusements.¹ The grand jury also indicted two of the corporation's executives for manslaughter.² The indictment marked only the second time that a state has indicted a corporation for any degree of homicide greater than negligent homicide. In the first case an Indiana jury acquitted the Ford Motor Company on three counts of reckless homicide arising out of the deaths of three girls in a Ford Pinto automobile.³ In addition to these two indictments, in recent years several states have begun to allow the indictment of corporations for lesser degrees of homicide.⁴ As a result of the increasing number of corporations indicted for homicide and the increasing tendency to charge corporations with other intent offenses,

1. *State v. Six Flags Corp.*, No. 65,084 (Ocean City, N.J. Super. Ct. Law Div., indictment filed Sept. 14, 1984); see Wall St. J., Sept. 17, 1984, at 8, col. 1 (Sw. ed.) (report of the indictment); *infra* notes 101-08 and accompanying text (discussion of the case). The New Jersey Code of Criminal Justice defines aggravated manslaughter as occurring "when the actor recklessly causes death under circumstances manifesting extreme indifference to human life." N.J. STAT. ANN. § 2C:11-4(a) (West 1982). Aggravated manslaughter is a crime of the first degree. *Id.* § 2C:11-4(c). It is a form of criminal homicide, which a person commits if he "purposely, knowingly, [or] recklessly . . . causes the death of another human being." *Id.* § 2C:11-2(a). "Person" includes a corporation or an unincorporated association when relevant. *Id.* § 2C:1-14(g).

2. *State v. Six Flags Corp.*, No. 65,084 (Ocean City, N.J. Super. Ct. Law Div., indictment filed Sept. 14, 1984). The New Jersey code states that criminal homicide constitutes manslaughter when it is committed recklessly. N.J. STAT. ANN. § 2C:11-4(b) (West 1982). Manslaughter is a second degree crime. *Id.* § 2C:11-4(c).

3. *State v. Ford Motor Co.*, No. 5324 (Ind. Super. Ct., indictment filed Sept. 13, 1978), *digested at* 47 U.S.L.W. 2178 (1978); see also 47 U.S.L.W. 2514-15 (1978) (text of judge's denial of motion to quash). See generally Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465, 483-84 (1981) (discussing the *Ford Motor Co.* case); Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 NOTRE DAME LAW. 911, 919-24 (1979) (analyzing the *Ford Motor Co.* case prior to the trial).

4. See *Granite Constr. Co. v. Superior Court*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983) (manslaughter); *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941 (Ky. Ct. App. 1980) (manslaughter); *Commonwealth v. McIlwain School Bus Lines*, 283 Pa. Super. 1, 423 A.2d 413 (1980) (vehicular homicide); *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. App.—Texarkana 1983, pet. granted) (criminally negligent homicide).

the legal community is becoming embroiled in the battle over the efficacy of corporate criminal liability.⁵

This Comment first traces the development of corporate criminal liability for homicide in American jurisprudence. The goals of criminal law are then examined against the background of corporate criminal liability, and the efficacy of their application to corporations is discussed. Finally, this Comment raises questions about the ability of courts to mesh the corporate concept of a fictional entity with traditional criminal law legal principles.

I. HISTORY OF CORPORATE CRIMINAL LIABILITY FOR HOMICIDE

A. Early History

The most widely accepted common law view rejected the notion that a corporation could be held criminally liable.⁶ As the corporate form became more popular in America, however, some action had to be taken to control corporate criminal activities. Early decisions held corporations criminally liable for regulatory offenses or nonfeasance,⁷ but not for misfeasance.⁸ In

5. Several commentators have applauded the expansion of corporate criminal liability and called for its increased use in appropriate circumstances. See Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 128-29 (1976); Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1145 (1983); Note, *supra* note 3, at 924. Other commentators argue that corporate criminal liability is unworkable and inefficient. See Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 582 (1982) [hereinafter cited as Comment, *Economic Inefficiency*]; Comment, *Corporate Criminal Liability For Homicide: Has The Fiction Been Extended Too Far?*, 4 J.L. & COM. 95, 125-26 (1984) [hereinafter cited as Comment, *Fiction Extended Too Far?*]; Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 917-26 (1975).

The debate will likely be further exacerbated by the recent tragedy in Bhopal, India. A storage tank containing methyl isocyanate leaked, unleashing a deadly gas cloud that killed approximately 2,500 people and injured an estimated 100,000 more. Within hours of the accident, Indian officials arrested the manager of the Union Carbide plant at which the leak occurred and four of his colleagues on charges of "culpable homicide through negligence." *India's Night of Death*, TIME, Dec. 17, 1984, at 24. In addition, Indian officials arrested Union Carbide's United States Chairman, Warren M. Anderson, and two more Union Carbide officials later in the week, charging them with "negligence and corporate criminal liability" and "criminal conspiracy." The charges carry a maximum penalty of death under Indian law. Officials later released Anderson, but the arrested Union Carbide of India officials remained in custody. *Id.* In addition to the potential criminal liability, attorneys have filed civil suits exceeding \$15 billion. *Id.* at 24-25; see also *Union Carbide Fights for Its Life*, BUSINESS WEEK, Dec. 24, 1984, at 52-60 (account of the tragedy and legal difficulties).

6. As Lord Holt, C.J., stated: "A corporation is not indictable, but the particular members of it are." Anonymous, 88 Eng. Rep. 1518, 1518 (K.B. 1701). See generally Bernard, *The Historical Development of Corporate Criminal Liability*; Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393 (1982) (tracing the development of corporate criminal liability at the common law), 22 CRIMINOLOGY 3, 4-5 (1984) (noting the difference of opinion among commentators as to the development of criminal liability); Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393 (1982) (tracing the development of corporate criminal liability at the common law).

7. Nonfeasance is the nonperformance of some act that ought to be performed. *Desmarais v. Wachusett Regional School Dist.*, 360 Mass. 591, 276 N.E.2d 691, 693 (1971).

8. *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41, 43-44 (1841). Misfeasance is the improper performance of some act that a person may lawfully do. *Desmarais v. Wachusett Regional School Dist.*, 360 Mass. 591, 276 N.E.2d 691, 693 (1971).

1852 the New Jersey Supreme Court established a precedent by abandoning the nonfeasance/misfeasance distinction and affirming the propriety of holding a corporation criminally liable for an affirmative act.⁹ Two years later in *Commonwealth v. Proprietors of New Bedford Bridge*¹⁰ the Massachusetts Supreme Court followed suit, characterizing the nonfeasance/misfeasance distinction as absurd.¹¹ The court in *Bedford Bridge* noted that it could classify the nature of the wrong either as failing to construct a proper bridge, thus allowing a finding of nonfeasance, or as constructing an improper bridge, allowing a finding of misfeasance.¹² If the court maintained the nonfeasance/misfeasance distinction, then the court's choice of classification would predetermine the outcome of the matter.

Despite these courts' attempts to expand corporate criminal liability, substantial barriers remained to prosecuting a corporation for crimes requiring the formulation of intent. Courts considered corporations incapable of forming the mens rea¹³ necessary for a finding of guilt in those crimes characterized as *malus animus*.¹⁴ Jurists refused to attribute a specific state of mind to the corporate "person" that had no soul and existed purely as an economic entity.¹⁵ In addition, since the corporation lacked any physical existence that could be jailed, statutes requiring corporal punishment for many serious crimes precluded prosecution.¹⁶ Some statutorily defined crimes required commission by human beings, again effectively precluding prosecution of corporations.¹⁷

Beginning in 1904 these barriers to prosecution of corporations began to fall. In *United States v. Van Schaik*¹⁸ a federal court of appeals confronted the issue of some statutes' absence of an appropriate means of punishment for corporations. The court allowed indictment of the corporation in *Van Schaik* after some 900 passengers drowned when a steamship owned by the corporation caught fire.¹⁹ The life preservers provided by the ship failed to

9. See *State v. Morris & Essex R.R.*, 23 N.J.L. 360 (1852). The court noted that once the concept of holding a corporation for nonfeasance is accepted, all objections as to the intangibility of the corporation fall away. *Id.* at 366. Even if the corporation could act "not affirmatively" on its own behalf, it could "employ the hands of others." *Id.* at 367.

10. 68 Mass. (2 Gray) 339 (1854).

11. *Id.* at 346.

12. *Id.*

13. Mens rea is defined as a guilty mind or a guilty or wrongful purpose. *Tift v. State*, 133 Ga. App. 466, 211 S.E.2d 411, 412 (1974). The Model Penal Code delineates four states of mens rea: purposely, knowingly, recklessly, and negligently. MODEL PENAL CODE § 2.02(2) (Proposed official draft 1962).

