

Murder, Inc.: The Criminal Liability of Corporations for Homicide

I. INTRODUCTION

Fire swept through the Haunted Mansion at Six Flags Corporation's Great Adventure amusement park in Jackson Township, New Jersey on May 11, 1984, resulting in the death of eight teenagers.¹ The Ocean County Prosecutor's Office launched a criminal investigation which led to a special grand jury indictment for manslaughter against Six Flags Corporation, Great Adventure, Inc., and two individuals.² Following a lengthy jury trial, the two corporations were acquitted in 1985.³

The *Six Flags* case represents a current trend in homicide cases towards prosecution of corporations instead of, or in addition to, individuals.⁴ The growth of this trend has been unaccompanied by any discernible rationale as many of the modern cases accept, without discussion, corporate criminal liability for manslaughter as a well-settled concept.⁵ The criminal law has followed an erratic and often unreasoned path from the proposition that a corporation could not commit any crime, to the modern notion that a corporation is capable of manslaughter.⁶ As such, the purpose of this comment is first to trace the develop-

¹ Asbury Park Press, May 12, 1984, at 1, col. 4.

² Indictment, *State v. Six Flags Corp.*, No. I-0650-9-84 (N.J. Super. filed Sept. 14, 1984).

³ N.Y. Times, July 21, 1985, at 1, col. 1.

⁴ See *infra* notes 132-38 and accompanying text.

⁵ See Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957). Professor Mueller described the development of criminal liability of corporations as follows:

Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is a hybrid of vicarious liability, absolute liability, an inkling of *mens rea* — though a rather degenerated *mens rea* —, a few genes from tort law and a few from the law of business associations. This weed is called *corporate criminal liability* (*herba responsibilitas corporationis M.*, for those who prefer the botanical term). Nobody bred it, nobody cultivated it, nobody planted it. It just grew. To be quite sure, it has not done much harm; at least nobody has established any harmful results stemming from its mere existence, so that some may well wish to conclude upon its usefulness. Has it done any good? Again, nobody knows, though the farmers of the law have formed many opinions, all resting on rather educated agronomic conjecture.

Id.

⁶ *Id.* at 22-23.

ment of corporate criminal liability for homicide and, second, to examine the social utility of prosecuting corporations rather than individuals.

II. HISTORICAL PERSPECTIVE

A. *The Early Cases: 1613-1890.*

Early common law courts did not recognize criminal liability of corporations for any offense.⁷ Explaining the rationale for this position, the Court of the King's Bench in 1613 stated in dictum in *In re Sutton's Hospital*⁸ that corporations were incapable of certain crimes because "they have no souls."⁹ *Sutton's Hospital* was not a criminal action, but rather a civil trespass suit arising out of a conveyance of real property to a corporation.¹⁰ The plaintiff, an heir of Thomas Sutton, claimed title to land which Sutton had conveyed to a corporation established for hospital purposes prior to his death. The issue of ownership turned in part upon whether a hospital could properly be incorporated prior to the actual establishment of the hospital.¹¹ The court held that a proposed hospital would "be sufficient to support the name of an incorporation when the corporation itself [exists] only in the abstract."¹² The court, in order to emphasize the abstract nature of a corporation, went on to catalogue a number of acts, both criminal and non-criminal, which a corporate entity could not perform.¹³

At the beginning of the next century, the concept set forth in the *Sutton's Hospital* dictum was adopted in an anonymous case decided by Chief Justice Holt.¹⁴ Lord Holt's remarkably concise opinion stated in its entirety that "[a] corporation is not indicta-

⁷ See Anonymous, 88 Eng. Rep. 1518, 12 Mod. 559 (K.B. 1702); *In re Sutton's Hospital*, 77 Eng. Rep. 937 (K.B. 1613); 1 W. BLACKSTONE, COMMENTARIES 476-77.

⁸ 77 Eng. Rep. 937 (K.B. 1613).

⁹ *Id.* at 973.

¹⁰ *Id.* at 961.

¹¹ *Id.* at 961, 973.

¹² *Id.* at 973.

¹³ *Id.* The court noted, inter alia, that a corporation "is invisible, immortal, and rests only in intendment and consideration of the law . . ." *Id.* The court further noted that corporations "cannot commit treason, nor be outlawed, nor excommunicate [nor] can they appear in person, but by attorney . . . [They] cannot do fealty for an invisible body can neither be in person, nor swear [and they are] not subject to imbecilities, death of the natural body, and divers[e] other cases." *Id.* (citations omitted).

¹⁴ Anonymous, 88 Eng. Rep. 1518, 12 Mod. 559 (K.B. 1702).

ble, but the particular members of it are."¹⁵ A number of later courts, however, declined to follow the opinion, with some treating it as dictum¹⁶ and others doubting its authenticity.¹⁷ Nevertheless, defense attorneys occasionally cited the opinion during the eighteenth century, despite its questionable genesis and lack of explanatory facts and reasoning.¹⁸

By the mid-nineteenth century, courts gradually accepted the concept of corporate criminal liability in limited circumstances.¹⁹ In *Regina v. Birmingham & Gloucester Railway*,²⁰ the court held that a corporation could be indicted for nonfeasance²¹ where the corporation was held in contempt of a court order to construct a bridge.²² The prosecution's primary objective, however, was not to punish but to coerce the corporation to act.²³ The Queen's Bench expanded upon *Birmingham & Gloucester* in the case of *Regina v. Great North of England Railway*,²⁴ holding that a corporation could be indicted for malfeasance.²⁵ The indict-

¹⁵ *Id.*

¹⁶ See *Regina v. Great N. of Eng. Ry.*, 72 Rev. Rep. 262, 264, 9 Q.B. 315, 319 (1846). See also *infra* notes 24-29 and accompanying text.

¹⁷ See *State v. Morris & E. R.R.*, 23 N.J.L. 360 (Sup. Ct. 1852). In *Morris & E. R.R.* Chief Justice Green commented:

It may well be doubted whether this is not one of those cases which extorted from Lord Holt 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." Aside from the apochryphal character of the report, it is hardly credible that so learned and accurate a judge as Lord Holt should have laid down the broad proposition imputed to him by his reporter.

Id. at 364.

¹⁸ See, e.g., *Great N. of Eng. Ry.*, 72 Rev. Rep. at 264, 9 Q.B. at 319. In that case, the defense counsel stated that "[t]he dictum of HOLT, CH. J, in an *Anonymous* case in *Modern Reports*, will be relied upon for the defendants," while acknowledging that "[i]t does not appear what the facts there were, nor whether the indictment was for a misfeasance or a nonfeasance." *Id.* (citation omitted).

¹⁹ See, e.g., *State v. Morris & E. R.R.*, 23 N.J.L. 360 (1852); *Regina v. Great N. of Eng. Ry.*, 72 Rev. Rep. 262, 269, 9 Q.B. 315, 326; *Regina v. Birmingham & G. Ry.*, 61 Rev. Rep. 207, 3 Q.B. 223 (1842).

²⁰ 61 Rev. Rep. 207, 3 Q.B. 223 (1842).

²¹ See *id.* at 215, 3 Q.B. at 233. "Nonfeasance" is defined as the "[n]on-performance of some act which ought to be performed, omission to perform a required duty at all, or total neglect of duty." BLACK'S LAW DICTIONARY 950 (5th ed. 1979) Nonfeasance should be distinguished from malfeasance. See *infra* note 25.

²² *Birmingham & G. Ry.*, 61 Rev. Rep. at 208, 3 Q.B. at 223.

