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Corporate Criminal Liability for Homicide: The Need to Punish Both the Corporate Entity and its Officers

I. Introduction

On June 14, 1985, Cook County Circuit Judge Ronald J.P. Banks found three executives[1] of Film Recovery Systems, Inc. guilty of the murder[2] of Stefan Golab, a company employee.[3] Judge Banks also found Film Recovery Systems, Inc. and its sister company, Metallic Marketing Systems,[4] guilty of involuntary manslaughter[5] and fourteen counts of reckless conduct.[6] The verdict in *People v. Film Recovery Systems, Inc.*[7] marks the first time in the history of the United States that both a corporation *and* its individual directors have been convicted of criminal homicide.[8]

The guilty verdict in *Film Recovery* has encouraged local prosecutors throughout the country to bring similar charges against corporations and their directors.[9] Critics of the regulatory agencies argue

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1. In addition to the three executives found guilty by Judge Banks, Michael T. MacKay and Gerald R. Pett were also indicted for murder. As of July 17, 1986, Michael MacKay's extradition from Utah has been blocked. The action against Gerald R. Pett was dismissed. Note, *Corporations Can Kill Too: After Film Recovery, Are Individuals Accountable For Corporate Crimes?*, 19 LOY. L.A.L. REV. 1411, 1427-28 (1986) [hereinafter *Corporations Can Kill Too*].

2. For the Illinois statute defining murder, see *infra* note 178.

3. Report of Proceedings at 11, People v. Film Recovery Systems, Inc., No. 83-11091 (Cook County Cir. Ct. of Ill. June 14, 1985) consolidated with People v. O'Neil, No. 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985). For a complete discussion of the case, see *infra* notes 167-187 and accompanying text.

4. B.R. MacKay & Sons, Inc., a private silver refinery and part owner of Film Recovery Systems, Inc., was also indicted for manslaughter. *See Corporations Can Kill Too, supra* note 1, at 1412.

5. For the Illinois statute defining involuntary manslaughter, see *infra* note 170.

6. For the Illinois statute defining reckless conduct, see *infra* note 171.

7. Nos. 83-11091, 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985).

8. *People v. Film Recovery Systems, Inc.* was not the first indictment of both the corporation and its individual directors. *See, e.g.*, People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981). In *Warner-Lambert* the corporation and several of its officers were indicted for the death of six employees in an explosion in one of the company's manufacturing plants. New York's highest court, however, dismissed the indictment for failure to prove causation. *Id.* at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160. For a discussion of the facts and holding of *Warner-Lambert*, see *infra* notes 148-66 and accompanying text.

9. Postell, *A Criminal Lack of Safety in the Workplace*, 22 TRIAL 121 (July 1986). In Texas, two corporations and their officers have been charged with criminally negligent homicide for the deaths of three employees in trench cave-ins. State v. Peabody Southwest, Inc., No. 259, 254 (Travis County Ct. of Tex. filed Nov. 22, 1985); State v. Sabine Consolidated, Inc., No. 259, 257 (Travis County Ct. of Tex. filed Nov. 22, 1985). In California, Los Angeles

that current agency policies have failed to deter illicit corporate conduct.[10] This inadequacy has placed much of the burden on state prosecutors to bring criminal charges against the corporation. The *Film Recovery* decision and the resulting wave of corporate criminal prosecutions represent a current trend by the courts to increasingly rely on criminal sanctions to shape corporate conduct.[11] The imposition of criminal sanctions on corporate criminals raises the question of whether criminal sanctions constitute an effective deterrent against corporate misconduct.

Historically, indictment of a corporation for any criminal violation was impossible.[12] As society recognized a strong need[13] to hold corporations responsible for their criminal actions, the barriers[14] that initially barred prosecution of the corporate criminal gave way to the demands of society. The doctrine of corporate criminal liability developed in response to the needs of society. As this development progressed, legal critics continued to question the efficacy of criminal sanctions against corporate defendants, emphasizing the failure of criminal sanctions to deter future criminal conduct.[15]

This Comment explores the evolution of the doctrine of corpo-

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District Attorney Ira K. Reiner had instituted a "roll out" program in which an attorney and an investigator are sent to the scene of industrial-workplace deaths. Middleton, *Prosecutors Get Tough on Safety*, NAT'L L.J. Apr. 21, 1986, at 1, col. 1. In People v. Maggio, No. A780779 (Los Angeles Mun. Ct. filed Mar. 26, 1986), District Attorney Reiner brought charges of involuntary felony-manslaughter against a corporation and its president when an employee drilling a 33-foot deep elevator shaft suffocated because of inadequate safety equipment. In State v. Autumn Hills Convalescent Nursing Home, No. 85-CR-2526 (Bexar Cty. Ct. of Tex. filed Apr. 2, 1986), the business entity, a nursing home, the corporation's president, vice-president, and five current and former employees, were charged with the murder by neglect of an elderly patient. The case was dismissed because of a hung jury. In People v. Landis, No. 391583 (Los Angeles Mun. Ct. of Cal. filed Dec. 20, 1983), a film director and several members of the production crew were charged with manslaughter in consequence of the deaths of three actors on a movie set. *See also Corporations Can Kill Too, supra* note 1, at 1411-12.

10. *See* Radin, *Corporate Criminal Liability for Employee-Endangering Activities*, 18 COLUM. J.L. & SOC. PROBS. 39 (1983). From its inception in April, 1971 through 1983, only seven criminal cases have been prosecuted under the Occupational Safety and Health Act. None of the seven cases has "extracted penalties greater than those attainable under the Act's civil provisions." *Id.* at 67. The futility of the Act's criminal sanctions demonstrates the need for a more effective prosecution of corporate criminal behavior. *Id.* at 63-67.

11. *See, e.g.*, Comment, *Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229 (1979) [hereinafter *Developments*] ("[T]he federal government has come to rely more and more on the deterrent effect of criminal punishment to shape corporate action."). For a criticism of the *Developments* analysis, see Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 445-46 (1981).

12. *See infra* notes 16-20 and accompanying text.

13. *See* 1 K. BRICKEY, CORPORATE CRIMINAL LIABILITY § 1:01 at 1 (1984).

14. *See infra* notes 39-43 and accompanying text.

15. *See infra* notes 213-30 and accompanying text.

rate criminal responsibility for homicides from its inception to its current status represented by the *Film Recovery* decision. It probes the appropriateness and efficacy of using criminal sanctions to deter illicit corporate conduct. Finally, this Comment concludes that criminal sanctions can be an effective method of deterring illicit corporate behavior only when the corporation and its individual officers are prosecuted with equal fervor.

II. Corporate Criminal Responsibility

A. Early History

The evolution of the theory of corporate criminal responsibility has been a very slow, methodical process. Traditionally, corporations were not indictable for any wrongful act.[16] In 1701, Chief Justice Holt stated in an anonymous case[17] that "[a] corporation is not indictable but the particular members of it are."[18] A corporation was considered to be a fictional entity.[19] Based on the principle that a corporation had no soul and no body, courts held that a corporation was incapable of having the criminal intent necessary for all crimes.[20]

As the growth and development of the modern corporate entity progressed, courts began to move away from the inflexible approach adopted by the early common law judges.[21] In spite of the legal bar-

16. K. BRICKEY, *supra* note 13, § 2:01, at 13.

17. Anonymous, 88 Eng. Rep. 1518 (K.B. 1701). It is questioned by some authorities whether this case was referred to by Lord Holt when he extorted the bitter complaint of his reporters, "that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on the bench." State v. Morris and Essex Railroad Co., 23 N.J.L. 360 (1852).

18. Chief Justice Holt's famous dictum became accepted as black letter law by treatise writers. *See, e.g.*, 1 W. BLACKSTONE, COMMENTARIES * 476 ("A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may in their distinct individual capacities.").

19. "A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law." Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). *See also* K. BRICKEY, *supra* note 13, § 2:01, at 14. (The corporation was recognized in law as an artificial entity. As an abstraction it lacked physical, mental, and moral capacity to engage in wrongful conduct or to suffer punishment.)

20. 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.10, at 361 (1986); *see also* Comment, *Corporate Criminal Liability For Homicide: Has The Fiction Been Extended Too Far?*, 4 J.L. & COM. 95, 96 (1984) [hereinafter *Corporate Criminal Liability*] (a corporation has no soul or mind; therefore it lacks the requisite intent necessary to be guilty of offenses requiring a guilty mind). A corporation can, however, be executed. Blackstone called the court-ordered dissolution of a corporation "civil death." *See* W. BLACKSTONE, *supra* note 18, at 484.

21. W. LAFAVE & A. SCOTT, *supra* note 20, § 3.10 at 361. *See also* K. BRICKEY, *supra* note 13, § 2:02, at 15. (During their early development corporations were few in number, well regulated, and chartered to perform specific tasks. Their impact on the general populace was minimal. As the corporation became more common, a growing perception of the courts and

riers[22] to corporate prosecution, there was a strong public perception of the necessity of holding corporations accountable for their actions.[23] The theory of corporate criminal liability developed under three common-law frameworks — the law of nuisance,[24] the nonfeasance/misfeasance distinction,[25] and crimes requiring intent.[26]

The evolution of corporate criminal liability began when corporations were held strictly liable for violations of welfare offenses.[27] An individual could bring a cause of action in nuisance against a corporation if the corporation's action or failure to act caused harm to the public good.[28] Holding corporations responsible for violations of welfare offenses was not precluded by any theoretical or philosophical barrier because there was no intent requirement and the penalty, a fine, could be imposed on the corporation.[29]

The nonfeasance/misfeasance distinction was well established in English common law.[30] As early as 1834[31] American courts had adopted the principle that corporations may be held criminally liable for nonfeasance,[32] but not misfeasance.[33] This distinction, however,

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legislatures recognized the need for additional mechanisms to regulate corporate behavior.)