14. *Malus animus* is bad or evil intention. See *New Bedford Bridge*, 68 Mass. at 345; *State v. Morris & Essex R.R.*, 23 N.J.L. 460, 460 (1852); *Queen v. Great N. of England Ry.*, 115 Eng. Rep. 1294, 1295 (1846).

15. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 33 (1972) (citing H. HENN, HANDBOOK ON THE LAW OF CORPORATIONS § 186 (1961)).

16. See Brickey, *supra* note 6, at 410 n.99. The author notes that since the early felonies were punishable by death or dismemberment, obstacles prevented imposing corporate liability for felonies. *Id.*

17. See *infra* notes 34-41 and accompanying text.

18. 134 F. 592 (C.C.S.D.N.Y. 1904).

19. The case came before the court of appeals when the defendants filed demurrers seeking to quash the indictment.

keep those passengers who jumped overboard afloat. The court could find the corporation guilty of manslaughter pursuant to a federal statute that provided that an owner shall be deemed guilty of manslaughter if through the owner's fraud, connivance, misconduct, or violation of the law a person loses his life.²⁰ Another statute charged steamship owners with the duty of providing suitable life preservers for all passengers.²¹ The court stated that the fact that the manslaughter statute provided only for a punishment of imprisonment failed to bar prosecution of the corporation.²² Noting that the lack of a suitable punishment for corporations must have been merely an oversight, the court stated that Congress surely could not have meant to allow seafaring corporate carriers to escape liability for acts punishable if performed by individuals.²³ The court thus imputed to Congress an intent to punish corporations despite the statute's silence.²⁴

In 1909 the Supreme Court further eroded the punishment barrier in *United States v. Union Supply Co.*²⁵ In *Union Supply* a corporation allegedly had violated a federal statute regarding record-keeping by oleomargarine dealers.²⁶ The statute provided that in the event of a conviction, punishment consisted of both a fine and imprisonment.²⁷ The Court held that when a statute provides for two independent punitive sanctions, the Court would construe the statute so as to give effect to any sanction that can practicably be applied.²⁸ The Court's decision, therefore, made it possible to prosecute the corporation and, if the corporation were found guilty, to impose on it only the fine portion of the statutory punishment.

In this same year the Supreme Court also overcame the second barrier to prosecution, the requirement in certain statutes that a crime be committed by human beings. The Court upheld the constitutionality of holding a corporation criminally liable for the acts and omissions of its agents in *New York Central & Hudson River Railroad v. United States*.²⁹ More specifically, the Court imputed the agent's intent to the corporation,³⁰ thus exposing the

20. 134 F. at 594.

21. *Id.* at 597.

22. *Id.* at 602.

23. *Id.* The court inquired, "[i]s it to be concluded, simply because the given punishment cannot be enforced, that Congress intended to allow corporate carriers by sea to kill their passengers through misconduct that would be a punishable offense if done by a natural person?" *Id.*

24. The court noted that a more reasonable interpretation of the statute was that Congress inadvertently omitted to include punishment for corporations, rather than that it intended to cloak the owners with immunity simply because they were corporations. *Id.*

25. 215 U.S. 50 (1909).

26. See Act of May 9, 1902, ch. 784, Pub. L. No. 57-110, 32 Stat. 193, 197.

27. *Id.* § 6, 32 Stat. at 197.

28. 215 U.S. at 55. Writing for the Court, Mr. Justice Holmes noted:

[I]f we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape.

Id.

29. 212 U.S. 481 (1909).

30. *Id.* at 494. New York Central was charged and convicted of granting rebates to sugar

corporation to criminal liability for those crimes requiring the formulation of intent.³¹ The Court stated that a corporation that profits by the acts of its agents and officers should be punishable because of the intent and knowledge of those agents to whom it has granted authority to act.³² The Court indicated that imputing the agents' knowledge to the corporation comported with public policy and allowed for some measure of control over corporations, which had begun to dominate the business world even in the early 1900s.³³

An analysis of early attempts to prosecute corporations for homicide best demonstrates the statutory barriers to prosecution that existed. In *People v. Rochester Railway & Light Co.*³⁴ a grand jury indicted a utility company for criminal homicide for allegedly installing a gas jet negligently and thus causing the death of an apartment tenant by asphyxiation.³⁵ The New York Court of Appeals first confronted the problem of intent.³⁶ Drawing on the Supreme Court's decision in *New York Central* and the vicarious liability concept from tort law,³⁷ the court held that corporations could commit certain acts of criminal homicide.³⁸ The court next turned to an analysis of the homicide statute, which defined homicide as "the killing of one human being by the act, procurement or omission of another."³⁹ The court concluded that the use of the word "another" in the statute limited liability for commission of the offense to human beings.⁴⁰ The court expressly rejected the contention that the legislature could have meant "another" to refer to a "person," thus possibly encompassing a corporation.⁴¹

The New Jersey Supreme Court in *State v. Lehigh Valley Railroad Co.*⁴²

refineries in violation of the Elkins Act. See Elkins Act, ch. 2564, 34 Stat. 1246 (1907) (current version at 49 U.S.C. §§ 41-43 (1982)). The Court analogized to civil liability, stating that it was going only one step beyond the principle governing civil liability by holding that the act of the agent could be controlled by imputing his act to his employer and then penalizing the corporation. 212 U.S. at 494.

31. 212 U.S. at 494-95.

32. *Id.* at 495.

33. *Id.* Despite its holding, the Court noted that corporations could not commit some crimes because of the very nature of the crimes. *Id.* at 494. The Court failed, however, to elaborate on which crimes it considered corporations incapable of committing.

34. 195 N.Y. 102, 88 N.E. 22 (1909).

35. 88 N.E. at 22.

36. *Id.* at 22-24.

37. The concept of vicarious liability is the imputation of the negligent acts of *A* to *B*, despite *B*'s having played no part in the commission of the act, having done nothing to encourage it, and perhaps even having done all that was possible to prevent it. The imputation arises out of some relationship between *A* and *B*. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 69 (4th ed. 1971); see also Fisse, *supra* note 5, at 1192-94 (discussing the vicarious liability concept as applied to corporate criminal law).

38. 88 N.E. at 24. The court noted: "[W]e have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in homicide" *Id.*

39. N.Y. PENAL CODE § 179, as quoted in 88 N.E. at 24.

40. 88 N.E. at 24. To hold otherwise, the court noted, would "violent[ly] strain" interpretation of criminal statutes. *Id.*

41. *Id.*

42. 90 N.J.L. 372, 103 A. 685 (1917).

overcame the semantic difficulties that had plagued the New York court in *Rochester Railway*. In *Lehigh Valley* a grand jury indicted a railroad corporation and others for criminal manslaughter after some railroad cars overloaded with dynamite exploded and killed a bystander.⁴³ The *Lehigh Valley* court rejected the widely accepted common law definition of manslaughter,⁴⁴ noting that many authorities disagreed as to the proper definition.⁴⁵ Refusing to be constrained by such a narrow definition of homicide, the court adopted a more flexible definition of homicide, which it felt comported with the growing trend to hold corporations criminally liable.⁴⁶ Indicating that the *Rochester Railway* decision exemplified the way in which inflexible construction of statutes stifles the growth and development of the law,⁴⁷ the *Lehigh Valley* court became the first to uphold the indictment of a corporation for criminal homicide.⁴⁸ The railroad pleaded nolo contendere to the charge and paid a \$1,000 fine.⁴⁹

B. Modern Decisions

New Jersey remained the only state to allow corporations to be indicted for criminal homicide until 1974, when New York permitted the indictment of a corporation for criminal homicide. In *People v. Ebasco Services, Inc.*⁵⁰ a grand jury indicted a corporation for criminally negligent homicide after a cofferdam⁵¹ under construction collapsed during assembly, leading to the drowning of two workmen. The New York Court of Appeals had stated in *Rochester Railway* that a grand jury could theoretically indict a corporation for homicide, but that the statute as written in 1909 precluded indictment.⁵² The *Ebasco Services* court, however, dealt with a revised statute.⁵³ The new

43. 103 A. at 686.

44. The common law definition of manslaughter is the killing of one human being by another. *Id.*

45. The court noted that Blackstone defined felonious homicide as "the killing of a human creature, of any age or sex, without justification or excuse." *Id.* at 686 (citing 4 W. BLACKSTONE, COMMENTARIES *188).