²³ See *id.* at 215, 3 Q.B. at 233.

²⁴ 72 Rev. Rep. 262, 9 Q.B. 315 (1846).

²⁵ *Id.* at 269, 9 Q.B. at 326. "Malfeasance" is defined as:

[A] wrongful act which the actor has no legal right to do, or any wrongful conduct which affects, interrupts, or interferes with performance of official duty, or an act for which there is no authority or warrant of law

ment alleged that the Great North of England Railway Company had constructed a bridge in such a way that it obstructed a nearby public highway, thus creating a nuisance.²⁶ Lord Denman, writing for the court, saw no reason to distinguish between corporate nonfeasance and malfeasance.²⁷ He noted that while the court in *Birmingham & Gloucester* had specifically addressed nonfeasance, the decision "was by no means intended to deny the liability of a corporation for a misfeasance."²⁸ Here, the sovereign's purpose in bringing the action was not only to punish the corporation, but to compel it to remedy the defects of the bridge.²⁹

As early as 1837, New Jersey enacted a statute which provided a mechanism for the indictment of corporations.³⁰ The statute, however, did not specify the offenses for which a corporation could be indicted.³¹ This question was not addressed in New Jersey until 1852 when the supreme court held in *State v. Morris & Essex Railroad*³² that a corporation could be indicted for the creation of nuisance.³³ The facts of *Morris & Essex* resembled those of *Great North of England* in that the indictment charged the corporation with constructing a building on a public highway, "thereby creating a nuisance and obstruction to the free use of

official duty, or an act for which there is no authority or warrant of law or which a person ought not to do at all, or the unjust performance of some act, which [the] party performing it has no right, or has contracted not, to do.

BLACK'S LAW DICTIONARY 862 (5th ed. 1979).

²⁶ *Great N. of Eng. Ry.*, 72 Rev. Rep. at 262-63, 9 Q.B. at 315-17.

²⁷ *Id.* at 269-70, 9 Q.B. at 326.

²⁸ *Id.*

²⁹ *See id.* at 269-70, 9 Q.B. at 326-27. With regard to the argument that criminal proceedings should be directed at either to the individuals who gave the wrongful order or to those who carried it out, Lord Denmore observed:

We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any *reparation* for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation, acting by its majority . . .

Id. at 270, 9 Q.B. at 326-27 (emphasis added).

³⁰ Act of February 10, 1837, 1837 N.J. Acts 125. The statute provided in pertinent part, that a summons could be issued to a corporation in its corporate name, and that the summons could be served on a corporate president, officer or director.

Id. § 1, 1837 N.J. Acts at 125.

³¹ *See id.*

³² 23 N.J.L. 360 (Sup. Ct. 1852).

³³ *See id.* at 371-72.

said highway."³⁴ The supreme court noted in dictum that a corporation could not be held liable for certain crimes, including homicide, as there was no suitable punishment and corporations lacked capacity to form an evil intent.³⁵ Chief Justice Green observed, however, that such obstacles would not punish or bar corporate criminal liability for nuisance, rather its primary purpose would compel the corporation to remedy the situation.³⁶

*State v. Gilmore*³⁷ was the first case to hold a corporation criminally liable for a wrongful death, but, as with the criminal prosecutions in *Birmingham & Gloucester, Great North of England*, and *Morris & Essex*, the object was not to punish the corporate entity but rather to make reparations.³⁸ New Hampshire had enacted a statute in 1850 which provided that if a person died due to a railroad's negligence the state could, by indictment, prosecute the "proprietors" of the railroad.³⁹ If the prosecution was successful, a \$5,000 fine was imposed, the proceeds of which were distributed to the decedent's survivors.⁴⁰ Significantly, if there were no survivors, no fine could be imposed.⁴¹ The issue in *Gilmore* was whether the corporate entity or the individual stockholders were the "proprietors" of the railroad, and therefore liable under the statute.⁴² The *Gilmore* court held that the corporation was the proper defendant, noting that the statute effectively prescribed a civil tort action to be brought by the state on behalf of the decedent's survivors.⁴³ As such, *Gilmore* represented the furthest de-

³⁴ *Id.* at 371.

³⁵ *Id.* at 370. More specifically, Chief Justice Green noted:

It is true that there are crimes (perjury for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient.

Id.

³⁶ *Id.* The Chief Justice emphasized that:

There is a strong reason, which does not seem to have been adverted to in the reported cases, why the corporation, and not the individual directors or laborers, should be indicted for the creation of a nuisance. The *principal object* of an indictment for a nuisance, is to *compel it to be abated*; and regularly a part of the judgment upon conviction is, that the nuisance be abated.

Id. (emphasis added).

³⁷ 24 N.H. 461 (1852).

³⁸ *See id.* at 469-70.

³⁹ Act of July 13, 1850, § 7, 1850 N.H. Acts 928.

⁴⁰ *See id.*

⁴¹ *Gilmore*, 24 N.H. at 471.

⁴² *Id.* at 469.

⁴³ *See id.* at 471. The *Gilmore* court stated:

gree to which nineteenth century courts were willing to extend corporate criminal liability for wrongful death.

B. The Development of Criminal Liability for Corporate Manslaughter: 1900-1960.

In 1900, a Pennsylvania court in *Commonwealth v. Punxsutawney St. Passenger Railway*⁴⁴ addressed whether a corporation could be indicted and punished for committing homicide.⁴⁵ While recognizing the expansion of corporate criminal liability, the court quashed the indictment and held that no precedent existed for imposing liability on a corporation for crimes of which intent is an element of the offense.⁴⁶ The court also held that the criminal act of manslaughter by an agent was "so far ultra vires as to contravene all accepted rules in the criminal law for making it the act of the principal."⁴⁷

In that same year a Canadian court, in *Regina v. Great Western Laundry Co.*⁴⁸ also declined to hold a corporation criminally liable for manslaughter.⁴⁹ In that case, Gudrun Johnson, an employee of the Great Western Laundry Company was fatally injured when her skirt became caught on a rotating laundry machine shaft.⁵⁰ Great Western was indicted for criminal manslaughter on the grounds that the corporation had negligently failed to properly

The remedy, therefore, if the corporation is held answerable, would be consistent with the general policy of the law, which makes corporations liable civilly for all negligence of their agents and servants; and it would also be simple, easy, and effectual.

Id. at 472. See also *State v. Manchester & L. R.R.*, 52 N.H. 528, 549 (1873) (holding that prosecutions such as that in *Gilmore* were actually more akin to civil actions). The use of indictments to recover fines for disbursement to a decedent's survivors became quite common in New England in the latter part of the nineteenth century. See, e.g., *State v. Maine Cent. R.R.*, 77 Me. 244, 1 A. 673 (1885); *State v. Maine Cent. R.R.*, 76 Me. 357 (1884); *State v. Grand Trunk Ry.*, 58 Me. 176 (1870); *Commonwealth v. Boston & Me. R.R.*, 133 Mass. 383 (1882); *Commonwealth v. Boston & L. R.R.*, 126 Mass. 61 (1878); *Commonwealth v. Fitchburg R.R.*, 120 Mass. 372 (1876); *Commonwealth v. Fitchburg R.R.*, 92 Mass. (10 Allen) 189 (1865); *Commonwealth v. Boston & W. R.R.*, 65 Mass. (11 Cush.) 512 (1853); *Boston, C. & M. R.R. v. State*, 32 N.H. 215 (1855).

⁴⁴ 24 Pa. C. 25 (1900).