22. In addition to the theoretical barrier of the corporate fiction, "because the commission of a crime was *ultra vires* activity to a corporation, a criminal act by a corporate agent was considered beyond the authority of a corporation and therefore could not be imputed to it." *Corporations Can Kill Too, supra* note 1, at 1416-17 (footnotes omitted). *See, e.g.*, Music Box, Inc. v. Mills, 10 La. App. 665, 667, 121 So. 196, 197 (1929) (illegal acts committed by corporate officers "can have no legal, binding effect upon the corporations themselves"); Commonwealth v. Punksutawney St. Passenger Ry. Co., 24 Pa. C. 25, 26 (1899) (manslaughter "is so far ultra vires as to contravene all accepted rules in the criminal law for making it the act of the principal").

23. *Corporate Criminal Liability, supra* note 20, at 96.

24. For a discussion of the development of the law of nuisance in the corporate context, see generally K. BRICKEY, *supra* note 13, § 2:07, at 26.

25. *See infra* notes 30-36 and accompanying text.

26. *See infra* notes 37-43 and accompanying text.

27. W. LAFAVE & A. SCOTT, *supra* note 20, § 3.10, at 361. Corporations were charged with violations of welfare offenses for maintaining "[p]olluted river basins, deteriorated roads, decaying bridges and malodorous slaughterhouses." K. BRICKEY, *supra* note 13, § 2:07, at 26.

28. People v. Corporation of Albany, 11 Wend. 539, 543 (N.Y. Sup. Ct. 1834). Common law nuisance was defined as "an offense against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." *Id.*

29. W. LAFAVE & A. SCOTT, *supra* note 20, § 3.10, at 361.

30. K. BRICKEY, *supra* note 13, § 2:08, at 27.

31. People v. Corporation of Albany, 11 Wend. 539 (N.Y. Sup. Ct. 1834).

32. "Nonfeasance" is defined as "the omission of an act which a person ought to do." Bell v. Josselyn, 69 Mass. (3 Gray) 309, 311, 63 Am. Dec. 741 (1855). *See, e.g.*, New York & G.L.R. Co. v. State, 50 N.J.L. 303, 13 A. 1 (1888) (corporation indicted for failure to keep a bridge in repair); People v. Clark, 8 N.Y. 169, 14 N.Y.S. 642 (1891) (Railroad corporation failed to heat its passenger cars in conformance with state statute).

33. "Misfeasance" is defined as "the improper doing of an act which a person might lawfully do." Bell v. Josselyn, 69 Mass. (3 Gray) 309, 311, 63 Am. Dec. 741 (1855). *See, e.g.*, State v. Great Works Milling & Manufacturing Co., 20 Me. 41, 43 (1841) (a corporation "can neither commit a crime nor misdemeanor, by any positive or affirmative act, or incite

was soon abandoned. In *State v. Morris and Essex Railroad*,[34] the New Jersey Supreme Court became the first court to abandon the nonfeasance/misfeasance distinction. Two years later the Massachusetts Supreme Court, in the case of *Commonwealth v. Proprietors of New Bedford Bridge*,[35] using similar reasoning as that used in *Morris and Essex Railroad*, affirmed the propriety of holding a corporation criminally liable for an affirmative act.[36]

B. Crimes Requiring the Formulation of Intent

In contrast to the rather rapid development and acceptance of a theory of corporate criminal liability for welfare offenses and nonfeasance/misfeasance, the extension of the theory to crimes requiring intent developed slowly.[37] In their landmark decisions, the Supreme Courts of New Jersey and Massachusetts held a corporation criminally liable for an affirmative act, yet neither court extended liability to offenses requiring an evil intention.[38] The courts perceived the existence of two barriers that precluded the extension of liability to crimes requiring intent.[39] The first barrier, based on the notion that a corporation was a fictional entity, held corporations incapable of forming the *mens rea*[40] necessary for a finding of guilt in those

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others to do so . . .").

34. 23 N.J.L. 360 (1852). The company was indicted on a nuisance charge for building a bridge on a public highway and for obstructing the road with railroad cars. Sustaining the indictment, the court stated that there is no valid reason why a corporation may "be held liable for *nonfeasance*, and not for *misfeasance*." *Id.* at 369 (emphasis in original). It stated that a corporation cannot be held liable for certain crimes because a corporation is incapable of a "corrupt intent" or because the "punishment imposed by law cannot be inflicted upon a corporation." *Id.* at 370. The court concluded, however, that the "creation of a mere nuisance involves no such element. It is totally immaterial whether the person erecting the nuisance does it ignorantly or by design, with a good intent or an evil intent; and there is no reason why for such an offense a corporation should not be indicted." *Id.*

35. 68 Mass. (2 Gray) 339 (1854). The corporation was indicted on a nuisance charge for building a bridge across a river in such a way that navigation was obstructed.

36. The Massachusetts Supreme Court stated that:

> Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offenses against the person. But beyond this, there is no reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them . . . . It may be added, that the distinction between a non-feasance and a misfeasance is often one more of form than of substance.

Id. at 345-46.

37. *See* K. BRICKEY, *supra* note 13, § 2:09, at 31.

38. *See supra* notes 34-36 and accompanying text.

39. *See* Comment, *Corporate Criminal Liability For Homicide: Can The Criminal Law Control Corporate Behavior?*, 38 SW. L.J. 1275, 1277 (1985) [hereinafter *Corporate Behavior*].

40. In United States v. Greenbaum, 138 F.2d 437, 438 (C.C.A.N.J. 1943), the court

crimes characterized as *malus animus*.[41] The second barrier was of statutory creation. Most criminal statutes for crimes requiring a specific intent mandated corporal punishment.[42] Since the corporation lacked any physical existence it could not be incarcerated. Many statutes also required the crime to be committed by a "person," thereby precluding prosecution of corporations.[43]

Beginning at the turn of the century, the development of corporate criminal responsibility witnessed the gradual erosion of these barriers culminating in the *Film Recovery* case. The first barrier to fall was the punishment barrier. In *United States v. Van Schaik*,[44] the circuit court for the southern district in New York allowed indictment of a corporation after nearly 900 passengers drowned when a steamship owned by the corporation caught fire.[45] The New York manslaughter statute provided that violators of its provisions should be sentenced to imprisonment for a term of years and hard labor.[46] Despite the absence of direct statutory language proscribing a means of punishment of corporations, the court reasoned that Congress must have inadvertently omitted a suitable punishment and sustained the indictment.[47] For the first time a statute's failure to provide an appropriate penalty was rejected as a bar to corporate criminal liability.[48]

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defines "*mens rea*" as a guilty mind; a guilty or wrongful purpose; or a criminal intent. 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).

41. *See Corporate Behavior, supra* note 39, at 1277 n.14. "*Malus animus*" is defined as a bad or evil intention.

42. *See* K. BRICKEY, *supra* note 13, § 2:09, at 31 n.87. The author states that "one troublesome obstacle to imposing corporate liability for felonies was the nature of the authorized punishment. The early felonies — murder, wounding, mayhem, false imprisonment, rape, robbery, burglary, arson and larceny — all were punishable by death or dismemberment, sanctions quite incapable of being applied to the corporate entity."

43. *See Corporate Behavior, supra* note 39, at 1277.

44. 134 F. 592 (C.C.S.D.N.Y. 1904).

45. *Id.* at 594.

46. The statute provided that "every owner . . . through whose fraud, connivance, misconduct or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof . . . shall be sentenced to confinement at hard labor . . . ." *Id.*

47. *Id.* at 602. The court inquired:

> Is 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? A corporation can be guilty of causing death by its wrongful act. It can with equal propriety be punished in a civil or criminal action. It seems a more reasonable alternative that Congress inadvertently omitted to provide a suitable punishment for the offense, when committed by a corporation, than that it intended to give the owner impunity simply because it happened to be a corporation.

48. *See* I. U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW,

Five years after *Van Schaik*, the United States Supreme Court further eroded the punishment barrier in *United States v. Union Supply Co.*[49] The corporation in *Union Supply* was a wholesale dealer in oleomargarine. It had been charged with violation of a federal statute requiring such dealers to maintain records of their business transactions.[50] The statute provided that anyone who violated the provisions of the statute would be fined and imprisoned.[51] The defendant corporation argued that in the event of a conviction, the statute precluded punishment of a corporation because the corporation could not be imprisoned.[52] The Court rejected this argument concluding that "[t]he 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."[53] The Court's decision, therefore, made it possible to prosecute, convict and punish a corporation through the imposition of a fine.

Breaking the *mens rea* barrier presented a greater theoretical challenge than the punishment barrier. A corporation has no mind and no soul; therefore, a mental state has no meaning when applied to a corporation.[54] Several theories that attempt to justify the imposition of criminal penalties on corporations have been suggested by legal commentators.[55] The first theory holds a corporation responsible for the conduct of its agents.[56] The second theory holds a corporation responsible only for the acts of its policy-making officials.[57] The final theory holds a corporation liable for illegal conduct that results from reckless or unreasonable conduct.[58] Although no single

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WORKING PAPERS 168 (1970) [hereinafter WORKING PAPERS]. The commission stated that:

> It seems quite clear that the Supreme Court does not regard a specific declaration in a statute that corporations are subject to its terms as necessary in order to impose criminal penalties of the statute upon such bodies. Rather, it has long ago held that if the section of a statute prescribing a duty to be performed (or proscribing certain conduct) embraces all actors, and the actor intended to be reached is as likely to be a corporation as a natural person, the words "any person" in the penal clause of the statute are equally broad, imposing liability for violation upon all who are bound by the duty for proscription.