46. 103 A. at 686. The court expressly rejected the notion that the definition of "person" should be limited to human beings and noted that the statutory definition included "bodies corporate." *Id.*

47. *Id.* The *Lehigh Valley* court clearly indicated that charging the corporation with negligent homicide did not necessarily entail attributing criminal intention to the corporation. See Bernard, *supra* note 6, at 11; see also P. JAMES, INTRODUCTION TO ENGLISH LAW 184 (1979) (asserting that intention to commit murder will likely never be attributed to corporations); J. SIGLER, UNDERSTANDING CRIMINAL LAW 251 (1981) (asserting that corporations cannot commit premeditated murder, rape, or assault). As the *Ford Motor Co.* and *Six Flags* cases show, however, the criminal law is creeping ever nearer to attributing such intent.

48. Although the *Van Schaik* court allowed an indictment to stand, the indictment was based on the violation of a statute that defined a violation resulting in death as per se manslaughter. See *supra* notes 18-24 and accompanying text for a discussion of the *Van Schaik* case.

49. *State v. Lehigh Valley R.R.*, 92 N.J.L. 261, 106 A. 23, 23 (1919) (second appeal).

50. 77 Misc. 2d 784, 354 N.Y.S.2d 807 (Sup. Ct. 1974).

51. A cofferdam is a temporary boxlike structure that is placed in a river to allow workmen to descend to the river bottom for construction purposes. See Comment, *supra* note 3, at 480 n.154.

52. See *supra* notes 34-41 and accompanying text.

53. N.Y. PENAL LAW §§ 125.00-.60 (McKinney 1975).

statute stated that "[a] person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."⁵⁴ The court noted that the homicide article of the penal code defined "person" as a human being born and alive only when referring to the victim of homicide.⁵⁵ The statute, therefore, did not require that a human being commit the offense.⁵⁶ Turning to the general definition of "person" found in the code, the court held that as to the perpetrators of the offense, "person" could refer to a public or private corporation as well as to a human being.⁵⁷ The court stated that it did not commit any manifest impropriety by allowing the indictment of a corporation for manslaughter.⁵⁸ The court, however, found the indictment defective and dismissed the case.⁵⁹

Indiana became the third state to allow the indictment of corporations for criminal homicide in *State v. Ford Motor Co.*⁶⁰ The case established precedents in two areas of the law, making it especially noteworthy. *Ford Motor Co.* marked the first time that a grand jury indicted a corporation for a criminal offense in a product liability matter.⁶¹ The case also involved the first instance in which a state charged an American corporation with reckless homicide rather than the lesser offense of negligent homicide.⁶² Indiana indicted Ford on three counts of reckless homicide following the burning deaths of three teenage girls after another vehicle struck their Ford Pinto automobile from behind. The state alleged that Ford had knowingly manufactured a defective gas tank and had failed to correct the danger or to warn car owners.⁶³ Ford contended that a corporation could not be indicted for reckless homicide under the Indiana Criminal Code.⁶⁴ The definition of "person" contained in the criminal title, however, included corporations.⁶⁵ Another section of the criminal title further supported the indictment by

54. *Id.* § 125.10, quoted at 354 N.Y.S.2d at 810.

55. 354 N.Y.S.2d at 810-11; see N.Y. PENAL LAW § 125.05[1] (McKinney 1975).

56. 354 N.Y.S.2d at 810-11.

57. *Id.*

58. *Id.* at 811.

59. *Id.* at 812. Even though this case was dismissed, the court's decision clearly indicates that a corporation is indictable on a charge of criminal homicide in New York.

60. No. 5324 (Ind. Sup. Ct., indictment filed Sept. 13, 1978), digested at 47 U.S.L.W. 2178 (1978); see also M. CLINARD & P. YEAGER, CORPORATE CRIME 259-62 (1980) (discussing *Ford Motor Co.* and Pinto liability generally); Comment, *supra* note 3, at 483-84 (analyzing *Ford Motor Co.*).

61. See M. CLINARD & P. YEAGER, *supra* note 60, at 261. The authors note that although the maximum penalty that the court could impose was relatively small (\$30,000), Ford spent an estimated \$1 million to defend the case, fearing that a conviction would lead to greater liability in subsequent civil suits. *Id.*

62. See Bernard, *supra* note 6, at 12; Comment, *supra* note 3, at 465; Note, *supra* note 3, at 911.

63. See 47 U.S.L.W. 2514, 2515 (1978). In the text of his denial of the motion to dismiss, the judge stated: "[I]t is alleged that the defendant did recklessly authorize and approve the design, and did recklessly design and manufacture the automobile, and the indictment then charges that the defendant permitted said automobile to remain upon the highways and byways of the county." *Id.*

64. *Id.* Ford also alleged the constitutional defenses of lack of fair notice, ex post facto, and federal preemption.

65. IND. CODE ANN. § 35-41-1-2 (Burns 1979) defines "person" to include "a human being, corporation, partnership, unincorporated association, or government entity."

stating that corporations are subject to prosecution for any offense.⁶⁶ The title also provided for the levying of fines, costs, or forfeiture to punish a corporation convicted of any offense.⁶⁷ The statutory problems that had faced other courts did not, therefore, present any problem for the *Ford Motor Co.* court.

The highly publicized trial of the *Ford Motor Co.* case lasted ten weeks⁶⁸ and ended with a jury acquittal on all three counts.⁶⁹ The importance of the trial, however, has not gone unnoticed. Even before the case actually went to trial, legal commentary addressed its implications.⁷⁰ After the trial some observers argued that, despite the acquittal, the case put corporate America on notice that courts will hold them criminally liable for their actions.⁷¹ Other writers, however, noted that a large corporation is able to wield considerable power in denying accusations against it, as Ford did in the Pinto case.⁷² While observers, therefore, may disagree on the type of impact the case had, they do appear to agree that because of its precedential value the case did have a tremendous impact on American corporate criminal jurisprudence.⁷³

Since the *Ford Motor Co.* trial four states have dealt with questions of corporate criminal liability for homicide. Kentucky allowed the indictment of a corporation for second degree manslaughter in *Commonwealth v. Fortner LP Gas Co.*⁷⁴ The court relied upon a statutory definition of "person" that included corporations⁷⁵ as well as provisions dealing with corporate

66. *Id.* § 35-41-2-3(a).

67. *Id.* § 35-41-2-3(b).

68. M. CLINARD & P. YEAGER, *supra* note 60, at 261; Comment, *supra* note 3, at 484; Nat'l L.J., Mar. 24, 1980, at 2, col. 1.

69. M. CLINARD & P. YEAGER, *supra* note 60, at 261. Professors Clinard and Yeager note that during the trial the court disallowed numerous Ford documents that showed that Ford knew of the defect because the documents pertained to model years other than 1973, the year model in which the girls burned to death. *Id.* Ford had pursued an internal cost/benefit analysis and concluded that the \$11 safety improvement that would make the Pinto less likely to burn would cost more than the benefit derived. *Id.* at 260. As of 1977, one commentator estimated that 500 burn deaths had occurred because of Pinto gas tank ruptures. In many of these accidents no other serious injury occurred. See generally Dowie, *How Ford Put Two Million Firetraps on Wheels*, 23 BUS. & SOC. REV. 46 (1977) (analyzing the circumstances surrounding Ford's decision to delay recalling the Pinto).

70. See Note, *supra* note 3.

71. See M. CLINARD & P. YEAGER, *supra* note 60, at 261; Comment, *supra* note 3, at 484.

72. See M. ERMANN & R. LUNDMAN, CORPORATE DEVIANCE 17-18 (1982).

73. See M. CLINARD & P. YEAGER, *supra* note 60, at 261-62; Comment, *supra* note 3, at 484; Note *supra* note 3, at 911.

74. 610 S.W.2d 941 (Ky. Ct. App. 1980). The Kentucky Court of Appeals had dealt with the question once before in *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459 (1913). In that case the court held that corporations might be liable for lesser degrees of homicide if the legislature plainly expressed such an intent and provided appropriate punishment. 153 S.W. at 463. The court, however, could not find such an intent in the applicable statute as then written, stating that to hold that "person" included corporations would be giving the word a tortured meaning. *Id.* at 461-62. The court in *Fortner* was dealing with an updated statute.

75. KY. REV. STAT. § 500.080(12) (1975) states: "'Person' means human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a government authority."

finest and liability⁷⁶ in upholding the indictment of Fortner.