⁴⁵ *Id.* at 25-26.

⁴⁶ *Id.* at 26.

⁴⁷ *Id.* "Ultra vires" is defined as "[a]cts beyond the scope of the powers of a corporation, as defined by its charter or laws of state of incorporation." BLACK'S LAW DICTIONARY 1365 (5th ed. 1979).

⁴⁸ 13 Man. R. 66 (1900).

⁴⁹ *Id.* at 71.

⁵⁰ *Id.* at 66-67.

shield the machine shaft.⁵¹ The court, however, dismissed the indictment for lack of precedent⁵² and also because the corporation could not suffer imprisonment, the only prescribed penalty for manslaughter at the time.⁵³

In 1904, the Circuit Court of the Southern District of New York in *United States v. Van Schaick*⁵⁴ set new precedent by holding that a corporation could be indicted for manslaughter, even though under the applicable statute it could not be punished for the crime.⁵⁵ In *Van Schaick*, the Knickerbocker Steamboat Company was the corporate owner of the steamboat "General Slocum" (Slocum).⁵⁶ On June 15, 1904, a fire erupted on board the Slocum, and approximately 900 people drowned in an attempt to

⁵¹ *Id.* at 67.

⁵² *Id.* at 72.

⁵³ *Id.* at 73-74. *Cf.* Regina v. Union Colliery Co., 7 B.C.R. 247 (Crim. App. 1900) (holding corporate entity could be indicted and punished by fine for criminal negligence but not for manslaughter where negligence resulted in death of human beings). *Id.* at 252-53. *But see* Rex v. East Crest Oil Co., 3 D.L.R. 535 (Alberta App. Div. 1944). The *East Crest Oil* court, in holding a corporation criminally liable for manslaughter, stated that:

There is no doubt that in substance if not in words, the charge here is manslaughter and we surely are sufficiently advanced now to describe an offence [sic] for what it is, and there would seem to be no good reason why a charge of manslaughter as such should not lie against a corporation

Id. at 540-41.

⁵⁴ 134 F. 592 (C.C.S.D.N.Y. 1904).

⁵⁵ *Id.* at 602. The applicable statute provided in part:

Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer, 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 before any [c]ircuit [c]ourt of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years.

Id. at 594 (citing Act of Feb. 28, 1871, ch. 100, § 56, 16 Stat. 456 (codified as amended at 18 U.S.C. § 1115 (1982))). The statute now provides for a \$10,000 fine as an alternative to imprisonment and contains this additional provision:

When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1115 (1982).

⁵⁶ 134 F. at 594.

escape the flames.⁵⁷ The company was indicted for manslaughter for failing to provide, in violation of federal law, either proper lifesaving or firefighting equipment.⁵⁸ A number of individual directors and officers were accused of complicity in the alleged manslaughter.⁵⁹ These individuals argued, however, that they could not be held liable for complicity because the corporation could not be convicted of the substantive offense.⁶⁰ The Circuit Court judge rejected this argument, holding that the corporation could be convicted of the offense even though it could not suffer the punishment of "confinement at hard labor for a period of not more than ten years."⁶¹ The judge further noted that under the statute there was no need to prove intent to kill.⁶²

Five years later the United States Supreme Court, in the landmark case of *New York Central & Hudson River Railroad v. United States*,⁶³ held that corporations could be indicted for the acts of their agents without offending constitutional notions of due process.⁶⁴ Justice Day, writing for the court, drew an analogy between corporate civil and criminal liability.⁶⁵ The Justice noted that corporations were already civilly liable for the wrongful acts of their agents "because the act is done for the benefit of

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 602.

⁶¹ *Id.* at 594, 602. Judge Thomas reasoned:

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.

Id. at 602.

⁶² *Id.* Judge Thomas explained:

The statute makes the owner's "fraud, misconduct, connivance or violation of law," causing death, an offense. In this case the duty of supplying proper life preservers is commanded by the law. This affirmative command involves another command—that life preservers not in compliance with the law shall not be furnished. The corporation navigated without them, and caused death thereby. It is not necessary to show intention to kill, nor malice in fact.

Id.

⁶³ 212 U.S. 481 (1909).

⁶⁴ *Id.* at 493.

⁶⁵ *See id.* at 494.

the principal."⁶⁶ He asserted that "we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting."⁶⁷ Justice Day further held that a corporation could be liable for an intent crime, reasoning that an agent's intent could be imputed to the corporation.⁶⁸

After the *New York Central* decision, state courts followed a meandering course in their consideration of corporate criminal liability for homicide.⁶⁹ Two states declined to impose criminal liability on corporations for homicide on purely statutory grounds.⁷⁰ In *People v. Rochester Railway & Light Co.*,⁷¹ the court held that New York's homicide statute did not apply to corporations.⁷² In *Rochester Railway*, the corporation was indicted for manslaughter on the grounds that its agent had negligently installed a device in a residence, resulting in the death of a person.⁷³ The *Rochester Railway* court, while citing the rationale of *New York Central* with approval,⁷⁴ nevertheless declined to hold the corporation liable.⁷⁵ The court observed that the New York homicide statute defined homicide as "the killing of one human being by the act, procurement or omission of another."⁷⁶ The court determined that the legislature's use of the words "human

⁶⁶ *Id.* at 493.

⁶⁷ *Id.* at 494.

⁶⁸ *Id.* at 493. Justice Day cited a noted treatise as persuasive authority: 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. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.

Id. at 492-93 (quoting J. BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* 255-56 (8th ed. 1892)).

⁶⁹ See, e.g., *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459 (1913); *State v. Lehigh Valley R.R.*, 90 N.J.L. 372, 103 A. 685 (Sup. Ct. 1917), *aff'd on rehearing*, 94 N.J.L. 171, 111 A. 257 (N.J. 1920); *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909).

⁷⁰ See *Commonwealth v. Illinois Cent. R.*, 152 Ky. 320, 153 S.W. 463; *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909). See also *infra* notes 71-85 and accompanying text.

⁷¹ 195 N.Y. 102, 88 N.E. 22 (1909).

⁷² *Id.* at 108, 88 N.E. at 24.

⁷³ *Id.* at 103-04, 88 N.E. at 22.

⁷⁴ *Id.* at 106-07, 88 N.E. at 23-24.

⁷⁵ *Id.* at 108, 88 N.E. at 24.

⁷⁶ *Id.* at 107, 88 N.E. at 24 (citation omitted).

being" and "another" meant that only "another human being" could commit homicide.⁷⁷ The court noted in dicta, however, that given a differently worded statute, a corporation could be held accountable for criminal homicide.⁷⁸

In *Commonwealth v. Illinois Central Railroad*,⁷⁹ a Kentucky court similarly declined to hold corporations criminally liable for homicide absent a clear statutory mandate. In that case a corporation was indicted for involuntary manslaughter after one of its employees, a railroad engineer, negligently ran a locomotive at excessive speed into another railroad car, resulting in the death of a passenger.⁸⁰ The lower court dismissed the indictment, and the commonwealth appealed.⁸¹

The reviewing court determined that corporations generally cannot be held liable for intent crimes.⁸² The court asserted that involuntary manslaughter, as defined by common law, involved "a killing by one person of another person,"⁸³ and as such, "it would . . . be giving the word 'person' a tortured meaning to say that it include[d] a corporation."⁸⁴ The court noted in dicta, however, that "if authorized by a statute including corporations" an indictment might be sustainable for degrees of homicide not requiring actual intent.⁸⁵

⁷⁷ *Id.* at 108, 88 N.E. at 24. The court stated that it did not "discover any evidence of an intent on the part of the Legislature to abandon the limitation of its enactments to human beings or to include a corporation as a criminal." *Id.*

⁷⁸ *Id.* at 107, 88 N.E. at 24.