49. 215 U.S. 50 (1909).
50. *See* Act of May 9, 1902, ch. 784, Pub. L. No. 57-110, 32 Stat. 193, 197.
51. *Id.* § 6, 32 Stat. at 197.
52. 215 U.S. at 52-53.
53. *Id.* at 55.
54. *See supra* notes 19-20 and accompanying text.
55. *See Developments, supra* note 11, at 1241; WORKING PAPERS, *supra* note 48, at 184-85; Mueller, *Mens Rea and the Corporation*, 19 U. PITT L. REV. 21, 42 (1957); Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 840-44 (1927).
56. *See infra* notes 61-86 and accompanying text.
57. *See infra* notes 87-90 and accompanying text.
58. *See infra* notes 92-93 and accompanying text.

theory has gained universal acceptance,[59] each theory recognizes the strong necessity of holding corporations liable for specific intent crimes.[60]

The first theory of corporate blameworthiness, adopted from the law of agency,[61] is commonly referred to as the doctrine of *respondeat superior*.[62] The theory treats a corporation as a principal and its officers, directors and employees as agents of the principal.[63] The corporation, as principal, is responsible for the acts and intent of each of its agents. Through the doctrine of *respondeat superior*, the mental state of any employee is imputed to the corporation.[64] Under this theory the corporation may be held liable for the wrongful act of a single low-level employee, even though its directors or managers are blameless.[65]

Several commentators have argued that this theory is unjust because it punishes a corporation when it is not morally proper to do so.[66] Under the doctrine of *respondeat superior*, however, a corporation may not be held criminally liable for the acts of any of its agents unless the agent commits a crime within the scope of his employment with the intent to benefit the corporation.[67] At first glance it seems that this standard would be sufficient to preclude corporate liability when it is not morally proper to do so. In practice, however, this standard is easily satisfied.

First, it must be proven that an agent of the corporation committed a crime and that the agent acted with the requisite intent[68]

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59. *See, e.g.*, Mueller, *supra* note 55, at 23 ("It is safe to say that, for the most part, the law has proceeded without rationale whatsoever . . .").

60. *See id. See also* K. BRICKEY, *supra* note 13, § 3:01, at 39 ("public policy considerations required that a corporation be held accountable for crimes committed or authorized by officers and directors").

61. *See Developments, supra* note 11, at 1247; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 70, at 460-67 (4th ed. 1971); RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

62. Translated from latin, "*respondeat superior*" literally means "Let the master answer." BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

63. *See Developments, supra* note 11, at 1242.

64. *Id.*

65. *See* Mueller, *supra* note 55, at 42 (corporation liable for wrongful act of an inferior employee even though top management employees are blameless).

66. *See, e.g., id.* (The author argues that this theory of corporate blameworthiness can lead to unjust results when both the shareholders and top-level managers are blameless); *Developments, supra* note 11, at 1242 ("it is unfair to impute to the corporation the intent of a lone agent without also considering whether conscientious efforts were made by other agents to prevent the crime.").

67. *See Developments, supra* note 11, at 1247.

68. *Id.* It would be logical to assume that the specific intent required to convict a corporation would be the same as is necessary to convict an individual. "However, since the corporation is perceived as an aggregation of its agents, it is not necessary to prove that a specific person acted illegally, only that *some* agent of the corporation committed the crime." *Id.* at 1248 (emphasis in original). *See*, United States v. American Stevedores, Inc., 310 F.2d 47, 48

required by the governing statute.[69] While it is conceded that a corporation acts only through its agents, prosecution of the corporation does not depend on indictment of the agents.[70] The acquittal of a corporation's agents will not preclude conviction of the corporation on the same charges.[71] The general premise that corporate intent is imputed only from individual intent is frequently contradicted by the federal courts.[72] These courts have consistently found the requirement of corporate criminal intent satisfied even where no agent's criminal intent has been shown.[73]

Second, for the intent of an agent to be imputed to the corporation, it must be shown that the agent committed the crime while acting within his scope of employment.[74] The meaning of the phrase "scope of employment" has never been clearly defined.[75] Generally, however, an agent's act "is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at

(2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963); United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941). *See also* Mueller, *supra* note 55, and accompanying text.

69. *See Developments, supra* note 11, at 1247. *See* Boise Dodge, Inc. v. United States, 406 F.2d 771, 772 (9th Cir. 1979).

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

71. *See* Note, *Individual Liability of Agents for Corporate Crimes Under the Proposed Federal Criminal Code*, 31 VAND. L. REV. 965, 968 (1978) ("juries have frequently found corporate defendants criminally culpable while acquitting agents who clearly committed the criminal acts"). *See, e.g.*, United States v. American Stevedores, Inc., 310 F.2d 47, 48 (2d Cir. 1962) (acquittal of corporation's principal operators of willfully failing to report corporate income did not preclude conviction of corporation on same charges), *cert. denied* 371 U.S. 969 (1963).

72. *See, e.g.*, United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir.) (court acquitted all individual defendants but convicted corporation of conspiracy to restrain interstate trade and commerce in violation of § 1 of the Sherman Anti-Trust Act), *cert. denied*, 314 U.S. 618 (1941). *See also* United States v. Dotterweich, 320 U.S. 277, 279 (1943) (individual convicted of violation of Federal Food, Drug, and Cosmetic Act but corporation acquitted). *But see* Imperial Meat Co. v. United States, 316 F.2d 435, 440 (10th Cir.) (court adhered to the requirement of finding an individual guilty as a condition precedent to conviction of a corporation), *cert. denied*, 375 U.S. 820 (1963); Pevely Dairy Co. v. United States, 178 F.2d 363, 370-71 (8th Cir. 1949) (conviction of corporation and acquittal of its agents "weakened the presumption of correctness usually attributable to the verdict of a jury"), *cert. denied*, 339 U.S. 942 (1950).

73. *See Developments, supra* note 11, at 1249.

74. *See* W. PROSSER, *supra* note 61, § 70, at 460-67. For a general discussion of "scope of employment," see Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222 (1940).

75. *See* RESTATEMENT (SECOND) OF AGENCY § 229 (1958). The conduct of an agent "must be of the same general nature as that authorized, or incidental to the conduct authorized." The Restatement also lists several factors to be taken into account when determining whether or not "conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment . . . ." *Id.*

least in part, by a purpose to serve the master."[76]

The courts, however, have adopted a very flexible approach when defining "scope of employment."[77] The acts of an agent are often held to fall within the scope of employment even when the agent acted in violation of express instructions and general corporate policy.[78] The flexibility employed by the courts in interpreting an agent's "scope of employment" allows the viability of the doctrine to be maintained. Without such an extension of liability, corporations could avoid liability altogether by the simple expediency of labelling all illegal conduct ultra vires,[79] thereby placing such conduct outside the scope of employment.[80]

Third, to establish corporate liability under the doctrine of *respondeat superior*, the prosecution must show that the illegal act was committed with the intent to benefit the corporation.[81] This requirement has not been strictly enforced by the courts. Many courts have sustained conviction of the corporation even though no actual benefit has been derived from the agent's illegal act.[82] The requirement, however, has not been completely discarded, and it remains an important evidentiary tool.[83]

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76. *See* W. PROSSER, *supra* note 61, § 70, at 461.

77. *Id.* at 460. *See also* United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3rd Cir. 1970) (when viewed in light of judge's definition of "scope of employment," agent's conduct was clearly within scope of his employment), *cert. denied*, 401 U.S. 948 (1971).

78. *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006-07 (9th Cir. 1972) (corporation criminally liable under the Sherman Anti-Trust Act for act of agent even though agent acted contrary to company policy and was twice told to discontinue such practices); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3rd Cir. 1970) (defendant corporations and corporate officers convicted of violations of the Sherman Anti-Trust Act), *cert. denied*, 401 U.S. 948 (1971); United States v. Armour & Co., 168 F.2d 342, 343-44 (3d Cir. 1948) (corporation convicted of violating regulations issued pursuant to the Emergency Price Control Act of 1942 in consequence of acts by several of its agents).

79. "*Ultra vires*" is defined as acts beyond the scope of the powers of a corporation, as defined by its charter or laws of the state of incorporation. State *ex rel.* v. Holston Trust Co., 168 Tenn. 546, ____, 79 S.W.2d 1012, 1016 (1935).

80. *See Developments, supra* note 11, at 1250.

81. *Id. See, e.g.*, United States v. Ridglea State Bank, 357 F.2d 495, 498-500 (5th Cir. 1966) (employer may not be penalized for employee's criminal act if agent acted for some purpose other than that of serving employer); Standard Oil Co. v. United States, 307 F.2d 120, 128 (5th Cir. 1962) ("[T]he purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation."). *See generally* K. BRICKEY, *supra* note 13, § 4:02, at 84.

82. Standard Oil Co. v. United States, 307 F.2d 120, 128-29 (5th Cir. 1962). *See, e.g.*, United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963) (proof of actual benefit to the corporation was not essential to a finding of its criminal responsibility); United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.) (proof of actual benefit not necessary) *cert. denied*, 337 U.S. 959 (1949).

83. *E.g.*, Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir.) ("We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential,

In addition to the flexible approaches used by courts to satisfy the requirements of scope of employment and intent to benefit the corporation, under the doctrine of ratification these factors may be satisfied if an employer approves of the agent's conduct after it has occurred.[84] When a corporation adopts and ratifies the acts of its agents, the corporation will be responsible for such acts, even if the agent is performing outside the scope of his employment and without intent to benefit the corporation.[85] Under the doctrine of ratification a corporation will be held liable for the approbation of its agents' wrongful acts rather than the commission of wrongful acts by the corporation itself.[86]

The second theory of corporate blameworthiness, whereby only the intentions of top level personnel are imputed to the corporation, developed in response to criticisms of the doctrine of *respondeat superior*.[87] Under this "qualified approach" to the doctrine of *respondeat superior*, the corporation is held to be morally responsible only for the acts and intent of its policy-making officials.[88] Unlike the doctrine of *respondeat superior*, the "qualified approach" does not allow a corporation to be held responsible for the acts and intent of a lower level employee over which the corporation has no control.[89] It is this factor of corporate control over the actions of its top level employees that distinguishes the "qualified approach" from the doctrine of *respondeat superior*.[90]

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not an operative fact."), *cert. denied*, 326 U.S. 734 (1945).

84. The doctrine of ratification has been defined as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." RESTATEMENT (SECOND) OF AGENCY § 82 (1958); *Developments, supra* note 11, at 1250-51.