Pennsylvania and California also have recently allowed the prosecution of corporations for criminal homicide. In *Commonwealth v. McIlwain School Bus Lines*⁷⁷ a Pennsylvania superior court reversed the lower court's quashing of an information⁷⁸ charging a corporation with criminal liability in the death of a child run over by the corporation's school bus.⁷⁹ The company had failed to equip the bus with properly adjusted mirrors that would have enabled the driver to see the child after she had left the bus.⁸⁰ The defendant asserted all of the classic defenses to prosecution of a corporation.⁸¹ Overruling a 1900 precedent, the court allowed the indictment to stand.⁸²

A California court of appeals also upheld the indictment of a corporation for criminal homicide in *Granite Construction Co. v. Superior Court*.⁸³ The case arose after seven construction workers were killed in an accident at a power plant construction site. After examining decisions from California and other jurisdictions, the court followed its interpretation of the applicable statute's plain meaning and allowed the indictment for manslaughter.⁸⁴ The court rejected a due process argument raised by the corporation.⁸⁵

Texas is the only state that has rejected the concept of corporate criminal liability for homicide in recent years. In *Vaughan & Sons, Inc. v. State*⁸⁶ a Texas court of appeals dismissed an information charging a corporation with

76. The legislature had included a section providing for fines as penalties against corporations. *Id.* § 534.050. The maximum fine for a felony is \$20,000 or double the amount of the defendant's gain from the offense, whichever is greater. *Id.* The legislature also had written a section detailing corporate liability. *Id.* § 502.050.

77. 283 Pa. Super. 1, 423 A.2d 413 (1980).

78. An information is an accusation exhibited against some person without the benefit of an indictment by a grand jury. *Salvail v. Sharkey*, 108 R.I. 63, 271 A.2d 814, 817 (1970).

79. The charge was homicide by vehicle, which occurs when a person "unintentionally causes the death of another person while engaged in the violation of any law . . . applying to the operation or use of a vehicle . . . when the violation is the cause of death." 75 PA. CONS. STAT. ANN. § 3732 (Purdon 1977). A new version of the statute is the same for the relevant offense. *See id.* § 3732 (Purdon Supp. 1984-1985).

80. The state requires such mirrors pursuant to a statute. *See id.* § 4552(e) (Purdon 1977).

81. The corporation asserted that by definition only a natural person could commit the offense. 423 A.2d at 413. The lower court agreed, noting that the legislature had written the statute using the term "any person *who* . . . causes the death of another." *Id.* The lower court stated that "who" refers to humans and "which" refers to corporations, but the appellate court expressly rejected this reasoning. *Id.* at 420. The lower court also asserted that no suitable punishment could be imposed. The appellate court also rejected this reasoning, citing *Van Schaik* and other decisions. *Id.* at 421-23.

82. *Id.* at 418-19. The court overruled *Commonwealth v. Punxsutawney St. Passenger Ry.*, 24 Pa. C. 25 (1900), in which the court refused to hold a corporation liable for assault in the ejection of a passenger. *See Comment, supra* note 3, at 468-70.

83. 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983).

84. 197 Cal. Rptr. at 6-9. The court noted that when "a statute's language is clear, its plain meaning should be followed." *Id.* at 6. The California Penal Code defines "person" so as to include corporations. CAL. PENAL CODE § 7 (West 1970). Manslaughter is defined as the unlawful killing of a human being without malice. *Id.* § 192. California also has a catch-all statute that provides for punishment of corporations. *Id.* § 672. In light of these statutes, the court held that the plain meaning rule allows the indictment of corporations for manslaughter. 197 Cal. Rptr. at 9.

85. 197 Cal. Rptr. at 9.

86. 649 S.W.2d 677, 679 (Tex. App.—Texarkana 1983, pet. granted). The case arose

criminally negligent homicide. The court stated that the Texas legislature could not have intended to include corporations within the class of "persons" capable of forming the requisite intent to commit homicide.⁸⁷ The statute, however, described homicide as the killing of an "individual" by a "person."⁸⁸ The court noted that although "person" is defined to include corporations,⁸⁹ giving the statute its plain meaning would allow the state to prosecute corporations for every crime that a person could commit,⁹⁰ including degrees of homicide requiring the culpable mental state of intentionally or knowingly.⁹¹ Noting the infeasibility of attributing such a mental state to a corporation, the court refused to change the indictable parties based upon the state of culpability.⁹² The court warned that unless the legislature clearly evinces a desire to so prosecute corporations, courts should "make haste slowly" in holding corporations criminally liable for homicide.⁹³

The court of appeals opinion ignored changes that the legislature made when it revised the Texas Penal Code in 1974.⁹⁴ As noted in the practice commentary to section 19.01 of the penal code, throughout the code the term "another" is used to refer to the victim of the offense.⁹⁵ In the homicide chapter, however, "individual" is substituted for "another."⁹⁶ "Individual" is defined as a human being who is born and alive.⁹⁷ If the legislature had intended only human beings to be capable of committing homicide, it could have defined homicide as the killing of one individual by another or as the killing of an individual by an individual. The legislature did not choose to do this, however, opting instead to define homicide as the killing of an individual (human being) by a person (legal or natural).⁹⁸ The legislature exhibited an abundance of caution in its definition. The use of an alternative definition, that is, the killing of one human or person by another, had caused

because of the deaths of two persons in a traffic accident allegedly caused by two of the corporation's employees.

87. *Id.* at 678-79.

88. TEX. PENAL CODE ANN. § 19.01 (Vernon 1974). The section states that "[a] person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual." *Id.* Another section defines criminally negligent homicide as causing the death of an individual by criminal negligence. *Id.* § 19.07(a).

89. *See id.* § 1.07(a)(27).

90. 649 S.W.2d at 678.

91. *Id.* at 679.

92. *Id.* at 678-79. The court noted that the statute's wording does not indicate that the degree of culpability determines the type of individual capable of committing homicide. *Id.*

93. *Id.* at 679.

94. Texas was the last state to delineate a corporation's criminal responsibility. *See* Anderson, *Corporate Criminal Liability for Specific Intent Crimes and Offenses of Criminal Negligence—The Direction of Texas Law*, 15 ST. MARY'S L.J. 231, 232 (1984). The author noted that a 1968 law review article might have spurred the legislature into action. *Id.* at 232-33; *see* Hamilton, *Corporate Criminal Liability in Texas*, 47 TEX. L. REV. 60 (1968). Professor Hamilton authored a proposed revision of the Texas Penal Code that he published in the article. *See id.* at 77-85. The legislature adopted several of Professor Hamilton's proposals. Anderson, *supra*, at 233 n.9.

95. TEX. PENAL CODE ANN. § 19.01 comment (Vernon 1974).

96. *Id.*

97. *Id.* § 1.07.

98. *See supra* note 88.

some semantic problems in other jurisdictions.⁹⁹ Texas lawmakers therefore avoided an alternative definition. The legislators may have also been aware that defining homicide as the killing of one person by another might allow the state to charge one corporation with the "death" of another corporation. The court of appeals did not consider any of these possibilities, asking instead for a statute that plainly states that a corporation may be charged with homicide.¹⁰⁰ The *Vaughan* case is currently pending before the Texas Court of Criminal Appeals on the state's appeal.

C. *New Developments: Six Flags Indicted*

On September 14, 1984, a New Jersey grand jury indicted the Six Flags Corporation and two of its officers in connection with the deaths of eight youths killed in a fire at one of the corporation's amusement parks in New Jersey.¹⁰¹ The fire occurred in the Haunted Castle amusement at Great Adventure Park. The Six Flags Corporation and Great Adventure, Incorporated face charges of aggravated manslaughter, the most severe charge that the state may bring against a corporation under New Jersey law.¹⁰² The grand jury also charged the individual defendants with manslaughter.¹⁰³ The indictment alleges that Six Flags recklessly caused the deaths of the eight youths and showed extreme indifference to human life.¹⁰⁴ The grand jury found that the attraction had been unsafe since it opened in 1978.¹⁰⁵ The fire began when an unidentified youth accidentally touched his cigarette lighter to a foam rubber padded wall inside the Haunted Castle. The grand jury believed that the use of the highly flammable foam rubber padding indicated the corporation's reckless disregard for human life, thus warranting the aggravated manslaughter charge.¹⁰⁶ In addition to the criminal indictment, Six Flags faces a number of civil lawsuits arising out of the incident.¹⁰⁷

If the *Six Flags* case goes to trial, it will mark only the second time that a state has prosecuted a corporation for any degree of homicide requiring a mens rea higher than negligence. No jury has ever convicted a corporation of any offense greater than negligent homicide.¹⁰⁸ If the *Six Flags* jury returns a guilty verdict, the case will have a tremendous impact on American corporate criminal jurisprudence. Even if the jury convicts Six Flags, however, a question still remains as to the efficacy of corporate criminal liability.