⁷⁹ 152 Ky. 320, 153 S.W. 459 (1913).

⁸⁰ *Id.* at 321, 153 S.W. at 460.

⁸¹ *Id.*

⁸² *Id.* at 323, 153 S.W. at 461. The court distinguished prosecution of corporations for intent crimes, the purpose of which is to punish the corporation, from prosecutions for the wrongful death of a human being, the purpose of which is to recover a fine for distribution to the decedent's survivors. *Id.* at 328, 153 S.W. at 463. The court noted:

While the tendency of the later cases is to extend the doctrine of corporate, civil liability for torts involving personal violence to criminal prosecutions, in most states in which that has been done, the indictments provided for are designed mainly to furnish a civil remedy in favor of the estate of the deceased, although in the form of a criminal action; therefore the decisions in those states are of little importance in determining the question before us.

Id. at 328, 153 S.W. at 463. See *supra* notes 37-43 and accompanying text.

⁸³ *Id.* at 324, 153 S.W. at 462.

⁸⁴ *Id.* at 325, 153 S.W. at 461-62.

⁸⁵ *Id.* at 328, 153 S.W. at 463. Cf. *Rex v. Cory Bros.*, 1 K.B. 810 (1927) (holding that corporations cannot be indicted for any crime which requires a mens rea, including manslaughter, even given a statute providing for the indictment of corporations).

Four years later, in *State v. Lehigh Valley Railroad*,⁸⁶ a New Jersey court expressly held that corporations could be indicted and punished by fine for involuntary manslaughter.⁸⁷ Justice Swayze, writing for the supreme court, determined that there was nothing "in the nature of the crime, the character of the punishment prescribed therefor, or the essential ingredients of the crime, which [made] it impossible" to hold a corporation criminally liable for manslaughter.⁸⁸ The court distinguished its decision from *Rochester Railway* and *Illinois Central*, noting that those decisions were "based entirely upon the construction of the exact language of the penal code."⁸⁹ Instead, Justice Swayze implied that the common law definition of manslaughter was broad enough to encompass a corporation.⁹⁰ Justice Swayze further asserted that he was "not troubled by" the lack of legal precedent regarding the imposition of corporate liability, stating the indictment was "in harmony with established legal principles."⁹¹

Almost fifty years after *Lehigh Valley*, an Oregon court de-

⁸⁶ 90 N.J.L. 372, 103 A. 685 (Sup. Ct. 1917), *aff'd*, 94 N.J.L. 171, 111 A. 257 (N.J. 1920).

⁸⁷ 90 N.J.L. at 376, 103 A. at 686.

⁸⁸ *Id.* at 373-74, 103 A. at 685-86.

⁸⁹ *Id.* at 375, 103 A. at 686.

⁹⁰ *Id.* at 374-75, 103 A. at 686. New Jersey's definition of homicide at the time of the *Lehigh Valley* decision appears to have been first expounded in *State v. Zellers*, 7 N.J.L. 220 (Sup. Ct. 1824) as "where a person kills another upon a sudden transport of passion or heat of blood, upon a reasonable provocation, and without malice." *Id.* at 243. Justice Swayze, however, did not cite this definition in his opinion, instead relying on a broader definition provided by Blackstone:

Blackstone . . . defines felonious homicide as "the killing of a human creature, of any age or sex, without justification or excuse." He then adds by way of illustration: "This may be done either by killing one's self, or another man." Blackstone does not say that these are the only cases of felonious homicide; as far as his text goes, the case of involuntary manslaughter by a corporation aggregate is not excluded, and is within the words of his definition. But if we assume, as is probably the fact, that Blackstone did not have in mind the case of involuntary manslaughter by a corporation aggregate as a possible case of felonious homicide, nevertheless, his illustration of suicide as a felonious homicide shows that the definition relied upon (killing of one human being by another human being) is inaccurate.

Id. at 375, 103 A. at 686 (citation omitted).

⁹¹ *Lehigh Valley*, 90 N.J.L. at 376, 103 A. at 686 (citing *Regina v. Great Western Laundry Co.*, 13 Man R. 66 (1900), discussed *supra* notes 48-53 and accompanying text). *Id.* There have only been three New Jersey opinions reported subsequent to *Lehigh Valley* concerning indictments of corporations for manslaughter: *State v. Pennsylvania R.R.*, 16 N.J. Super. 360, 84 A.2d 650 (App. Div. 1951), *aff'd* 9 N.J. 194, 87 A. 2d 709 (1952) (assuming without comment that corporation could be indicted for manslaughter); *State v. Central R.R.*, 102 N.J.L. 475, 133 A. 68 (Sup. Ct. 1926); *State v. Pennsylvania R.R.*, 3 N.J. Misc. 687, 129 A. 479 (Sup. Ct. 1925)

clined to hold a corporation criminally liable for manslaughter on statutory grounds in *State v. Pacific Powder Co.*⁹² In *Pacific Powder*, the defendant's employee parked a truck containing six and one-half tons of explosives.⁹³ While the truck was unattended, an adjacent wooden building caught fire.⁹⁴ The heat from the fire caused the truck to explode, resulting in the death of a bystander.⁹⁵ A grand jury returned an indictment for manslaughter against Pacific Powder Company.⁹⁶ The state supreme court affirmed the trial court's judgment dismissing the indictment, holding that a corporation was not a person within the meaning of the Oregon manslaughter statute.⁹⁷ The court noted, however, that given a properly drafted statute a corporation could be indicted for manslaughter.⁹⁸

C. *The Modern Cases: 1974-1988.*

Thirteen years after *Pacific Powder*, New York had an opportunity to reconsider its earlier position on criminal liability of corporations for homicide in *People v. Ebasco Services, Inc.*⁹⁹ Ebasco Services, Inc., along with several co-defendants, was responsible for the construction of an extension to a generating station located along the East River in Astoria, New York.¹⁰⁰ Defendant Spearin, Preston & Burrows, Inc. had constructed a cofferdam in the East River to allow workers to perform certain tasks necessary to the project on the river bottom.¹⁰¹ The cofferdam collapsed, however, killing two workmen.¹⁰²

The defendants were charged with criminally negligent homicide.¹⁰³ The defendants moved for dismissal, asserting among other things, that corporations were not indictable for

(both dismissing indictments against corporations where no corporate negligence had been shown).

⁹² 226 Or. 502, 360 P.2d 530 (1961).

⁹³ *Id.* at 503, 360 P.2d at 530.

⁹⁴ *Id.*, 360 P.2d at 530.

⁹⁵ *Id.*, 360 P.2d at 530.

⁹⁶ *Id.* at 502-03, 360 P.2d at 530.

⁹⁷ *Id.* at 507-08, 360 P.2d at 532.

⁹⁸ *Id.* at 505-06, 360 P.2d at 531-32.

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

¹⁰⁰ *Id.* at 785, 354 N.Y.S. 2d at 809.

¹⁰¹ *Id.* A cofferdam is "a temporary watertight enclosure (as of piles packed with clay or of metal plates) from which the water is pumped to expose the bottom of a body of water and permit construction (as of foundations or piers). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 439 (1986).

¹⁰² *Ebasco*, 77 Misc. 2d at 785, 354 N.Y.S.2d at 809.