85. *See, e.g.*, Continental Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960) (corporation responsible for acts of agents when superiors adopted and ratified such conduct).

86. *Developments, supra* note 11, at 1251 n.38. The author notes that "[t]his notion conflicts with the traditional criminal law principle that one is generally not criminally liable for an act merely because he approved of it after the fact."

87. *See supra* notes 65-66 and accompanying text.

88. *See Developments, supra* note 11, at 1242; WORKING PAPERS, *supra* note 48, at 185 n.67. *See, e.g.*, Mueller, *supra* note 55, at 42 (the author refers to this qualified approach as "vicarious liability proper" and the doctrine of *respondeat superior* as "vicarious liability twice removed."). *See also* MODEL PENAL CODE § 2.07 (1962). The Model Penal Code has proposed a theory similar to the "qualified approach." Only the intent of top officials and not that of subordinates is imputed to the corporation. For a discussion of the Model Penal Code provisions, see generally *Developments, supra* note 11, at 1251-57.

89. Theoretically, a corporation has the power to appoint and the power to supervise only its top level officials. *Developments, supra* note 11, at 1242. The author notes that ideally a corporation is controlled by a group of stockholders. The stockholders, through their elected board of directors, control and supervise the management. *Id.*

90. The "qualified approach" has also been heavily criticized. The theory rests on the premise that the shareholders of a corporation have the power to supervise and control top-

The third theory of corporate blameworthiness is based on a negligence standard. The "negligence theory" imposes the requisite intent on the corporation itself as a working, operating unit.[91] It recognizes that in the typical corporation, illegal conduct "is the consequence of corporate processes such as standard operating procedures and hierarchical decisionmaking" rather than "the isolated activity of a single agent."[92] When corporate conduct is so unreasonable as to totally disregard accepted safety procedures, the corporation will be held morally responsible for its conduct.[93]

Of the three theories of corporate moral blameworthiness,[94] the doctrine of *respondeat superior* has been the theory most widely accepted and applied by the courts. In *New York Central & Hudson River Railroad v. United States*,[95] the Supreme Court firmly established the application of this doctrine as the proper standard to be used in the prosecution of corporate criminal activity.[96] The Court recognized the strong public interest in preventing corporations from committing "certain practices forbidden in the interest of public policy."[97] The Court noted that it needed to carry the tort doctrine "only a step farther" to uphold the conviction of a corporation by imputing the act and intent of its agent to the corporation.[98] A more restrictive interpretation of the doctrine of *respondeat superior* would grant corporations immunity from criminal liability and "vir-

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level officials. Ideally, it may be true that shareholders have such power and control. In reality, however, the shareholder of a typical corporation has very little control over corporate officers. *Developments, supra* note 11, at 1242. *See* WORKING PAPERS, *supra* note 48, at 189 n.76 (shareholders lack practical control of a corporation because they are rarely in a position to know of conduct of officers).

91. *Developments, supra* note 11, at 1243.

92. *Id.*

93. *Id.* at 1243 n.59.

94. *See supra* notes 55-60 and accompanying text.

95. 212 U.S. 481 (1909).

96. *Id.* at 492-96. New York Central was charged and convicted of violating the Elkins Act, ch. 2564, 34 Stat. 1246 (1907) (current version 49 U.S.C. §§ 41-43 (1982)). The purpose of the Elkins Act was to make the act of the agent the act of the corporation, and to include both within its restrictions. The Court upheld the constitutionality of the Elkins Act, recognizing that legal theorists of the day already adopted a form of vicarious liability. "Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done." *Id.* at 492-93 (quoting *Bishop, New Criminal Law* § 417). The Court stated that "we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting with the authority conferred upon them . . . . If it were not so, many offenses might go unpunished." *Id.* at 494-95. For a discussion of the doctrine of *respondeat superior* in the corporate context, see generally WORKING PAPERS, *supra* note 48, at 168-73.

97. 212 U.S. at 495. As early as 1909, the Court recognized the immense power of the corporate system. The law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands." *Id.*

98. *Id.* at 494.

tually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at."[99]

With the Supreme Court's adoption of the *respondeat superior* doctrine to determine the extent of a corporation's criminal liability, the *mens rea* barrier no longer shielded corporations from criminal responsibility. The statutory barrier, however, had yet to be broken.[100] Most criminal statutes proscribed the commission or omission of an act by a "human being," but did not include business entities within the definition.[101] The prosecutorial effect of such statutory language was demonstrated in the case of *People v. Rochester Railway & Light Co.*[102]

In *Rochester Railway & Light*, the corporation was indicted for manslaughter because it had allegedly installed "certain apparatus" in such a grossly negligent manner "that gases escaped and caused the death of an inmate."[103] The court first addressed the question of whether a corporation may properly be indicted for manslaughter.[104] Adopting the reasoning from *New York Central*, the court held that the corporation was responsible for the acts of its agents and, therefore, in the proper case a corporation may be indicted for manslaughter.[105]

The court then addressed the issue of whether the homicide statute, which defined homicide as "the killing of one human being by the act, procurement or omission of another"[106] included corporations within its purview. The court concluded that the use of the word "another" in this statutory context clearly indicated a legislative intent to limit liability for commission of the offense to human

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99. *Id. New York Central* involved the violation of a regulatory offense that did not require willfulness or knowledge as an element. The Supreme Court later applied the concept of corporate willfulness to criminal law in *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958). In *A & P Trucking*, a partnership was prosecuted as an entity under § 222(a) of the Motor Carrier Act for "knowingly and willingly" violating requirements of the Interstate Commerce Commission. Although the defendant was a partnership, the Court's reasoning encompassed all "impersonal entities" including "corporations and other associations." The Court stated that "it is elementary that such impersonal entities can be guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of *respondeat superior*." *Id.* at 125.

100. *See supra* note 42 and accompanying text.

101. *See supra* note 43 and accompanying text.

102. 195 N.Y. 102, 88 N.E. 22 (1909). *See also* Commonwealth v. Illinois Central Railroad Co., 152 Ky. 320, 153 S.W. 459 (1913) (homicide requires killing of one human being by "another" human being).

103. 195 N.Y. at 104, 88 N.E. at 22.

104. *Id.* at 104-107, 88 N.E. at 22-24.

105. *Id.* at 107, 88 N.E. at 24. The court stated that "we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation." *Id.*

106. N.Y. PENAL CODE § 179, *as quoted in* 195 N.Y. at 107, 88 N.E. at 24.

beings.[107] In dismissing the indictment, the court specifically rejected the argument that "another" refers to another "person," which might then include corporations.[108]

The Supreme Court of New Jersey, in *State v. Lehigh Valley Railroad Co.*,[109] was confronted with a similar question of semantics.[110] The court examined the *Rochester Railway* decision and recognized that under the statutory language of the New York Penal code, the New York court correctly held that "another" meant "another human being."[111] The court noted, however, that there was a trend in corporate criminal law to move away from such inflexible approaches.[112] The *Lehigh Valley* court consequently rejected the formalistic approach to statutory interpretation employed by the court in *Rochester Railway* and sustained the indictment against the corporation[113] concluding that the word "person" included "bodies corporate" as well as individuals.[114]

C. *Recent Decisions*

For nearly 60 years, New Jersey remained the only state to sustain an indictment against a corporation for criminal homicide. The semantic barrier created by the statutory definitions of "person" remained an obstacle to corporate criminal responsibility. It was not until 1974 that the reasoning of *Lehigh Valley* was adopted in New York to sustain an indictment against a corporation for negligent homicide.

In *People v. Ebasco Services, Inc.*,[115] several corporations were

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107. 195 N.Y. at 107, 88 N.E. at 24. The court noted: "It seems to us that it would be a violent strain upon a criminal statute to construe this word as meaning an agency of some kind other than that already mentioned or referred to, and as bridging over a radical transition from human beings to corporations." *Id.*

108. *Id.*

109. 90 N.J.L. 372, 103 A. 685 (1917).

110. *Id.* at 373-4, 103 A. at 686. A grand jury indicted the Lehigh Valley Railroad and others for criminal manslaughter after some railroad cars overloaded with dynamite exploded and killed a bystander. *Id.*

111. *Id.*

112. *Id.* Although the court recognized that the *Rochester Railway* decision was a valid interpretation of the New York Penal Code, the court criticized the case stating:

> The case is a good illustration of the way in which the proper growth and development of the law can be prevented by the hard and fast language of a statute, and of the advantage of our own system by which the way is open for a court to do justice by the proper application of legal principles.

Id.

113. *Id.* The *Lehigh Valley Railroad* case was the first decision to uphold the indictment of a corporation for criminal homicide. *See Corporate Behavior, supra* note 39, at 1280 n.48.

114. *Id.*

115. 77 Misc.2d 784, 354 N.Y.S.2d 807 (Sup. Ct. 1974).

indicted for negligent homicide when a cofferdam still under construction collapsed, causing the death of two workmen. The corporations were indicted for violation of the New York Penal Code,[116] which had been revised since the *Rochester Railway* decision. The new statute stated that "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."[117] The court stated that the definition of "person" as defined in the code "does not require that the person committing the act of homicide be a human being."[118] The court also noted that when used in other provisions of the Penal Code, "person" included "a public or private corporation."[119] Although the court found the indictment defective and dismissed the case, it concluded that a corporation may commit homicide and may properly be held accountable.[120]

The *Ebasco Services* case was the first of a recent wave of decisions holding corporations criminally liable for homicide based upon definitions of the word "person" that include a corporation within the meaning of a common-law or statutory definition of homicide.[121] In *State v. Ford Motor Co.*,[122] the Ford Motor Company was charged with three counts of reckless homicide after three teenage girls died when the Pinto they were driving was struck from behind and exploded.[123] The court had no trouble sustaining the indictment because the Indiana Criminal Code[124] specifically included corporations within its definition of "person."[125]

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

117. *Id.*

118. 77 Misc.2d at 786, 354 N.Y.S.2d at 810. The Penal Code defined "person" as follows: " 'Person' *when referring to the victim of a homicide*, means a human being who has been born and is alive." N.Y. PENAL LAW § 125.05[1] (emphasis added by court).