99. See *supra* notes 34-49 and accompanying text.

100. 649 S.W.2d at 679.

101. State v. Six Flags Corp., No. 65,084 (Ocean City, N.J. Super. Ct. Law Div., indictment filed Sept. 14, 1984); see Wall St. J., Sept. 17, 1984, at 8, col. 1 (Sw. ed.) (report of the indictment).

102. Wall St. J., Sept. 17, 1984, at 8, col. 1 (Sw. ed.).

103. *Id.* The Six Flags Corp. termed the indictment " 'particularly inappropriate' in citing individual employees." *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. The only other corporation against which a state has brought such charges, Ford Motor Co., received an acquittal from the jury. See *supra* notes 60-73 and accompanying text.

II. THE EFFICACY OF CORPORATE CRIMINAL LIABILITY

The cases dealing with corporate criminal liability for homicide provide an excellent background against which to analyze the efficacy of corporate criminal liability generally. Some observers believe that holding corporations criminally liable serves to deter corporations from engaging in criminal activities.¹⁰⁹ Others disagree, however, and assert that attempting to punish a fictional entity as a criminal will not serve to deter criminal behavior in any way.¹¹⁰ The problem with corporate criminal liability, however viewed, arises out of the collision of two legal concepts that are by their very nature ill at ease with each other. The concept of a fictional economic entity simply does not mesh with the four goals of criminal law: deterrence, retribution, incapacitation, and rehabilitation.¹¹¹ An analysis of these four goals as they apply to corporate criminal liability is necessary to any assessment of the efficacy of that liability.

A. Deterrence

Observers historically have disagreed as to which of the enumerated goals of criminal law the state seeks in holding corporations criminally liable.¹¹² Observers almost unanimously agree, however, that the state seeks deterrence in every case.¹¹³ In fact, some believe that deterrence is the only goal of criminal law applicable to corporations.¹¹⁴ While observers agree that deterrence is a goal of corporate criminal liability, some question still remains whether that goal is achieved.¹¹⁵ The courts that have convicted cor-

109. See, e.g., Elkins, *supra* note 5, at 129 (supporting corporate criminal liability for the social good); Fisse, *supra* note 5, at 1243-46 (calling for revisions to make criminal liability for corporations more effective); Note, *supra* note 3, at 923-24 (absent potential criminal responsibility the value of human life is reduced to a mere cost/benefit analysis).

110. See, e.g., Comment, *supra* note 3, at 491-92 (questioning the extension of criminal law to a fictional body); Comment, *Economic Inefficiency*, *supra* note 5, at 582 (asserting that private remedies are superior to criminal remedies because of inefficiency of criminal remedies); Comment, *Fiction Extended Too Far?*, *supra* note 5, at 125-26 (supporting civil remedies as a substitute for criminal remedies).

111. See W. LAFAYE & A. SCOTT, *supra* note 15, § 5. The authors list education as a separate goal. This Comment, however, will subsume education under the deterrence heading.

112. Compare *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1365-75 (1979) [hereinafter cited as *Developments in the Law*] (noting that the basic goal of corporate criminal liability is deterrence and thus the civil system is better equipped to handle corporations through fines), with Fisse, *supra* note 5, at 1147, 1244 (arguing that the goals are deterrence and retribution, with rehabilitation and incapacitation as subgoals; the criminal law is better suited to meet these goals).

113. See *Developments in the Law*, *supra* note 112, at 1235-36 nn.16-20, 23-25.

114. *Id.* The author notes that:

In justifying the imposition of criminal sanctions for illicit corporate activity, commentators most often cite deterrence as the primary rationale. They reason that retribution cannot be a concern of statutes dealing with activities which are not in and of themselves morally wrong Similarly, it is argued, society is not concerned with incapacitating or rehabilitating those who might well be pillars of the community had they not violated a technical economic regulation.

Id. at 1235 (footnotes omitted).

115. See Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 918 (asserting that since most corporate offenders are recidivists, clearly the punishments meted

porations often have been lenient in meting out punishment.¹¹⁶ While a fine may deter a small corporation, it will not likely deter a large corporation.¹¹⁷ Fines large enough to affect large corporations, however, could run into strong constitutional and judicial disfavor. A fine that is large enough to deter a large corporation would likely face a challenge as an unconstitutionally excessive fine.¹¹⁸ Such fines can also have an adverse impact on corporate motivation and the free enterprise system.¹¹⁹ Statutes often limit fines to nominal amounts for many crimes.¹²⁰ In *McIlwain Bus Lines*,¹²¹ for example, the court levied a fine of only \$10,000, the maximum amount that a corporation could be fined for negligent homicide.¹²² The proper method of calculating profit fines also presents courts with a problem. A Texas statute provides that the courts may fine a corporation up to double the amount of

out serve neither to deter nor to rehabilitate); see also *Developments in the Law*, *supra* note 112, at 1365-75 (evaluating deterrence and suggesting alternative solutions).

116. See M. CLINARD & P. YEAGER, *supra* note 60, at 316 & apps. F-I. An analysis of the data in the authors' appendix H shows that courts use monetary penalties and nonmonetary criminal penalties sparingly as compared to other sanctions.

117. See *id.* at 316. Often statutory limitations keep fines low. As the authors note, the fines "are ludicrously small relative to the corporations' assets, sales, and profits." *Id.* These low penalties allow corporations to include penalties in their cost/benefit analyses. "Corporate profit, not morality, is the ultimate test of effectiveness. Bankruptcy represents the ultimate failure." *Id.* at 273.

118. See U.S. CONST. amend. VIII, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." A fine large enough to deter a supercorporation such as General Motors could entail a penalty of billions of dollars. The courts might question the propriety of such fines in light of the eighth amendment. See also Note, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 *FORDHAM L. REV.* 637, 639 (1984) (noting that excessive fines might face a challenge as cruel and unusual punishment).

119. These impacts can be examined in light of what Professor John Coffee has called the "deterrence trap" and what Professor Fisse calls the "retribution trap." See Coffee, "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 *MICH. L. REV.* 386, 389-93 (1981); Fisse, *supra* note 5, at 1218. The concept of the deterrence trap arises out of the theory that one committing a crime will only be deterred if the expected punishment cost of the action exceeds the gain. See Coffee, *supra*, at 389. The expected penalty is calculated by discounting the expected profit by the risk of apprehension and conviction factor. If the expected profit is \$1 million and the risk of apprehension is 25%, then the expected penalty must equal or exceed \$4 million in order to deter the corporation. *Id.* The dilemma arises when the corporation's resources are not adequate to satisfy such a penalty. If the expected punishment cost exceeds the corporation's "wealth boundary," adequate deterrence will not be achieved since the expected penalty will not equal or exceed the expected gain. *Id.* at 390. The expected gain is the expected profit divided by the risk of loss, leading to a \$4 million expected gain figure in the above example. By inference, then, if courts impose fines large enough to deter certain corporate actions, bankruptcy and its attendant impacts may ensue. Note, however, that Professor Coffee bases the deterrence trap concept on purely economic models. If the corporation involved is risk-averse, then it will likely choose to pursue a legal course of action that avoids the possibility of bankruptcy, despite the fact that the expected gain is greater than the expected penalty.

Professor Fisse notes that the same problem occurs with retribution. Fisse, *supra* note 5, at 1218. The retributive fine or sanction levied based on the concept of "justice as fairness" may exceed the corporation's ability to pay, thus bankrupting the corporation. *Id.*

120. See *supra* note 117; see also Comment, *Fiction Extended Too Far?*, *supra* note 5, at 118-19 (questioning the deterrent capability of nominal fines).

121. See *supra* notes 77-82 and accompanying text.

122. See 18 PA. CONS. STAT. ANN. § 1101 (Purdon 1983). The statute limits the fine for a misdemeanor of the first degree to \$10,000.

profit that the corporation earned through its illegal conduct.¹²³ In the case of a national corporation, however, a determination of the amount of the corporation's profit that was made within the state may be very difficult. Texas has not yet invoked this statute in a criminal prosecution.

If fines cannot serve as an effective deterrent against corporate criminal activity, then courts must search for nonmonetary means of punishing corporations. Courts could impose probation upon the corporation, requiring certain internal restructuring and the donation of time to community projects.¹²⁴ Again, however, problems arise. If a court mandates the internal restructuring of a corporation, some means for assuring that the corporation follows the court's orders is necessary. The court in effect would have to become a corporate watchdog, constantly monitoring those corporations acting under court orders. Overburdened courts cannot place themselves in such an untenable position.