¹⁰³ *Id.*

criminally negligent homicide.¹⁰⁴ In the interim between the *Rochester Railway* and *Ebasco* decisions, however, New York enacted a new statute which the court determined would allow the prosecution of a corporation for homicide.¹⁰⁵ Despite this enactment, the court dismissed the indictment on other grounds.¹⁰⁶

Similarly, a Kentucky court in 1980, noting changes in statutory law since *Commonwealth v. Illinois Central Railroad* was decided in 1913, held that a corporation could be indicted for manslaughter in *Commonwealth v. Fortner L.P. Gas Co.*¹⁰⁷ Fortner L.P. Gas Co. was indicted after its employee, unable to stop his truck due to defective brakes, caused the death of a schoolchild.¹⁰⁸ The court noted numerous Kentucky statutes through which "the legislature manifested its clear intention in regard to corporate responsibility."¹⁰⁹ The court determined that "[t]aken collectively,

¹⁰⁴ *Id.* at 786, 354 N.Y.S.2d at 810. The defendants also contended that the statute under which they were indicted, N.Y. PENAL LAW § 125.10 (McKinney 1975), was unconstitutionally vague; that the indictment did not adequately particularize the acts which were the basis for the alleged crime; and that the evidence presented to the grand jury was legally insufficient. *Ebasco*, 77 Misc.2d at 786, 354 N.Y.S.2d at 810.

¹⁰⁵ *Id.* at 787, 354 N.Y.S.2d at 811. The court held that "[t]he killing of a human being by a corporation is an act that can be proscribed by the Legislature." *Id.* at 786, 354 N.Y.S.2d at 810 (citing *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 107, 88 N.E. 22, 24 (1909)). The court then noted that the applicable statute provided that "[a] person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person." *Id.* (quoting N.Y. PENAL LAW § 125.10 (McKinney 1975)). The court observed that while the Penal Law defined "person" as "a human being who has been born and is alive," with reference to homicide victims, the statute provided no specific definition regarding the perpetrator of a homicide. *Id.* at 786-87, 354 N.Y.S.2d at 810-11 (citing N.Y. PENAL LAW § 125.05(1) (McKinney 1975)). The court therefore looked "to the broader definition of 'person' contained in the over-all definitional article of the Penal Law." *Id.* at 787, 354 N.Y.S.2d at 811. "'Person' means a human being, and where appropriate, a public or private corporation . . ." N.Y. PENAL LAW § 10.00(7) (McKinney 1975) [emphasis added]. The court determined that this definition, coupled with the *Rochester Ry.* dicta which suggested that corporations could be held criminally liable for homicide given a statutory mandate, provided evidence of a legislative intent to punish corporations for homicide. *Ebasco Serv. Inc.*, 77 Misc. 2d at 787, 354 N.Y.S.2d at 811.

¹⁰⁶ *Id.* at 788, 354 N.Y.S.2d at 812. The court determined that the indictment failed to sufficiently particularize the facts constituting the alleged crime. *Id.*, 354 N.Y.S.2d at 812.

¹⁰⁷ 610 S.W.2d 941 (Ky. Ct. App. 1980).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 942-43. In particular, the court examined KY. REV. STAT. ANN. § 500.080 (12) (Michie/Bobbs-Merrill Supp. 1986) (providing that "person" includes, where appropriate, corporations); KY. REV. STAT. ANN. § 502.050 (Michie/Bobbs-Merrill 1985) (providing for corporate criminal liability in certain contexts); KY. REV. STAT. ANN. § 534.050 (Michie/Bobbs-Merrill 1985) (providing for imposition of fines on corporations for criminal offenses); KY. REV. STAT. ANN.

these statutes are clearly the type envisioned by the court in *Commonwealth v. Illinois Central R.R.* . . . when it said that an indictment might lie if authorized by statute."¹¹⁰

In *People v. Warner-Lambert Co.*,¹¹¹ a corporation was indicted along with several of its officers and employees after an explosion in one of its factories killed six workers.¹¹² The indictment, however, was dismissed because the court discerned "no proof sufficient to support a finding that defendants foresaw or should have foreseen the physical cause of the explosion."¹¹³ Acknowledging the distinction between civil and criminal liability, the court declined to impose criminal liability absent evidence that the defendant's actions directly caused the deaths.¹¹⁴ The court further recognized that the standard of causation in criminal cases was greater than that in a civil matter.¹¹⁵

State v. Ford Motor Co.,¹¹⁶ an unreported but well-publicized case, arose from the death of three teenage girls after their 1973 Ford Pinto exploded when struck in the rear by another vehicle.¹¹⁷ A grand jury indicted the Ford Motor Company for reckless homicide on the theory that the corporation recklessly failed to recall the defectively designed automobiles in a timely fashion.¹¹⁸ Ford moved pre-trial to dismiss the indictment, arguing *inter alia* that Indiana's reckless homicide statute was unconstitutional as applied to corporations as it was violative of due process.¹¹⁹ The court, however, denied the motion, holding that the Indiana statute was not unconstitutionally vague¹²⁰ and that it

§ 507.040 (Michie/Bobbs-Merrill 1985) (providing in part that "persons" can commit manslaughter).

¹¹⁰ *Id.* at 943. See also *Commonwealth v. McIlwain School Bus Lines*, 283 Pa. Super. 1, 423 A.2d 413 (1980), which held that a corporation could be indicted for manslaughter, noting similar changes in the Pennsylvania Crimes Code. *Id.* at 14, 21, 423 A.2d at 419, 423 (distinguishing *Commonwealth v. Punxsutawney St. Passenger Ry.*, 24 Pa. C. 25 (1900), discussed *supra* notes 44-47 and accompanying text).

¹¹¹ 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980).

¹¹² *Id.* at 299, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

¹¹³ *Id.* at 305, 414 N.E.2d at 665, 434 N.Y.S.2d at 164.

¹¹⁴ *Id.* at 306, 414 N.E.2d at 666, 434 N.Y.S.2d at 165.

¹¹⁵ *Id.* See also *People v. Deitsch*, 97 A.D.2d 327, 470 N.Y.S.2d 158 (1983) (assuming without comment that corporations could be indicted for manslaughter).

¹¹⁶ No. 5324 (Ind. Sup. Ct. filed Mar. 13, 1980).

¹¹⁷ See Maakestad, *State v. Ford Motor Co.: Constitutional, Utilitarian and Moral Perspectives*, 27 St. Louis U.L.J. 857, 859 (1983).

¹¹⁸ *Id.*

¹¹⁹ *State v. Ford Motor Co.*, No. 5324, slip op. at 7 (Ind. Sup. Ct. filed Feb. 2, 1979).

¹²⁰ *Id.* at 9.

provided sufficient notice of its applicability to corporations.¹²¹ The case subsequently went to trial, at which the corporation was acquitted.¹²²

In 1983, two states again questioned the susceptibility of corporations to indictment for homicide with sharply conflicting results.¹²³ In *Vaughan & Sons, Inc. v. State*,¹²⁴ a Texas court declined to hold a corporation criminally liable for manslaughter.¹²⁵ In that case, a jury convicted a corporation of manslaughter for causing, through two of its employees, the death of two individuals in a motor vehicle accident.¹²⁶ The Texas Court of Appeals reversed the conviction.¹²⁷ The court discerned no legislative intent to punish corporations within the statutory language defining homicide, reasoning that a corporation could not formulate the necessary state of mind to commit all degrees of the crime.¹²⁸

Later that year, the California Court of Appeal refused to

¹²¹ *Id.* at 12.