119. 77 Misc.2d at 787, 354 N.Y.S.2d at 811. The general definition of "person" in the Penal Code is as follows: " 'Person' means a human being, and where appropriate, a public or private corporation." N.Y. PENAL LAW § 10.00(7) (McKinney 1975).

120. 77 Misc.2d at 787, 354 N.Y.S.2d at 811.

121. This trend has also reached the United States Congress. Section 1 of Title 1 of the United States Code provides that in determining the meaning of any Act of Congress, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (1982).

122. No. 5324 (Ind. Sup. Ct., indictment filed Sept. 13, 1978), *digested at* 47 U.S.L.W. 2178 (1978).

123. *Id.* This case has been noted for making two additional advances in corporate criminal liability. The corporation was indicted for reckless homicide rather than the lesser offense of negligent homicide. It was also the first time a corporation was indicted for a criminal offense in a products liability matter. *See Corporate Behavior, supra* note 39, at 1281.

124. IND. CODE ANN. § 35-41-1-2 (Burns 1979) defines "person" to include "a human being, corporation, partnership, unincorporated association, or government entity." The court's conclusion was further supported by another section of the criminal title which stated that corporations are subject to prosecution for any offense. *Id.* at § 35-41-2-3(a).

125. The *Ford Motor Co.* case raised a great deal of controversy and spurred several

Since *Ford Motor Co.*, courts in Pennsylvania,[126] Kentucky[127] and California[128] have addressed the issue of corporate criminal liability for homicide and sustained prosecutions against the corporations involved. When faced with a similar question in Texas, however, the appellate court rejected the concept of corporate criminal liability for homicide, thereby becoming the only state in recent years to do so.

In *Vaugh & Sons, Inc. v. State*,[129] the corporation allegedly caused the death of two individuals in a motor vehicle collision.[130] The court acknowledged the fact that the Texas Penal Code includes a corporation within the definition of person[131] and accepted the concept that a corporation may be held criminally liable for the criminal acts of its agents.[132] The court, however, refused to extend this con-

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comments by legal scholars. *See* M. CLINARD & P. YEAGER, CORPORATE CRIME 259-62 (1980). *See, e.g.*, 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 and its impact on corporate criminal deterrence); Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 NOTRE DAME LAW 911, 919-24 (1979) (analyzing the *Ford Motor Co.* case and its impact on the evolution of corporate criminal liability). Much analysis has focused on the propriety of criminal sanctions in the corporate homicide context. One group maintains that the *Ford Motor Co.* case put the corporate world on notice that it can be indicted for homicide. *See* M. CLINARD & P. YEAGER, *supra*; Comment, *supra*. The other group argues that the case demonstrates how easily large corporations can escape criminal liability even when they clearly deserve punishment. *See* M. ERMANN & R. LUNDMAN, CORPORATE DEVIANCE 17-18 (1982); *Corporate Behavior, supra* note 39, at 1281-82.

126. In Commonwealth v. McIlwain School Bus Lines, Inc., 283 Pa. Super. 1, 423 A.2d 413 (1980), the corporation was charged with homicide by vehicle. The Pennsylvania Vehicle Code provided that homicide by vehicle may be committed by "[a]ny person who unintentionally causes the death of another person . . . ." 75 PA. CONS. STAT. ANN. § 3732 (Purdon 1977). The Vehicle Code defined "person" as "[a] natural person, firm, co-partnership, association or corporation." 75 PA. CONS. STAT. ANN. § 102 (Purdon 1977). The court concluded that homicide by vehicle may be committed by a corporation. 283 Pa. Super. at 15, 423 A.2d at 420.

127. In Commonwealth v. Fortner LP Gas, 610 S.W.2d 941 (Ky. Ct. App. 1980), the court of appeals sustained an indictment against a corporation for manslaughter in the second degree. The Kentucky Penal Code defined "person" as follows: " 'Person' means human being, and where appropriate, a public or private corporation or unincorporated association, a partnership, a government or a governmental authority." KY. REV. STAT. § 500.080(12) (1975).

128. Granite Construction Co. v. Superior Court, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983). The corporation was charged with the death of seven construction workers who were killed in an accident at a power plant. The Court of Appeals, Fifth District, denied the corporation's petition for a preemptory writ of mandate challenging its indictment. The California Penal Code defines "person" so as to include corporations. CAL. PENAL CODE § 7 (West 1970). The Penal Code also has a catch-all statute that provides for punishment of corporations. *Id.* at § 672. The court concluded that for purposes of liability for criminal prosecution a corporation "stands before the law on the same footing as individuals." 149 Cal. App. 3d at 467, 197 Cal. Rptr. at 5.

129. 649 S.W.2d 677 (Tex. App.- Texarkana 1983, pet. granted).

130. *Id.* At trial the corporation was convicted and assessed a fine of $5,000.00.

131. TEX. PENAL CODE ANN. § 1.07(a)(27) (Vernon 1974). "Person" is defined as "an individual, corporation, or association." *Id.*

132. 649 S.W.2d at 678.

cept of vicarious corporate liability to crimes requiring specific intent.[133]

For crimes requiring specific intent, the court stated that it was necessary to examine the legislative intent for each specific crime to determine whether corporations were included within the class of culpable parties.[134] For the offense of criminally negligent homicide, the court reasoned that "whoever is capable of committing criminal homicide must also be capable of intent, knowledge, and recklessness — not just criminal negligence."[135] The court concluded that a corporation was incapable of such intent and knowledge and, therefore, reversed the conviction of the trial court.[136]

D. Causation

In addition to overcoming the various barriers that have traditionally precluded the extension of criminal liability to the corporate criminal,[137] the prosecution must satisfy all the necessary common law elements of homicide in order to obtain a conviction against the corporation. At common law, an individual was guilty of murder if the prosecution could prove that the defendant committed an affirmative act, or failed to act when there was a duty to act, that the defendant had a malicious state of mind, and that his conduct was the "legal" cause of the death of a human being. Additionally, in many jurisdictions, death must occur within a year and a day after the defendant's act or omission to act.[138]

Of the four elements necessary to prove murder, the proof of causation can be very difficult. Proof of a culpable state of mind is necessary to the imposition of criminal liability. It is not enough, however, that the defendant conducts himself with an intention to produce the specified result; the defendant's act or omission must have also caused the prohibited result.[139] For those crimes which require that the defendant intentionally, recklessly or negligently cause a certain result, proof of causation remains a necessary element of

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133. *Id.* The court remarked that "It is fundamental to our criminal jurisprudence that for more serious offenses guilt is personal and not vicarious." *Id.*

134. *Id.*

135. *Id.* at 678-79. The Texas Penal Code states that "[a] person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual." TEX. PENAL CODE ANN. § 19.01 (Vernon 1974).

136. 649 S.W.2d at 679.

137. *See supra* notes 39-43 and accompanying text.

138. W. LAFAVE & A. SCOTT, *supra* note 20, § 7.1(f) at 611.

139. *See* Note, *Criminal Liability of Corporate Managers for Deaths of their Employees: People v. Warner-Lambert Co.*, 46 ALB. L. REV. 655, 663 (1982) [hereinafter *Liability of Corporate Managers*]. *See generally* W. LAFAVE & A. SCOTT, *supra* note 20, § 3.12, at 277.

liability.[140]

To prove causation it is necessary to show that the conduct of the defendant was both the actual cause and the "legal" cause of the result.[141] Conduct is considered the actual cause of a particular result if the result would not have happened in the absence of such conduct.[142] This requirement is commonly referred to as the "but for" test.[143]

The second hurdle in proving causation is often the most difficult. Even if the defendant's conduct is the actual cause of the particular result, liability will not be imposed if it is not the "legal" cause of the result.[144] "[P]roblems of legal causation arise when the actual result of the defendant's conduct varies from the result which the defendant intended (in the case of crimes of intention) or from the result which his conduct created a risk of happening (in the case of crimes of recklessness and negligence)."[145] Typical variances between intended results and actual results may be in the person or property harmed, the manner in which the harm occurs, or the type or degree of the harm.[146]

Most of the actual cases addressing the question of "legal" causation concern homicide.[147] In *People v. Warner-Lambert Co.*,[148] the Court of Appeals of New York addressed the question of "legal" cause in the context of corporate criminal responsibility.[149] The defendant corporation[150] and several of its officers and employees were charged with six counts of manslaughter in the second degree[151] and

140. *See* W. LAFAVE & A. SCOTT, *supra* note 20 § 3.12 at 277.

141. *Id.* at 281.

142. *Id.* at 282.

143. *Id.* at 279. The authors stated that the test may be articulated as " 'but for' the antecedent conduct the result would not have occurred." *Id.* Model Penal Code § 2.03(1) states that conduct "is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred." MODEL PENAL CODE § 2.03(1) (1962).

144. W. LAFAVE & A. SCOTT, *supra* note 20, § 3.12 at 279.

145. *Id.* at 286-87.

146. *Id.* at 287. A key element of legal cause is foreseeability. In this context, " 'foreseeable' means something less than probable or likely but more than possible; perhaps it is best described as something which, as one looks back on the event, does not strike him as extraordinary." *Id.* § 7.12 at 284. A defendant will not be liable for manslaughter if the manner in which the victim is killed seems quite extraordinary in light of what could be foreseen or was foreseeable. *Id.*

147. *Id.*

148. 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

149. *Id.*

150. Warner-Lambert Co. is a manufacturing corporation. The plant involved in this suit was in the production of Freshen-Up chewing gum.