Some courts have required the donation of time to community projects as an alternative punishment.¹²⁵ The use of such measures, however, raises some new questions.¹²⁶ Problems can arise as to: (1) judicial favoritism toward certain groups or projects;¹²⁷ (2) establishment clause violations if the group being aided has any religious affiliation;¹²⁸ and (3) enforcement of any requirements other than man-hour or dollar requirements.¹²⁹ Opponents of corporate criminal liability raise questions about whether such community involvement projects are really punishment.¹³⁰ Unless the court requires a corporation to donate a large amount of time or money, the corporation may view such projects as simply the cost of doing business.¹³¹

123. See TEX. PENAL CODE ANN. § 12.51(c) (Vernon Supp. 1984). Courts may apply the profit fine in those cases arising out of personal injury, property damage, or other losses caused by the corporation. *Id.*

124. See M. CLINARD & P. YEAGER, *supra* note 60, at 305-10. See generally Note, *supra* note 118, at 641-44 (analyzing the use of forced organizational reform as a corporate sanction).

125. See *United States v. Arthur*, 602 F.2d 660, 664 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979) (upholding lower court's order that the defendant, who had misapplied bank funds, perform two years of charitable work); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1164-65 (S.D.N.Y. 1983) (bakeries required to deliver baked goods to community organizations as part of probation).

126. See Note, *supra* note 118, at 648-52 (discussing nonmonetary probation). The author concludes that "[c]ourts should not be eager to wield their discretionary powers in such an uncharted area." *Id.* at 662.

127. *Id.* at 655-56.

128. *Id.* at 651-52. The establishment clause forbids government support of religious groups. U.S. CONST. amend. I, cl. 1.

129. The court can sentence a corporation to serve a certain number of hours aiding a charitable group as a probation term, but the court cannot control the quality of work or effort put into those hours. A condition requiring that a corporation furnish an executive to perform the public service is mostly externalized, and the effect, therefore, does not reach the corporation. See Note, *supra* note 118, at 654.

130. See M. CLINARD & P. YEAGER, *supra* note 60, at 292-94 (examining some community service sentences and concluding that they lack any real deterrent impact).

131. Note, *supra* note 118, at 639. When probation conditions require the expenditure of money or hours, the same can be said of probation. Some commentators, however, have criticized the view of the corporation as purely a profit maximizer. See Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 460 (1980).

Some observers argue that the only way really to deter illegal corporate behavior is to hold individuals responsible rather than the corporation.¹³² Problems arise, however, from such an assertion. Courts often encounter extreme difficulty in attempting to identify with precision the person within the corporation responsible for any given action.¹³³ In many of today's large corporations this difficulty could be especially acute because of multiple offices and levels of management that make tracing any act to one individual impossible.

Aside from the identification problem, imposing liability on corporate officials is not efficacious for several other reasons. The courts often turn a sympathetic ear to corporate officers convicted of illegal behavior.¹³⁴ Both judges and jurors tend to view a businessman as a respectable citizen not deserving of condemnation.¹³⁵ In those cases in which the state charges both the individual and the corporation, juries tend to convict the corporation and acquit the individual.¹³⁶ Jurors often sympathize with an officer who acted for the good of the corporation and view the officer as a victim of the profit-making pressures inherent in the corporate world.¹³⁷ The officer also does not always suffer a damaged reputation in the eyes of his peers from a criminal conviction. One observer noted that a difference exists between the business code and the criminal code, and a businessman loses prestige only by violating both.¹³⁸

When attempting to hold a corporate officer liable for the acts of those subject to the officer's control, courts require a showing that the employee acted within the scope of his employment and on behalf of the corporation.¹³⁹ Even if the prosecution satisfies these two elements, the officer, and the corporation for that matter, can still assert two defenses. The officer may assert that he exercised due diligence in overseeing the employee's activ-

132. See, e.g., *Developments in the Law*, *supra* note 112, at 1375 (concluding that criminal sanctions effectively apply to individuals only); Comment, *Fiction Extended Too Far?*, *supra* note 5, at 122-26 (concluding that individual criminal liability is more effective deterrent); Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 927 (concluding that threat of jail sentence for individuals will better serve to deter corporate illegality).

133. See Comment, *Fiction Extended Too Far?*, *supra* note 5, at 116; Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 922.

134. See M. CLINARD & P. YEAGER, *supra* note 60, at 286-88. The professors note that what executives fear the most is not conviction, but imprisonment. Judges, however, shrink from the notion of sending a white collar criminal to jail. *Id.* at 288.

135. *Id.* at 288-92; see also Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 919 (public regards businessman as a respectable citizen).

136. See Comment, *Fiction Extended Too Far?*, *supra* note 5, at 120-21. The author notes that in *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941), the jury convicted the corporation, but acquitted the individual defendants. The court stated, "[W]e cannot understand how the jury could have acquitted all of the individual defendants. As a matter of logic, reconciliation between the verdict of guilt and verdict of acquittal is impossible." *Id.* at 411, quoted in Comment, *Fiction Extended Too Far?*, *supra* note 5, at 120. The acquittal of the individual does not absolve the corporation and vice versa. Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 911.

137. See Comment, *Fiction Extended Too Far?*, *supra* note 5, at 121.

138. See Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 918.

139. Comment, *Fiction Extended Too Far?*, *supra* note 5, at 108-09.

ities.¹⁴⁰ Unless the crime is regulatory or strict-liability, this defense is exculpatory if proven.¹⁴¹ The officer may also assert the defense of ultra vires.¹⁴² Under this defense if the corporate officers have not participated in or in any way encouraged illegal conduct, then the employee has automatically acted outside the scope of employment.¹⁴³ The defendant can argue that since the corporation's charter controls its activities, any activities carried on outside of the charter are ultra vires.¹⁴⁴ Courts once widely accepted this theory, but it has fallen into disrepute today in most jurisdictions that have addressed the question.¹⁴⁵

One other theory of punishment that addresses the individual and the corporation is that of occupational disqualification. Under this theory the court bars the individual committing an illegal act from participating in the activity that led to the illegal action. At least two recent observers have advocated the use of occupational disqualification as a means of deterring corporate behavior.¹⁴⁶ They argue that disqualification as a punishment bears a reasonable relationship to the criminal act because it bars the individual from pursuing the occupation of his choice.¹⁴⁷ The loss of wages inherent in such a punishment would also serve as the equivalent of a fine.¹⁴⁸ Judges unwilling to incarcerate white collar criminals may be willing to use occupational disqualification as an alternative.¹⁴⁹

The arguments made by these observers, however, assume too much. Occupational disqualification could fall prey to the problems inherent in any attempt to deter corporate criminal behavior. First, in order to disqualify the guilty individual, the prosecution and court must identify the person who committed the act. As noted previously, this identification is virtually impossible in most large corporations. The brunt of disqualification would, therefore, very likely fall on small corporations. This fact mitigates against one observer's claim that disqualification might lead to more even-handed sentencing of corporate offenders.¹⁵⁰

The belief that judges would favor disqualification over incarceration is also ill-founded. One of the main reasons that courts do not punish individ-

140. *Id.* at 109.

141. *See id.* *See generally* Comment, *Limits on Individual Accountability for Corporate Crimes*, 67 MARQ. L. REV. 604, 610-18 (1984) (discussing strict liability offenses).

142. Comment, *Fiction Extended Too Far?*, *supra* note 5, at 111-12.

143. *Id.*

144. *Id.*

145. *See* Egan v. United States, 137 F.2d 369, 378 (8th Cir. 1943) (malfeasance of corporate agents is not ultra vires); United States v. Mirror Lake Golf & Country Club, Inc., 232 F. Supp. 167, 172 (W.D. Mo. 1964) ("It is horn-book law that a corporation may be held to be criminally liable even though its acts are ultra vires.").

146. *See* Comment, *Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation*, 73 J. CRIM. L. & CRIMINOLOGY 604 (1982) [hereinafter cited as Comment, *Occupational Disqualification*]; Comment, *supra* note 141, at 626-30.

147. *See* Comment, *Occupational Disqualification*, *supra* note 146, at 604-05; Comment, *supra* note 141, at 627.

148. Comment, *Occupational Disqualification*, *supra* note 146, at 615; Comment, *supra* note 141, at 627.

149. *See* Comment, *supra* note 141, at 627.