¹²² Verdict, *State v. Ford Motor Co.*, No. 11-431 (Ind. Cir. Ct. Mar. 13, 1980).

¹²³ *Compare* *Granite Constr. Co. v. Superior Court*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (Ct. App. 1983) with *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Ct. App. 1983), *rev'd and remanded*, 737 S.W.2d 805 (Tex. Crim. App. 1987) (en banc).

¹²⁴ *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Ct. App. 1983), *rev'd and remanded*, 737 S.W.2d 805 (Tex. Crim. App. 1987) (en banc).

¹²⁵ *Id.* at 679.

¹²⁶ *Id.* at 677.

¹²⁷ *Id.* at 679.

¹²⁸ *Id.* at 678. The court reached this conclusion despite the state penal code's specific inclusion of corporations within its definition of "person," and that the code defined criminally negligent homicide as occurring when "[a] person . . . causes the death of an individual by criminal negligence." *Id.* at 678 (citing TEX. PENAL CODE ANN. §§ 1.07(2)(27); 19.07(a) (Vernon 1974)). The court, however, noted that a reading of the code which always included corporations as "persons" would lead to absurdities that legislature could not have intended, such as corporations being held criminally liable for escape from confinement, rape, prostitution, abuse of corpses, and smoking tobacco. *Vaughan & Sons*, 649 S.W.2d at 678. As such, the court "look[ed] to the legislative intent in relation to each category of crime." *Id.* The court determined that as "all the degrees of homicide, including criminally negligent homicide, [were] together in one unit," the legislature must have "intended these to be different degrees of the same crime." *Id.* The court could find "no indication in the wording of the statute or elsewhere that the type of individual capable of committing homicide varies with the degree of culpability." *Id.* at 678-79. Therefore, the court held that "person" did not include "corporation" in this instance because corporations are incapable of crimes requiring intent, knowledge, or recklessness. *Id.* at 679.

But cf. *Lynch v. Port of Houston Auth.*, 671 S.W.2d 954 (Tex. Ct. App. 1984) (assuming, without comment, that corporations could be held criminally liable for homicide). The *Lynch* case was a civil action for wrongful death against a public entity, but the court made reference in its opinion to a prior criminal action arising

exempt a corporation from criminal liability for manslaughter in *Granite Construction Co. v. Superior Court*.¹²⁹ In *Granite Construction*, seven workers died in an accident on a power plant project.¹³⁰ The *Granite Construction* court distinguished its holding from *Vaughan & Sons*, noting first that the two states defined manslaughter differently, and second that California had historically prosecuted corporations for intent crimes.¹³¹

A fire at the Great Adventure amusement park in Jackson, New Jersey,¹³² gave rise to yet another criminal prosecution of a corporation for homicide. On May 11, 1984, fire erupted inside Great Adventure's Haunted Mansion attraction, resulting in the death of eight patrons.¹³³ Following an investigation by the Ocean County Prosecutor's Office,¹³⁴ a grand jury indicted Great Adventure, Inc., its parent, Six Flags Corporation, as well as two executives, for manslaughter and aggravated manslaughter.¹³⁵ Later that year, the corporate defendants moved to dismiss the indictment on the grounds that the definition of manslaughter contained in the New Jersey Code of Criminal Justice was not applicable to corporations.¹³⁶ The court denied the motion,¹³⁷

out of the same incident to which the Port of Houston Authority had pleaded *nolo contendere*. *Id.* at 959.

The Texas Court of Criminal Appeals later reversed the decision of the Court of Appeals in *Vaughan & Sons* and remanded the case for consideration of other issues raised by the defendant on appeal. *Vaughan & Sons, Inc. v. State*, 737 S.W.2d 805, 814 (Tex. Crim. App. 1987) (en banc). See *infra* notes 139-47 and accompanying text.

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

¹³⁰ *Id.* at 466, 197 Cal. Rptr. at 4.

¹³¹ *Id.* at 471-72, 197 Cal. Rptr. at 7-8. The court noted:

Although corporations in Texas may not be capable of forming "intent" or possess a "condition of the mind," California corporations can form intent, be reckless and commit acts through their agents. The criminal intent problem has not been squarely addressed, but corporations have been prosecuted for crimes of specific intent under the California Penal Code.

Id. at 472, 197 Cal. Rptr. at 8 (citations omitted).

¹³² Asbury Park Press, May 12, 1984, at 1, col. 4.

¹³³ *Id.*

¹³⁴ *Id.* at 1, col. 6.

¹³⁵ Indictment, *State v. Six Flags Corp.*, (N.J. Super. Ct. Law Div. filed Sept. 14, 1984).

¹³⁶ Transcript of Proceedings at 3-19, *State v. Six Flags Corp.*, No. I-0650-9-84 (N.J. Super. December 3, 1984) [hereinafter TRANSCRIPT OF PROCEEDINGS]. Specifically, the defense argued that

Section 179 of the Penal Code, defines homicide as "the killing of one human being by the act, procurement or omission of another." We think that the final word, another, naturally and clearly means a second or additional member of the same kind or class alone referred to by the

and the case ultimately proceeded to trial where both corporations were acquitted of all charges by a jury.¹³⁸

In September 1987, the Court of Criminal Appeals of Texas, sitting en banc, reversed and remanded the decision of the Court of Appeals in *Vaughn & Sons, Inc. v. State*.¹³⁹ Presiding Judge Onion, writing for the majority, held that the state legislature clearly intended to impose criminal liability on corporations for negligent homicide.¹⁴⁰ The court reasoned that the statute defining the offense used the word "person" rather than "individual," and thus incorporated the Penal Code's general definition of "per-

preceding words, namely, another human being . . . [W]e should not interpret it as Appellant asks us to as meaning another "person" which may then include corporations. . . [W]e construe this definition of homicide as meaning the killing of one human being by another human being.

Id. at 4.

The defense further argued that the holding of *State v. Lehigh Valley R.R. Co.*, 90 N.J.L. 372, 103 A. 685 (1917), *aff'd*, 94 N.J.L. 171, 111 A. 257 (1920) (*see supra* notes 87-94 and accompanying text) should no longer apply, as the New Jersey Code of Criminal Justice, enacted in 1979, defined manslaughter differently than the common law, upon which *Lehigh Valley* was decided. TRANSCRIPT OF PROCEEDINGS *supra*, at 6-7. The code provides that "A *person* is guilty of criminal homicide if he purposely, knowingly, recklessly or, under the circumstances set forth in section 2C:11-5, causes the death of *another human being*." N.J. STAT. ANN. § 2C:11-2.a (West 1982) [emphasis added]. The next subsection indicates that "[c]riminal homicide is murder, *manslaughter*, or death by auto." N.J. STAT. ANN. § 2C:11-2.b (West 1982) [emphasis added].

¹³⁷ TRANSCRIPT OF PROCEEDINGS, *supra* note 136, at 19-36. The State contended that the *Lehigh Valley* case was still good law, despite the change in the definition of manslaughter:

[We] believe the statute was not meant to change [the *Lehigh Valley* holding]. In fact, the commentary to the statute stated the phrase "another human being," and again [we] differ with the defense, "another human being" was used instead of "another person" [because] . . . [t]he Court did not want to or the revision committee did not want to incorporate fetal termination into our homicide statute and thus use the term "another human being" instead of "another person."