151. The New York Penal Code defines "manslaughter in the second degree" as follows: "A person is guilty of manslaughter in the second degree when: He recklessly causes the death of another person." N.Y. PENAL LAW § 125.15 (McKinney 1975).

six counts of criminally negligent homicide[152] as a result of the deaths of six employees. The deaths were the result of a massive explosion and fire in the corporation's manufacturing plant caused by the improper ventilation of flammable particles and gases.[153]

Addressing the question of the defendant's criminal liability, the court recognized that corporations may be indicted for homicide.[154] As to causation, the court stated that the evidence was "sufficient to establish the existence of a broad, undifferentiated risk of explosion from ambient MS (magnesium stearate) dust which had been brought to the attention of defendants. It may be assumed that, if it be so categorized, the risk was both substantial and unjustifiable."[155] The court, however, concluded that something more was necessary to prove causation. Expanding upon the common law definition of causation, the court held that "the defendants actions must be a *sufficiently direct cause* of the ensuing death before there can be any imposition of criminal liability."[156] For causation to be established under this rule, each particular event in the chain of events leading up to the ultimate result must have been foreseen or foreseeable.[157] Dismissing the indictment, the court held that the evidence failed to prove beyond a reasonable doubt that the defendants should have foreseen the physical cause of the explosion.[158]

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152. The New York Penal Code defines "criminally negligent homicide" as follows: "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person." N.Y. PENAL LAW § 125.10 (McKinney 1975).

153. 51 N.Y.2d at 299, 414 N.E.2d at 661, 434 N.Y.S.2d at 160. On the day of the explosion the employees were working with magnesium stearate (MS), a dry, dust-like lubricant and liquid nitrogen. Both chemicals are normally considered safe and are commonly used in the manufacturing process. The process employed by Warner-Lambert to apply the MS resulted in the release of a high concentration of MS dust into the air. *Id.* at 299, 414 N.E.2d at 662, 434 N.Y.S.2d at 161. When suspended in the air in sufficient concentration, the dust poses a substantial risk of explosion if ignited. Aware of the substantial degree of risk involved, the corporation had begun to modify its production process. On the date of the accident, however, only one of six production units had been modified. *Id.* at 301, 414 N.E.2d at 663, 434 N.Y.S.2d at 162.

154. *Id.* at 303 n.1, 414 N.E.S.2d at 664 n.1, 434 N.Y.S.2d at 163 n.1. The court presumed, without actually deciding, that sections 125.10 and 125.15 of the New York Penal Code were sufficient in scope to encompass deaths occurring in the course of manufacturing operations. The court stated, however, that no case had actually addressed the issue and that legislative history did not mandate such a result. The court then cited authority both for and against application of the Penal Code in this context. *Id.*

155. *Id.* at 304, 414 N.E.2d at 664, 434 N.Y.S.2d at 163. Counsel for the People argued that this observation was sufficient to satisfy a "but-for" test of causation. The People argued that "there was evidence of a foreseeable and indeed foreseen risk of explosion of MS dust and that in consequence of defendant's failure to remove the dust a fatal explosion occurred." *Id.* at 305-06, 414 N.E.2d at 665, 434 N.Y.S.2d at 164.

156. *Id.* at 306, 414 N.E.2d at 666, 434 N.Y.S.2d at 165 (emphasis in original).

157. *Id.*

158. *Id.* at 305, 414 N.E.2d at 665, 434 N.Y.S.2d at 164.

The *Warner-Lambert* decision has been criticized[159] for its interpretation of the elements of causation. Prior to the decision, New York's highest court, in *People v. Kibbe*,[160] stated that to impose criminal liability upon an individual it was sufficient to prove that "the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused."[161] The court's recognition of a "broad, undifferentiated risk of an explosion"[162] seems to satisfy the *Kibbe* court's "harm . . . which should have been foreseen" standard.[163] The *Warner-Lambert* court, however, expanded upon the *Kibbe* rule of foreseeability, adding to it the requirement that the defendant foresee the exact chain of events leading to the ultimate result.[164] Thus, the *Warner-Lambert* court "shifted the causation focus from a zone of harm to a pin-pointed cause of harm."[165] This new standard is inconsistent with the common law rules of causation.[166]

III. People v. Film Recovery Systems, Inc.

A. The Decision

In *People v. Film Recovery Systems, Inc.*,[167] the corporation[168] and its sister company, Metallic Marketing Systems, Inc.,[169] were

159. *See, e.g., Corporations Can Kill Too, supra* note 1, at 1438-39 (The *Warner-Lambert* standard "is inconsistent with the prior rule of causation"); *Liability of Corporate Managers, supra* note 139, at 659 (*Warner-Lambert* "may practically preclude the application of the New York homicide statutes to corporate agents.").

160. 35 N.Y.2d 407, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974), *aff'd sub nom.* Henderson v. Kibbe, 431 U.S. 145 (1977).

161. *Id.* at 412, 321 N.E.2d at 776, 362 N.Y.S.2d at 851-52.

162. 51 N.Y.2d at 304, 414 N.E.2d at 664, 434 N.Y.S.2d at 163.

163. 35 N.Y.2d at 412, 321 N.E.2d at 776, 362 N.Y.S.2d at 851-52.

164. 51 N.Y.2d at 305, 414 N.E.2d at 665, 434 N.Y.S.2d at 164. *See also Liability of Corporate Manager, supra* note 139, at 672 (The author notes that the *Kibbe* court "left unclear whether 'ultimate harm' meant simply the occurrence of death or the particular way that death occurred. The *Warner-Lambert* court held that 'ultimate harm' means the particular way that death occurs.").

165. *See* Radin, *supra* note 10, at 14.

166. *See supra* notes 137-46 and accompanying text.

167. Nos. 83-11091, 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985).

168. Film Recovery Systems, Inc. (FRS) is a small corporation located in suburban Elk Grove Village, Illinois. Using a standard process called cyanide-leaching, the firm recovers silver from old photographic film. The process required employees to dip film chips into large vats containing sodium cyanide and water. When the film came in contact with the solution it reacted producing silver cyanide. The silver cyanide was then placed in electroplating tanks. An electric current drew the silver onto metal plates. From these plates employees could remove scrapes of silver. FRS then shipped the silver scrapes to a refinery where the scrapes are processed into silver bullion. The process can be highly profitable and in FRS's case grossed between $13 and $20 million per year. *Corporations Can Kill Too, supra* note 1, at 1425.

169. Between 1979 and 1983 FRS had substantially expanded its production capacities. Its work force increased from six to forty employees; the majority of employees being illegal

charged with involuntary manslaughter[170] and fourteen counts of reckless conduct[171] as a result of the death of Stefan Golab,[172] a company employee.[173] Golab died from inhaling cyanide gases[174] that had permeated throughout the firm's factory. The individual defendants, Steven O'Neil,[175] Charles Kirschbaum[176] and Daniel Rodriguez[177] were charged with murder[178] and fourteen counts of reckless conduct.[179]

Based on a total review of all the evidence presented, Judge

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aliens who spoke little or no English. *Id. See, e.g.*, Moberg, *Employers who create hazardous workplaces could face more than just regulatory fines. They could be charged with murder.*, 14 STUDENT LAWYER 36 (Feb. 1986) ("[A] former bookkeeper testified that illegal aliens from Poland and Mexico were deliberately chosen to work with the dangerous chemicals since they were less likely to be knowledgeable or to complain.").

170. Illinois has no separate degrees of murder. Homicide is either murder, voluntary manslaughter, involuntary manslaughter or reckless homicide. Illinois defines involuntary manslaughter as follows: "A person who intentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly . . . ." ILL. ANN. STAT. ch. 38, § 9-3 (Smith-Hurd 1979).

171. Illinois defines reckless conduct as follows:

> A person is reckless or acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation . . . .

ILL. ANN. STAT. ch. 38 § 4-6 (Smith-Hurd 1984).

172. Stefan Golab was a 61-year-old Polish immigrant with a work visa. Golab began working at the large vats pumping and stirring the sodium cyanide solution inside the vats. The containers of sodium cyanide solution carried warning labels that read, in English: "Poison. Danger! May be fatal if inhaled, swallowed or absorbed through skin. Contact with acid or weak alkalies liberates poisonous gas . . . . Do not breathe dust or gas. Do not get in eyes, on skin, on clothing." *Corporations Can Kill Too, supra* note 1, at 1426. The workers at FRS dissolved the sodium cyanide in water, a weak alkali. *Id.* Despite attempts with the aid of an interpreter Golab was unable to effect a transfer. On February 10, 1983 Gobal collapsed and died on the job. *Id.* at 1427.

173. Report of Proceedings at 4, *People v. Film Recovery Systems, Inc.*

174. Medical and toxicological reports revealed that Golab had a blood cyanide level of 3.45 micrograms per millitre, a lethal dose. *Id.* at 6.

175. FRS was founded in 1979 by Steven J. O'Neil. With the aid of B.R. MacKay & Sons, Inc. of Salt Lake City, O'Neil established the sister company Metallic Marketing Systems, Inc. *See Corporations Can Kill Too, supra* note 1, at 1425.

176. The plant manager, Charles Kirschbaum, accepted his position at FRS after two years experience at another silver reclamation company. Kirschbaum's former employer, who also used the cyanide-leaching process, controlled the potentially poisonous gas by installing hooded vents over each vat. *Id.* at 1426. FRS chose not to use such effective methods to remove the gas, but rather, they relied on a faulty ceiling exhaust system and safety equipment that failed to prevent any of the potential harm. *Id.*

177. Daniel Rodriguez acted as foreman and assistant manager at the FRS plant.

178. Illinois defines murder as follows:

> (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another . . . .

ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979).

179. Report of Proceedings at 3-4, *People v. Film Recovery Systems, Inc.*

Banks delivered a guilty verdict as to all counts,[180] stating that the individual "defendants were totally knowledgeable in the dangers which are associated with the use of cyanide."[181] He found that the failure to properly warn employees of the dangers of working with cyanide was "reckless conduct"[182] and, through their acts of commission and omission, the defendants had created the lethal environment at the plant.[183]

In addressing the issue of corporate criminal liability,[184] Judge Banks rejected the notion that a corporation cannot be convicted of a crime requiring specific intent.[185] Specifically, Judge Banks stated that

> [T]he mind and mental state of a corporation is the mind and mental state of the directors, officers and high managerial personnel because they act on behalf of the corporation for both the benefit of the corporation and for themselves; and if the corporation's officers, directors and high managerial personnel act within the scope of their corporate responsibilities and employment for their benefit and for the benefit of the profits of the corporation, the corporation must be held liable for what oc-

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180. *Id.* at 11. Judge Banks' opinion contained only findings of fact. It did not include legal theory or citation to precedent.