150. *See id.* at 629.

uals is that the individuals are not considered worthy of condemnation.¹⁵¹ In order to apply disqualification, the court must convict the individual involved. Juries, however, often sympathize with individuals charged with corporate illegality.¹⁵² Those cases that have produced criminal convictions for individuals have rarely involved sentences of more than thirty days or fines that amount to anything of consequence.¹⁵³ If the courts intend occupational disqualification to have any deterrent effect at all, they must impose disqualifications with impacts reaching farther and punishing more severely than the sentences and fines that the judicial system is already hesitant to mete out.

Occupational disqualification also involves a definitional problem. If a court convicts the chief executive officer of an automobile manufacturing corporation of a criminal offense, a question may arise as to whether occupational disqualification precludes his acting as the CEO of any corporation or just of an automobile manufacturing corporation. Title changes easily circumvent the former, while the demand for a top CEO in any industry makes the latter ineffective. A penalty structured so as to preclude a corporate employee from pursuing the same duties would also be burdensome and unduly vague. An analysis of the cases addressing corporate criminal liability for homicide highlights the definitional problem inherent in disqualification. In *Lehigh Valley*,¹⁵⁴ for instance, if the court directed disqualification at the employee who overloaded the boxcar with explosives, a problem arises. The railroad employed the worker as a freight loader at the time of his allegedly criminal behavior. The court would have to decide whether occupational disqualification required that the employee be forbidden from working on any railroad or that he be forbidden from loading any freight. If the state charged the employee's supervisor or a corporate officer with an act that the employee committed, the job definition problems facing the court would be the same.

One other aspect of corporate criminal liability that proponents often cite as an effective deterrent is the public enmity and moral stigma attached to any criminal conviction.¹⁵⁵ The deterrent effect of this negative publicity, however, is highly questionable. As previously stated, courts subject corporate criminals to an entirely different set of standards than they apply to ordinary criminals. While many Americans view corporate criminals as

151. See M. CLINARD & P. YEAGER, *supra* note 60, at 288-89; Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 918-19.

152. See *supra* notes 134-37 and accompanying text.

153. See M. ERMANN & R. LUNDMAN, *supra* note 72, at 168. The authors also note that a study by noted authority Marshall B. Clinard indicated that only 1.5% of all enforcement efforts in 1975 and 1976 produced conviction of a corporate officer for failure to carry out the legal duties of the corporation. *Id.*; see also *id.* at 170-71 (table examining outcome of illegal campaign contribution investigation of 1973-74).

154. See *supra* notes 42-49 and accompanying text.

155. See, e.g., M. CLINARD & P. YEAGER, *supra* note 60, at 318-22 (advocating the use of publicity as a deterrent); Fisse, *supra* note 5, at 1146-47 (asserting that other commentators fail to take notice of deterrent value resulting from the social stigma of conviction); Note, *supra* note 3, at 923 (asserting that simple cost analysis will fail when potential public animosity is added to the equation).

more worthy of indignation than burglars,¹⁵⁶ this view seldom if ever emerges at trial.¹⁵⁷ Certain sociological factors come into play when a court tries a corporate criminal. Juries may view the individual as having created sufficient benefits to overcome the harm that he has caused.¹⁵⁸ Jurors may also view corporate executives as persons with whom they can, or wish they could, identify. Even if the courts convict a corporation of a major crime, public perception seldom changes. Between 1970 and 1980, 121 Fortune 500 companies were convicted of major crimes or illegal acts resulting in heavy fines.¹⁵⁹ Most of these corporations rank among the upper echelon of the Fortune 500,¹⁶⁰ and none has suffered any great loss due to negative publicity.¹⁶¹ For example, despite Ford's acquittal on reckless homicide charges, a number of decisions have held the company liable for damages in cases involving the Pinto.¹⁶² Even during the trial, however, people continued to drive and even buy Pintos. Ford remains one of the largest corporations in America.

The opponents of corporate criminal liability have urged that the fine falls upon the stockholders, who are twice removed from the wrongdoer.¹⁶³ These observers argue that since criminal liability punishes innocent stockholders for deeds over which they had no control, civil liability more appropriately deters unwanted corporate behavior.¹⁶⁴ The monetary expense of civil liability, however, is often much higher than the penalties that criminal law imposes.¹⁶⁵ Juries often feel the need to award high punitive damages as a means of punishing the corporation.¹⁶⁶ The expense of civil penalties falls

156. See M. CLINARD, *CORPORATE ETHICS AND CRIME* 14-17 (1983). Professor Clinard notes that public opinion polls showed a drop in confidence in the heads of large corporations from 55% in 1965 to 15% in 1975. He states that "[t]oday, the public regards corporate crime as a serious offense." *Id.* at 16. The public regards corporate offenses equal to or more serious than ordinary crimes, such as burglary or robbery. *Id.*; see also M. ERMANN & R. LUNDMAN, *supra* note 72, at 173-74 (discussing opinion polls and jury behavior).

157. M. ERMANN & R. LUNDMAN, *supra* note 72, at 174.

158. See M. CLINARD & P. YEAGER, *supra* note 60, at 290-91; Comment, *Fiction Extended Too Far?*, *supra* note 5, at 120-21.

159. See M. CLINARD, *supra* note 156, at 15.

160. *Id.*

161. See M. CLINARD & P. YEAGER, *supra* note 60, at 321. The corporations often react to negative publicity by launching extensive counterpublicity campaigns. *Id.*

162. The largest of the civil suits involved a plaintiff who was severely burned when a Pinto gas tank exploded after a rear-end collision. See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). The jury awarded a verdict of \$127,841,000, which included \$125,000,000 in punitive damages. The trial court refused Ford's motion for a new trial only after the plaintiffs agreed to a \$121,500,000 remittitur. 174 Cal. Rptr. at 358. The appellate court upheld the reduced verdict. *Id.* at 391.

163. See Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 920; Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 42 (1957).

164. See Comment, *Is Corporate Criminal Liability Really Necessary?*, *supra* note 5, at 920-28.

165. For example, the jury award in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), was much higher than any monetary criminal penalty. See *supra* note 162; see also Frank, *Trends in Million-Dollar Verdicts*, A.B.A. J., Sept. 1984, at 52 (discussing the increasing frequency of multi-million dollar verdicts); *Union Carbide Fights for Its Life*, *supra* note 5, at 56 (charting the huge price tag in recent liability cases).

166. See *supra* note 162; *Durrill v. Ford Motor Co.*, No. 79-3203 (Dist. Ct. of Nueces

just as heavily upon the stockholders as does a criminal fine. In either case the money paid out will very likely end up being passed on to the public through higher prices, and therefore, both civil and criminal liability may be inappropriate as a deterrent.

B. Incapacitation and Rehabilitation

At first sight the concepts of incapacitation and rehabilitation appear to have little to do with corporate criminal liability. Both concepts can be considered, however, as subgoals of deterrence and thereby retain a degree of viability in dealing with corporate criminal liability.¹⁶⁷ Only as subgoals of deterrence, however, do incapacitation and rehabilitation arguably have any useful application to corporate criminal law.¹⁶⁸ Incapacitation might also fit within the concept of retribution,¹⁶⁹ although its greatest benefit to society may be as a means of deterrence.

Incapacitation is often considered synonymous with incarceration, but other means of incapacitation can be applied to corporations. The ultimate form of incapacitation, the death penalty for corporations, is revocation of the corporate charter.¹⁷⁰ Courts seldom, if ever, have used this extreme measure.¹⁷¹ Another means of incapacitation courts can impose is corporate probation.¹⁷² Probation for corporations can take many forms, both monetary and nonmonetary.¹⁷³ One problem inherent in using probation, however, is the lack of a judicial system designed to monitor probation. While a corporation may be assigned to report to a probation officer, the multi-layered structure of many corporations may make ascertainment of violations of some probation conditions impossible. Donative requirements are easily monitored, but probation conditions requiring internal restructuring and policy changes may immerse probation officers in a time-consuming

County, 28th Judicial Dist. of Texas, Nov. 22, 1983), *discussed in* Nat'l L.J., Dec. 12, 1983, at 6, Sept. 4, 1984, at 10 (jury awarded \$100 million in punitive damages).

167. See Fisse, *supra* note 5, at 1159.

168. *Id.*

169. See *infra* notes 177-89 and accompanying text.

170. Texas law provides a good example. The Texas Legislature has provided for involuntary dissolution or revocation of the corporate charter on suit of the attorney general following conviction for a felony. See TEX. BUS. CORP. ACT ANN. art. 7.01 (Vernon 1980) (involuntary dissolution); *id.* art. 8.16 (revocation of corporate charter).

171. For example, no Texas court has used involuntary dissolution or revocation of the corporate charter in a criminal setting.