Id. at 21. Judge Blake agreed with the State's interpretation, adding:

[I]n view of the fact that the word "person" is susceptible to more than one definition, I believe that is the reason the word [sic] "another human being" was placed in the statute. In addition to which, other than a fetus which is discussed in some of the cases, I don't know of any other "person" other than "another human being" that can be a victim of a criminal homicide.

Id. at 33-34. Justice Blake concluded by stating that "[t]his court is satisfied that it should not adopt the very restrictive interpretation submitted by the defendants in this case." *Id.* at 34.

¹³⁸ N.Y. Times, July 21, 1985, at 1, col. 1.

¹³⁹ 737 S.W.2d 805, 814 (Tex. Crim. App. 1987) (en banc).

¹⁴⁰ *Id.* at 811.

son". which included corporations.¹⁴¹ The court further noted that common law rule requiring strict construction of penal statutes did not apply in Texas.¹⁴²

Judge Teague dissented, arguing that "[t]he majority opinion actually does absolutely nothing to clear the air in this area of law," which the judge termed "one big mess."¹⁴³ Judge Teague would have held that the state had not properly alleged criminally negligent homicide against the corporation, and alternatively, that the statute unconstitutionally violated due process.¹⁴⁴

¹⁴¹ *Id.* at 810. The court observed that certain offenses, such as bigamy and incest, do not apply to corporations because the actor is defined as an "individual" rather than a "person." *Id.* at 810 n.15 (citation omitted).

¹⁴² *Id.* at 810 (quoting TEX. PENAL CODE ANN. § 1.05(a) (Vernon 1974)). The relevant statute provides in part:

The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.

TEX PENAL CODE ANN. § 1.05(a) (Vernon 1974). Compare N.J. STAT. ANN. 2C:1-2.c (West 1982), which provides rules of construction without mentioning "strict construction." The strict construction rule, however, is still recognized in New Jersey. See *State v. Maguire*, 84 N.J. 508, 514 n.6, 423 A.2d 294, 297 n.6 (1980); see also *State v. Reed*, 183 N.J. Super. 184, 192, 443 A.2d 744, 749 (App. Div. 1982) ("Due process demands that penal statutes be strictly construed.").

Judge Clinton concurred, asserting that the imposition of criminal liability for homicide on corporations was within the police power of the Legislature. *Vaughan & Sons, Inc.*, 737 S.W.2d at 814-15 (Clinton, J., concurring). Judge Clinton acknowledged the dissent's contention that the statute as applied imposes strict liability upon corporations for the acts of their agents, but noted that such liability was supported by precedent. *Id.* at 815 (Clinton, J., concurring) (citing *American Plant Food Corp. v. State*, 587 S.W.2d 679 (Tex. Crim. App. 1979)).

¹⁴³ *Id.* at 815 (Teague, J., dissenting).

¹⁴⁴ *Id.* at 822 (Teague, J., dissenting). Judge Teague asserted that the State failed to allege in the information the acts of negligence it intended to rely upon to establish criminal negligence, but rather

only alleged in this information that the accused corporation committed the offense of "criminal negligence." Without more, this accusation is totally insufficient to accuse the appellant corporation with committing the criminal wrong of criminally negligent homicide. . . . And, there is no more.

Id. at 817 (citations omitted). Judge Teague suggested that under the majority's interpretation of the criminally negligent homicide statute, corporations could be held liable for imputed misconduct which they were helpless to avoid:

Under § 7.22(a)(1), when does a private corporation in Texas know that it committed a criminal wrong? The answer is easy. Much like one who has been struck by lightning will know, the corporation will know exactly at the moment in time when a trier of fact returns a verdict implicitly or expressly stating that because the corporation's employees or agents were found to have personally committed a misdemeanor offense, which it has now determined to be criminal, the corporation is to be strictly and automatically criminally liable for committing that wrong.

Judge Teague observed that the majority was, in effect, upholding the imposition of strict criminal liability upon a corporation for the acts of its agents.¹⁴⁵ The judge criticized this holding, asserting that it freed the legislature to enact other statutes imputing "criminally negligent activity by a third person who is under the control of another individual or person, such as a parent."¹⁴⁶ Judge Teague suggested that "[i]f that is the law, then the law is truly an ass."¹⁴⁷

In 1986, the State of Connecticut undertook a criminal prosecution of a corporation for negligent homicide in *State v. P.G.P. Industries, Inc.*¹⁴⁸ The action arose from an incident at a P.G.P. metal reclamation plant which resulted in an employee's death from carbon monoxide poisoning.¹⁴⁹ The State Attorneys' decision to prosecute the corporation, rather than any individuals, was based on his theory that the action of a number of officers and agents taken together amounted to "cumulative malfeasance."¹⁵⁰ On February 8, 1988, however, a Connecticut Superior Court judge granted defendant's motion for a judgment of acquittal at the close of the state's presentation of evidence at trial, citing failure of proof.¹⁵¹

Id. at 818.

¹⁴⁵ *Id.* Judge Teague further stated "that to strictly criminalize a private corporation doing business in Texas for the personal criminal acts of its employees or agents, pursuant to § 7.22(a)(1), amounts to arbitrariness and nonsense." *Id.* at 819.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Judge Teague warned that the majority opinion would have widespread negative ramifications:

[G]et ready for things to come because you ain't seen nothing yet. Parents of negligent children, you may also get ready because once the members of the Legislature have completely digested the majority opinion I predict it will not be long before a child's negligent acts, which are later determined to be criminal by some trier of fact, will be imputed to the child's parents, who are, at that instant in time, to be criminalized solely because his, her, or their child committed a personal criminally negligent act.

Id. at 820. Judge Teague also foresaw trial judges adopting "scarlet letter" style punishments for convicted corporations, "such as requiring the corporation to place on the sides of all its trucks such signs stating 'Killer corporation' or 'BEWARE—CAUTION: THIS CORPORATION HAS BEEN FOUND GUILTY OF KILLING ANOTHER HUMAN BEING.'" *Id.* at 816.

¹⁴⁸ No. CR4-123536 (Conn. Super. Ct. Feb. 8, 1988).

¹⁴⁹ See English, *Waterbury Prosecutor Takes on Corporation for Workers' Death*, Conn. L. Tribune, Aug. 4, 1986, at 1, col. 1.

¹⁵⁰ *Id.* at 8, cols. 3-4.

¹⁵¹ Transcript of Proceedings at 54-55, *State v. P.G.P. Industries, Inc.*, No. CR4-123536 (Conn. Super. Ct. Feb. 8, 1988).

III. ANALYSIS

A number of courts have held that corporations may be criminally liable for homicides arising from the wrongful acts of their agents.¹⁵² The authority relied on by these courts has held corporations criminally liable by analogy to tort law.¹⁵³ As a corporation is an entity which is legally distinct from its shareholders and agents,¹⁵⁴ a question remains as to the social utility of prosecuting the corporate entity in addition to, or instead of, corporate agents.¹⁵⁵ An answer to this question must address two issues: whether the objectives of criminal law and tort law are similar enough to warrant analogy, and more importantly, whether criminal prosecution of corporations for homicide serves those objectives.

A. *The Distinct Policy Considerations Underlying Civil and Criminal Responsibility for Wrongful Death.*

Justice Day wrote in *New York Central* that "we go only a step farther" in applying the civil doctrine of respondeat superior to criminal law.¹⁵⁶ Justice Day's simple analogy, however, ignores

¹⁵² See, e.g., *State v. Lehigh Valley R.R.*, 90 N.J.L. 372, 103 A. 685 (Sup. Ct. 1917), *aff'd after remand*, 94 N.J.L. 171, 111 A. 257 (1920), discussed *supra* notes 86-91 and accompanying text.