181. *Id.* at 7-8.

182. *Id.* at 9.

183. *Id.* Judge Banks stated that "The death of Stefan Golab was not accidental, but in fact murder." *Id.*

184. To overcome traditional statutory barriers to criminal prosecution of corporations, the prosecution relied on section 5-4 of the Illinois Criminal Code. Section 5-4 allowed indictment of a corporation pursuant to a demonstration of legislative intent to impose such liability. Section 5-4 provides:

> (a) A corporation may be prosecuted for the commission of an offense if, but only if:
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> (1) The offense is . . . defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation, and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, . . .; or
>
> (2) The commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation . . . .
>
> (c) For the purpose of this Section:
>
> (1) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.
>
> (2) "High managerial agent" means any officer of the corporation, or any other agent who had a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.

ILL. ANN. STAT. ch. 38, § 5-4 (Smith-Hurd 1985).

185. Report of Proceedings at 9, *People v. Film Recovery System, Inc.*

curred in the work place.[186]

On July 1, 1985, the three individual defendants were sentenced to 25 years in the Illinois state prison and fined $10,000 each.[187] In addition, Judge Banks imposed concurrent sentences of 364 days for each of fourteen counts of reckless conduct.[188] FRS and MMS were fined a combined total of $48,000.[189]

B. Analysis

Writing in 1957, Professor Gerhard O.W. Mueller[190] recognized the strong necessity of holding corporations criminally liable for their acts. He inquired, "Why should not a corporation be guilty of murder where, for instance, a corporate resolution sends the corporation's workmen to a dangerous place of work without protection, all officers secreting from these workmen the fact that even a brief exposure to the particular work hazards will be fatal?"[191] Mueller also recognized that a strong necessity does not justify imposition of criminal liability when it is not appropriate.[192]

In 1957 the rationale justifying the trend toward increased corporate accountability was still undergoing substantial changes. Barriers to expansion of corporate criminal liability still prevented a successful prosecution of a corporate defendant. The evolution of the doctrine has gradually eroded each barrier to the extension of liability. *People v. Film Recovery Systems, Inc.* is a breakthrough representing the culmination of the evolution of corporate criminal responsibility.

The novelty of the *Film Recovery* decision is not the fact that the corporation was convicted of involuntary manslaughter. Several courts had already found corporations guilty of manslaughter.[193] The significance of the *Film Recovery* decision is that in addition to the

186. *Id.* at 9-10. It is important to note here that Judge Banks has adopted the "qualified approach" to corporate moral blameworthiness which advocates that the acts and intent of only top level personnel should be imputed to the corporation. *See supra* notes 87-90 and accompanying text.

187. *Film Recovery Executives Sentences to 25 Years for 1983 Employee Death*, [June-Nov.] O.S.H. REP. (BNA) No. 1-26, at 76 (July 4, 1985).

188. *Id.* There is no parole in Illinois. The maximum time off the sentence allowed for good behavior is one day for each day served. Thus, O'Neil, Kirschbaum and Rodriguez must serve at least 12 ½ years of their 25 year sentence. *Id.*

189. *See Corporations Can Kill Too*, *supra* note 1, at 1433.

190. Gerhard O.W. Mueller was an associate professor of law at West Virginia University.

191. *See* Mueller, *supra* note 55, at 23.

192. *Id.*

193. *See supra* notes 109-14, 126-28 and accompanying text.

conviction of FRS and MMS, the court also found three individual officers of the corporation guilty of murder. The case represents the first time in the history of the United States that the corporation *and* its officers were convicted of homicide.[194] While the decision is unique in that it is a logical progression in the evolution of corporate criminal responsibility, the real breakthrough will be felt in the policy ramifications of the decision. *Film Recovery* is the first case to satisfy the traditional common-law justification for the imposition of criminal penalties.

The imposition of criminal penalties has traditionally been justified by one or more of four rationales: rehabilitation, incapacitation, deterrence and retribution.[195] These four rationales can be further subcategorized into two primary goals of criminal punishment. In theory, the imposition of criminal sanctions serves both social (deterrence) and moral (retribution) goals of a society.[196]

The rehabilitation and incapacitation of offenders and the deterrence of would-be offenders are socially desirable goals which may be achieved through the imposition of criminal sanctions.[197] Retribution appeases the moral outrage of a society by ensuring that criminal offenders are given their just desserts.[198] "Imposing criminal sanctions on a guilty person is justified, not because of the consequences which will result, but because it is *morally proper* to punish that person."[199] A criminal sanction is most effective when it satisfies both the social and moral goals of punishment.[200] In reality, however, it is very difficult to achieve an equal balance between deterrence and retribution.[201]

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194. *See supra* note 8 and accompanying text.

195. *See Developments, supra* note 11, at 1231; H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968); R. ORLOSKI, CRIMINAL LAW AN INDICTMENT 3 (1977); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 691 (1963); MODEL PENAL CODE § 1.02 (Proposed Official Draft, 1962).

196. *See, e.g.*, H. PACKER, *supra* note 195, at 36 ("[T]here are two and only two ultimate purposes to be served by criminal punishment: the deserved infliction of suffering on evildoers and the prevention of crime.").

197. *See Developments, supra* note 11, at 1231.

198. *See Developments, supra* note 11, at 1231-32; H. PACKER, *supra* note 195, at 37.

199. *Developments, supra* note 11, at 1231 (emphasis added).

200. *See, e.g., Developments, supra* note 11, at 1244 ("In designing standards of criminal liability for corporations and for individuals . . ., the courts and legislatures must attempt to strike an appropriate balance between deterrence and just desserts.").

201. *See, e.g., Developments, supra* note 11, at 1243 (in practice the two rationales frequently conflict); H. PACKER, *supra* note 195, at 36 ("these two purposes are almost universally thought of as being incompatible."); J. WAITE, THE PREVENTION OF REPEATED CRIME 11 (1943) ("punishments designed for the one purpose [retribution] may not be well suited to the other [deterrence]").

Deterrence[202] is cited by a majority of commentators as the primary justification for the imposition of sanctions upon corporate criminals.[203] The deterrent role of the criminal law is most effective on the socially conscious and calculating criminal. Deterrence does not threaten those persons whose status in society is in the lower stratum.[204] Those persons have nothing to risk, so the threat of a criminal sanction is an ineffective deterrent. Deterrence also does not affect the spontaneous, non-calculating criminal.[205]

Corporations do not fit into either of these two categories. A corporation is very conscious of its position in society and will not act so as to jeopardize that status. Corporate activity is also very deliberate. Because corporations act to maximize their economic benefits, all conduct is based on a cost-benefit analysis calculated to achieve the desired result.[206] Thus, "deterrence plays a more significant role in the area of corporate crime than in other areas of the criminal law."[207]

The common law has typically imposed the sanctions of imprisonment and fines to deter socially undesirable conduct.[208] The stigma of criminality which is associated with these sanctions often serves as an effective deterrent in and of itself.[209] Whether these sanctions are

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202. "Deterrence" has been defined as the "control or alteration of present and future criminal behavior which is effected by fear of adverse extrinsic consequences resulting from that behavior." D. BEYLEVELD, A BIBLIOGRAPHY ON GENERAL DETERRENCE RESEARCH xvi (1978).

203. *See Developments, supra* note 11, at 1235 n.16; H. PACKER, *supra* note 195, at 356; Comment, *Increasing Community Control Over Corporate Crime — A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 302 n.68 (1961); *Corporate Behavior, supra* note 39, at 1286; Radin, *supra* note 10, at 61.

204. *See* H. PACKER, *supra* note 195, at 45. *See generally* Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 957-60 (the author discusses how criminal sanctions have a varying degree of deterrent effect depending on the social and economic status of the individual).

205. *See Developments, supra* note 11, at 1235. *See, e.g.*, S. RUBIN, *supra* note 195, at 658 ("where strong passions or deep psychological motives are involved, the prospect of detection and punishment has relatively little effect" in deterring potential offenders). *See also* Gregg v. Georgia, 428 U.S. 153 (1976). Discussing the deterrent effect of the death penalty for the crime of murder the Court stated that "there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect." Nevertheless, the Court reasoned that for certain calculated crimes "the death penalty undoubtedly is a significant deterrent." *Id.* at 185.

206. *See Developments, supra* note 11, at 1235-36 & n.20; Mueller, *supra* note 55, at 42.

207. *See Developments, supra* note 11, at 1236.

208. *Id.* at 1365.

209. *See Developments, supra* note 11, at 1367. *See, e.g.*, Kadish, *Some Observations On the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 437 (1963) ("The central distinguishing aspect of the criminal sanction appears to be the stigmatization of the morally culpable."); Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 7 (1983) ("The social stigma attached to a conviction is

effective deterrents to corporate criminal behavior is uncertain.[210] Most commentators do agree, however, that if stringent sanctions are vigorously enforced, they can effectively deter corporate crime.[211] The threat of criminal sanctions is especially effective as a deterrent when the sanctions are applied to both the corporation and its individual officers.[212]

Several commentators question the effectiveness of criminal sanctions as deterrents.[213] They argue that corporate criminal sanctions are an effective deterrent whether applied to the corporation or the individual.[214] The corporate entity may not be imprisoned, so the primary sanction against illicit behavior is the imposition of a fine. As presently administered, however, the small fixed fines imposed on corporations are treated merely as a cost of doing business.[215]

The imposition of very large, substantial fines may force the corporation to double-check its cost-benefit analysis and thereby effectively deter the corporation from further illicit conduct. It is frequently argued, however, that such large penalties will be felt most heavily by innocent parties associated with the corporation.[216] The less culpable parties, including shareholders, creditors and consumers will be the ones who feel the brunt of any sanction imposed on the corporation.[217] This argument is most often made on behalf of the shareholders who have not participated in any criminal conduct but

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part of the punishment and, in some instances, may have a greater deterrent effect than the term of imprisonment itself."); J. WAITE, *supra* note 201, at 15 (One argument supporting the notion that punishment can be an effective deterrent rests "not upon fear of physical suffering so much as upon unwillingness to incur the reprobation and contumely of one's fellow human beings.").