172. See, e.g., *United States v. William Anderson Co.*, 698 F.2d 911, 912 (8th Cir. 1982) (court required corporate defendant to contribute funds and labor to charitable organizations as one of the conditions of probation); *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982) (defendant corporation required to contribute funds and donate an executive for one year); *United States v. Atlantic Richfield Co.*, 465 F.2d 58, 59 (7th Cir. 1972) (defendant required to develop environmental clean-up programs); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159, 1164-66 (S.D.N.Y. 1983) (bakeries and pastry shops required to donate baked goods to specified charities); *United States v. Wright Contracting Co.*, 563 F. Supp. 213, 214 (D. Md. 1983) (corporation required to donate \$175,000 to charitable organization); see Note, *supra* note 118, at 638.

173. See Note, *supra* note 118, at 644-52. When imposing nonmonetary probation, the court must exercise care in avoiding constitutional traps. *Id.* at 649-51.

watchdog role that they are ill-equipped to handle. Incapacitation is, therefore, problematic as a legitimate goal of corporate criminal liability.

The modern corporation is a fictional entity created strictly for business and economic purposes. A corporation does not have a soul or a mind and thus appears beyond rehabilitation. The internal structure of a corporation, however, may need rehabilitation.¹⁷⁴ When a court threatens a corporation with corporate criminal liability, the threat should spark internal corporate actions designed to prevent the recurrence of any illegal activity, such as crime prevention policies, internal disciplinary controls, and crime-preventive standard operating procedures.¹⁷⁵ If indeed corporate criminal liability has these effects, then rehabilitation is occurring. The enactment of internal controls assumes that deterrent measures levied against the corporation effectively create a desire to avoid future illegalities. The efficacy of deterrent measures levied by the court, however, is at least questionable.¹⁷⁶

C. Retribution

The concept of retribution as a goal of criminal law has fallen into disrepute in recent years.¹⁷⁷ Many observers feel that the only legitimate goal of corporate criminal liability is deterrence.¹⁷⁸ This assertion, however, completely ignores the concept of "justice as fairness."¹⁷⁹ The entire American legal system is based upon the concept that if one disobeys the law, one will be punished. If the law fails to punish those who disobey, criminals gain an advantage by their illegal behavior.¹⁸⁰ In the absence of retribution, those who obey the law will soon join those who disobey. The concept of deterrence, at least under the present system, is at best questionable. Society cannot, however, simply allow corporate illegality to continue due to the lack of any effective deterrent. Such a situation would have a very negative sociological impact.¹⁸¹ Legal theorists must stop ignoring the real value of retri-

174. See M. CLINARD & P. YEAGER, *supra* note 60, at 305-10; Fisse, *supra* note 5, at 1159-66.

175. See Fisse, *supra* note 5, at 1159-66.

176. See *supra* notes 112-66 and accompanying text.

177. See W. LAFAVE & A. SCOTT, *supra* note 15, § 5; Comment, *Fiction Extended Too Far?*, *supra* note 5, at 118; Note, *supra* note 3, at 922.

178. See *supra* note 114 and accompanying text.

179. See J. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW* (1979), cited in Fisse, *supra* note 5, at 1169. Murphy describes the political principle of justice as fairness as follows:

In order to enjoy the benefits that a legal system makes possible, each man must be prepared to make an important sacrifice—namely, the sacrifice of obeying the law even when he does not desire to do so. Each man calls on others to do this, and it is only just or fair that he bear a comparable burden when his turn comes. Now if the system is to remain just, it is important to guarantee that those who disobey will not thereby gain an unfair advantage over those who obey voluntarily. Criminal punishment thus attempts to maintain the proper balance between benefit and obedience by insuring that there is no profit in criminal wrongdoing.

J. MURPHY, *supra*, at 77.

180. J. MURPHY, *supra* note 179, at 78.

181. See *id.* at 77-78. If the public perceives that others are committing illegal acts unfettered by criminal liability and thereby gaining an advantage, the public will have no incentive

bution, which is its balancing influence in our system.

A modern example underscores the importance of retribution. In the past few years a number of revelations have been made concerning the asbestos industry in America. Evidence indicates that as early as the 1930s asbestos manufacturers were aware of the health danger of inhaling asbestos fibers.¹⁸² Despite this knowledge, and often against the advice of their own medical experts, the manufacturers continued to expose their employees to high levels of asbestos dust.¹⁸³ One firm went so far as to maintain a policy requiring its doctors not to warn employees of early signs of asbestosis,¹⁸⁴ despite the industry's acknowledgment that the disease is progressive and fatal if not treated in its early stages.¹⁸⁵ In 1972 the government forced the asbestos industry to reduce asbestos dust levels in its plants.¹⁸⁶ The actions of the industry, however, had already led to a large number of deaths and permanent disabilities.¹⁸⁷

If deterrence is the only goal of corporate criminal liability, then the asbestos industry will face no criminal liability. The officers who made the decisions that led to the cover-up and the continuance of the dangerous conditions have retired or died.¹⁸⁸ Current officers carefully comply with federal regulations to avoid a repetition of earlier conditions. The courts would deter nothing if they criminally prosecute the corporations. The fact remains, however, that the asbestos corporations knowingly caused the deaths of their workers. If the legal system allows them to escape without punishment, public confidence in the system will diminish. If, however, the corporations are charged criminally for the actions of those in earlier years, theoretically fairness will prevail. This result is especially true in light of the bankruptcy route that at least one asbestos manufacturer has opted for.¹⁸⁹ While the asbestos industry eliminated the physical danger, a sociological danger to society still exists if the courts allow asbestos manufacturers to pay no price for previous wrongdoing. Overcoming that sociological danger is the goal of retribution.

to remain law-abiding. This result is especially true as the gap between those gaining the advantage and those not increases.

182. See M. ERMANN & R. LUNDMAN, *supra* note 72, at 67-69.

183. *Id.* at 64-69.

184. Asbestosis is a lung disease caused by repeated inhalation of asbestos fibers. Asbestos is indestructible, and the body, therefore, reacts to its presence by isolating it. Scar tissue forms, forcing the heart to work harder due to reduced breathing capacity. As the disease progresses the lungs fill with scar tissue, ultimately causing death. Medical science has not yet developed a treatment for the disease. *Id.* at 61. Workers who inhaled excessive amounts of asbestos dust also suffer from lung cancer and mesothelioma, a rare cancer. *Id.* at 61-62.

185. *Id.* at 69. Former Johns-Manville officials confirmed the policy's existence, as did company records. *Id.*

186. *Id.* at 65.

187. See *id.* at 63-66.

188. See *id.* at 71-72.

189. See *In re Johns-Manville Corp.*, 36 Bankr. 727, 729 (S.D.N.Y. 1984). The company had over 16,000 lawsuits pending against it as of the date of filing the bankruptcy petition. *Id.* In denying a motion to liquidate filed by creditors, the court noted the number of unfilled suits to follow. *Id.* at 736.

III. CONCLUSION

In recent years society's demand for increased corporate accountability has led to an increase in corporate criminal liability. As courts hold corporations liable for more serious crimes, however, a dilemma arises. The modern corporation is often a highly complex, multi-layered economic entity. In many ways the criminal law simply does not know how to deal with this huge fictional entity. The growth of criminal law theories has not kept pace with the growth of corporations. Early decisions in which courts held corporations liable for criminal acts dealt with much smaller corporations that the criminal law could easily manage. While commentators have posited numerous theories for controlling modern illegal corporate behavior, the theories all require society to take some action that it appears unwilling to take. Public opinion polls reveal great enmity to corporate giants run amuck, yet juries shrink from punishing corporations or their executives.

An analysis of the goals of criminal law as applied to corporate crime also reveals numerous problems. Some observers have argued that deterrence is the only legitimate goal of corporate criminal liability. The deterrent effect of current sanctions is questionable, however. Other observers have argued that deterrence cannot be divorced from incapacitation and rehabilitation because they are all inextricably interwoven. These observers assert that retribution is a legitimate goal of corporate liability, even in those cases in which retribution is the only goal. Such cases include those in which a homicide is caused in the past and the cause is corrected before the state brings criminal charges. The means of attaining that retribution, however, remains an open question.

In the final analysis, the answer may lie in the hope that corporations will police themselves. To control corporations by enforcement measures is virtually impossible because of the strange mixture of fiction and reality inherent in the corporate form. Corporations must realize that, as a long-term proposition, what is good for society is also good for the corporation. They must put aside the purely economic basis on which they make many of their decisions and give something back to the society that permits their existence. Failure to do so may lead to more dire consequences as society searches for a means to control corporate illegality.