210. *See Developments, supra* note 11, at 1244 n.5.

211. *See id.* at 1244; Kennedy, *supra* note 209, at 4; H. PACKER, *supra* note 195, at 39-45, 356-57.

212. *See infra* notes 233-38 and accompanying text.

213. *See Developments, supra* note 11, at 1366; Comment, *Increasing Community Control Over Corporate Crimes — A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 293 (1961); *Corporate Behavior, supra* note 39, at 1286; Coffee, *supra* note 11, at 388-411; Radin, *supra* note 10, at 49-59.

214. *Developments, supra* note 11, at 1366.

215. *Id.* The author states that most corporations will risk the threat of criminal conviction because the "possible profits so outweigh the possible penalties that widespread noncompliance is inevitable" (quoting M. GREEN, THE CLOSED ENTERPRISE SYSTEM 162 (1972)). The *Ford Motor Co.* case is a perfect example of this theory. Ford Motor Co. chose not to make improvements on their Pintos that would have prevented explosion in rear-end collisions. Instead the company marketed a less costly yet extremely dangerous model. For a discussion of the *Ford Motor Co.* case and its ramifications, see *supra* notes 122-25 and accompanying text.

216. *See* Radin, *supra* note 10, at 53.

217. *Id. See, e.g., Corporate Behavior, supra* note 39, at 1292 ("The opponents of corporate criminal liability have urged that the fine falls upon the stockholders, who are twice removed from the wrongdoer."); *Corporations Can Kill Too, supra* note 1, at 1436 (liability of a corporation is likely to have a "negative effect on consumers").

whose securities may be devalued when the penalty is levied upon the corporation.[218]

It still might be argued that criminal sanctions are an effective deterrent when applied to the individual members of the corporation.[219] The threat of imprisonment may be the most effective way to prevent employee violations of the law. Even the incentive of increased profits will vanish in the face of a threatened jail sentence. The stigma associated with such sanctions is in itself a powerful deterrent, even absent a conviction.[220] In practice, however, the threat of personal conviction upon the individual officers and officials of the corporation has not been a reality.[221]

Several factors have traditionally worked to ensure that the individual actors go unpunished. The problems of moral neutrality, the proclivity of juries to acquit corporate officials and the difficulties of prosecution have consistently prevented successful prosecution of corporate personnel.

First, the problem of moral neutrality has played a substantial role in the field of corporate criminal liability.[222] For years society has been unwilling to label illicit corporate behavior as worthy of moral condemnation.[223] Legislatures frequently characterize corporate criminal violations as social offenses, not worthy of condemnation.[224] Public welfare offenses,[225] for example, punish illicit behavior regardless of culpability.[226] Thus, the focus of the community has been directed away from behavior that is morally offensive and deserving of criminal punishment.

Second, the trend of juries has been to acquit the white-collar individuals while convicting the firm.[227] Typically, the officers and officials of corporations are also the civic leaders of the community. They have wide public support which is manifested in an unwillingness of the jury to impose the criminal label and stigma upon someone who committed a violation that has traditionally been considered

218. *See* Radin, *supra* note 10, at 53. The author recognizes that this argument fails to consider that the shareholder's loss is limited to his initial investment and may be recognized as the risk of entering the market.

219. *See Developments, supra* note 11, at 1367; *Corporate Behavior, supra* note 39, at 1289.

220. *See supra* note 209.

221. *See Developments, supra* note 11, at 1367.

222. *See* Kadish, *supra* note 209, at 435-40.

223. *See id.* at 437; Radin, *supra* note 10, at 50-52.

224. Radin, *supra* note 10, at 50.

225. *See supra* notes 27-29 and accompanying text.

226. Kadish, *supra* note 209, at 437.

227. *See supra* notes 74-76 and accompanying text. *See also* Kadish, *supra* note 209, at 433; *Developments, supra* note 11, at 1367; *Corporate Behavior, supra* note 39, at 1289.

as not worthy of moral condemnation.[228]

Last, the difficulties of prosecution are amplified by the ability of corporations to protect culpable individuals.[229] Determining which individuals are responsible for the illicit conduct is especially difficult in large corporations where the mechanisms of control and authority are very complex. The unwillingness of society to label corporate criminal conduct as morally reprehensible and the unwillingness of juries to convict individual defendants of criminal violations, coupled with the difficulty of pinpointing the culpable individual, lessen the likelihood that the threat of personal conviction upon individual actors will provide an adequate deterrent.[230]

The arguments discussed above, which are traditionally proffered by commentators suggesting that the deterrent threat is inadequate to prevent corporate misconduct, fail in light of the *Film Recovery* decision. Current judicial trends demonstrate a growing willingness to impose criminal sanctions on corporate criminal offenders. As society becomes increasingly aware of the egregious conduct of its corporations, it is no longer reluctant to deem such conduct as morally reprehensible.

The *Film Recovery* case and the wave of prosecutions that have followed[231] demonstrate society's changing attitudes toward corporate criminal responsibility. Prosecutors are more willing to prosecute corporate criminals knowing that the barriers to a successful prosecution, which at one time made convictions highly unlikely, are now broken down.[232] Furthermore, juries will be more willing to convict corporate employees when faced with the knowledge that the conduct of individual defendants has led to serious injury or death.

The importance of the current trend in corporate criminal liability is the focus placed upon both the corporate entity *and* its individ-

228. *See* Kadish, *supra* note 209, at 437; *Developments, supra* note 11, at 1367. Even if the jury convicts the individual defendants, the stigma associated with that conviction is often negligible. *See, e.g.*, Kadish, *supra* note 209, at 437 ("[W]here the violation is not generally regarded as ethically reprehensible, either by the community at large or by the class of businessmen itself, the private appeal to conscience is at its minimum and being convicted and fined may have little more impact than a bad selling season."); *Corporate Behavior, supra* note 39, at 1289 ("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.").

229. *See Developments, supra* note 11, at 1368; Radin, *supra* note 10, at 57; MODEL PENAL CODE § 2.07, comment at 150 (Tent. Draft No. 4, 1955).

230. *See* Kennedy, *supra* note 209, at 8. As long as "any societal condition exists that undermines the successful transmission or reception of the deterrent message," a criminal sanction will not be an effective deterrent. *Id.*

231. *See supra* note 9.

232. *See* Middleton, *supra* note 9, at 8.

ual officers. Several commentators have noted that for the deterrence theory to be an adequate check on illicit corporate behavior both the corporation and its individual decision-makers must be prosecuted.[233] By directing the force of the law at both the corporate firm and its directors, the deterrence threat will force the corporate entity and its individual actors to monitor each other's activities. In effect, the threat of prosecution will implement a sort of "checks and balances" system on the corporation. The threat of prosecution will encourage employees to seek out and remedy violations before they occur and it will encourage the corporate entity to implement policies aimed at preventing violations. Even in large corporations, the double threat of prosecution will encourage the corporation to improve "internal monitoring and discipline systems at senior levels."[234]

Commentators who criticize the deterrent threat of criminal sanctions consistently base their theories in the context of prosecution of either the firm or the individuals. The generally accepted conclusion is that the firm could be successfully prosecuted but the sanctions imposed are inadequate to support the prosecution.[235] The commentators also conclude that while the punishment of an individual could be a substantial threat, the likelihood of prosecution is so minimal that the deterrent threat is inadequate to prevent criminal violations.[236] These arguments are no longer viable in light of the *Film Recovery* decision and the trend that it represents.

"For a threat of punishment to be effective as a deterrent, the threat must be credible and communicated. For credibility to be achieved, the threatened target group must believe that the system is capable of apprehending and punishing some offenders."[237] The current judicial trend toward increased corporate criminal responsibility has added certainty to a field of criminal prosecution that previously lacked credibility. As the probability of conviction and punishment increases, the viability of the deterrence threat is strengthened.[238]

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233. *See, e.g.*, Coffee, *supra* note 11, at 387 ("[A] sensible approach to corporate misbehavior still must punish the firm as well as the individual decision-maker."); Radin, *supra* note 10, at 56 (directing enforcement of criminal violations at the corporation and its directors will supplement the deterrent effect); *Developments*, *supra* note 11, at 1244 ("[C]orporate and individual criminal liability are complementary, not mutually exclusive.").

234. *See* Radin, *supra* note 10, at 57.

235. *See supra* notes 215-18 and accompanying text.

236. *See supra* notes 221-30 and accompanying text.

237. Kennedy, *supra* note 209, at 5.

238. *See id.* at 4-5. *See, e.g.*, G. DIX & M. SHARLOT, CRIMINAL LAW 122 n.1 (1979) ("The personality's ability to restrain instinctual urges to engage in aggressive and antisocial behavior will remain effective only if it is periodically reinforced by punishment of those who engage in such behavior.").

Prosecution and conviction of both the corporation and its individual officers is now a reality. The deterrence effect, therefore, is also a reality.

IV. Conclusion

For years, the imposition of criminal sanctions to punish corporate criminal activities has been criticized for its failure to effectively punish convicted corporations and for its failure to deter would-be corporate offenders. Historically, the doctrine of corporate criminal liability has been burdened by legal barriers that prevented efficient prosecution of corporations. As society recognized the need to control corporate crime, courts overcame these barriers. The current judicial trend in corporate criminal liability is the punishment of both the corporation and its individual officers. This trend, like other developments in the past, has developed to increase the efficiency of corporate prosecution. By prosecuting the corporation and its officers, this dual-system of punishment takes a step closer to striking a balance between the two primary goals of criminal punishment: retribution and deterrence.

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