¹⁵³ See *New York Cent. & H. R. R.R. v. United States*, 212 U.S. 481 (1909), See also *supra* notes 63-68 and accompanying text.

¹⁵⁴ "Corporation" is defined as:

An artificial person or legal entity created by or under the authority of the laws of a state or nation, composed, in some rare instances, of a single person and his successors, being the incumbents of a particular office, but ordinarily consisting of an association of numerous individuals. Such entity subsists as a body politic under a special denomination, which is regarded in law as having a personality and existence distinct from that of its several members

BLACK'S LAW DICTIONARY 307 (5th ed. 1979). See also Note, *Corporate Personality — A Functional Approach*, 23 UNIV. PITT. L. REV. 172 (1961) (observing that a corporation is a separate entity from its shareholders).

¹⁵⁵ See *infra* notes 179-88 and accompanying text. See also Maakestad, *supra* note 117, at 878-80 (discussing the deterrent effect of corporate criminal sanctions).

¹⁵⁶ *New York Cent.*, 212 U.S. at 494. "Respondeat superior" is a principle invoked where

by reason of some relation existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it.

W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 458 (5th ed. 1984) [hereinafter PROSSER]. PROSSER has noted that "[t]he most familiar illustration, of course, is the liability of a master for the torts of his servant in the course of his employment." *Id.* at 499-500.

the distinct purposes of tort and criminal law.¹⁵⁷ Nevertheless, many courts have cited *New York Central* with approval, suggesting that “[a]nomalies in the law . . . sometimes arise from blindly following the hasty decision of a distinguished judge.”¹⁵⁸

The doctrine of respondeat superior has long been recognized in tort law.¹⁵⁹ The rationale behind the doctrine, however, is somewhat difficult to discern. Prosser has catalogued a number of possible justifications but concludes that the “modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk.”¹⁶⁰ Costs of risk are imposed on employers, even if not personally at fault, generally because they are better able to bear them than an injured plaintiff.¹⁶¹ The employer, by absorbing the risk through higher prices or insurance, passes and distributes the risk to society at large as a cost of doing business.¹⁶²

As the primary purpose of tort law is compensation of victims, respondeat superior is useful in this regard.¹⁶³ If victims could only bring suit against an employee or agent of a company, the victim’s compensation would be limited to the personal financial resources of that individual. More adequate compensation may be obtained from the employer, the “deep pocket” who passes the costs of liability on to the consumer.¹⁶⁴

Conversely, as a general rule criminal law is not concerned with compensation.¹⁶⁵ The primary purpose of criminal law’s pu-

¹⁵⁷ *Id.* at 7-8. The purpose of a criminal prosecution is:

to protect and vindicate the interests of the public as a whole, by punishing by eliminating, the offender from society, either permanently or for a limited time, by reforming or rehabilitating, by teaching the offender not to repeat the offense, or by deterring others from similar conduct . . . [A] criminal prosecution is not concerned in any way with compensation of the injured individual against whom the crime is committed, and the victim’s only formal part in it is that of an accuser and a witness for the state.

Id. at 7 (footnotes omitted). This treatise further asserts:

The civil action for a tort, on the other hand, is commenced and maintained by the injured person, and its purpose is to compensate for the damage suffered, at the expense of the wrongdoer.

Id.

¹⁵⁸ *Waydell v. Luer*, 5 Hill 448, 453 (N.Y. 1843).

¹⁵⁹ See PROSSER, *supra* note 156, at 500.

¹⁶⁰ *Id.* (footnote omitted).

¹⁶¹ *Id.* at 500-01.

¹⁶² *Id.*

¹⁶³ *Id.* at 7.

¹⁶⁴ *Id.* at 500.

¹⁶⁵ *Id.* at 7.

nitive sanctions is to deter potential offenders from committing crimes, notwithstanding the oft-recited goals of reformation, protection and vindication of the public interest.¹⁶⁶ Curiously, the courts generally have addressed only whether corporations may be held criminally liable for homicide, without discussing whether they should be held liable.¹⁶⁷ While it is possible that some courts may have been deferring such policy considerations to the legislatures, others have clearly strained statutory language in order to hold corporations criminally liable.¹⁶⁸ Yet few courts have stated policy considerations in support of their decisions.¹⁶⁹

¹⁶⁶ *Id.* See also Maakestad, *supra* note 117, at 874-80. Professor Maakestad commented with regard to *State v. Ford Motor Co.* that:

[c]orporate decision making that previously had been considered an example of poor business judgment had been labeled as punishable criminal conduct through an Indiana prosecutor's bold expression of community sentiment. Although a jury chosen from a different community, following a change of venue, ultimately rendered a verdict of acquittal, the real significance of the prosecution was undiminished: local people who had considered their *moral boundaries* transgressed had risen up and expressed their outrage by requiring a corporation, like any other person, to stand judgment before a criminal jury.

Id. at 877 (footnote omitted). This "bold expression of community sentiment" in the *Ford Motor Co.* case may have been the prosecution's *only* significance, for as Professor Maakestad observed later in his article:

Clearly, the attempt to place criminal responsibility upon Ford for reckless homicide, an offense carrying a maximum penalty of only \$30,000 (\$10,000 per count) under Indiana law, holds much greater import as a symbolic declaration of public morality than it does as an instrument by which to combat corporate crime effectively in the future.

Id. at 878 (footnote omitted).

¹⁶⁷ See Mueller, *supra* note 5. Professor Mueller commented:

[w]hile the law of corporate criminal liability is easy to understand or, for any given jurisdiction, easy to ascertain, the rationale of corporate criminal liability is all but clear. It is safe to say that, for the most part, the law has proceeded without rationale whatsoever It simply rests on the assumption that such liability is a necessary and useful thing.

Id. at 23.

¹⁶⁸ See, e.g. TRANSCRIPT OF PROCEEDINGS, *supra* note 136, at 19-36. See also *supra*, notes 132-135 and accompanying text.

¹⁶⁹ See *infra* notes 177-78 and accompanying text. See also NEW JERSEY CRIMINAL LAW REVISION COMMISSION, THE NEW JERSEY PENAL CODE — VOLUME II: COMMENTARY (1971). The Commission's Commentary to § 2C:2-7 of the then proposed Penal Code concerning liability of corporations noted that "[t]he modern development . . . has proceeded largely without reference to any intelligible body of principle and the field is characterized by the absence of articulate analysis of the objectives thought to be attainable by imposing criminal fines on corporate bodies." *Id.* at 64. The Legislature nevertheless enacted the provision. See N.J. STAT. ANN. § 2C:2-7 (West 1982).

The early cases which held that corporations could be indicted for certain acts did set forth policy considerations, but deterrence of crime was not among them.¹⁷⁰ Rather, those indictments were brought in order to compel a corporation either to act or desist from an act.¹⁷¹ As such, the indictments were more in the nature of a contempt action.¹⁷² Likewise, the line of cases which arose in New England in the late nineteenth century imposing criminal liability on corporations for manslaughter were in substance civil suits more analogous to our present day wrongful death actions.¹⁷³ In those cases, the prosecutor assumed the role of the decedent's personal representative.¹⁷⁴ The proceeds of any fine recovered were distributed to the decedent's surviving kin.¹⁷⁵

Modern prosecutions of corporations for homicide seek neither to compensate nor compel, but to punish and deter crime.¹⁷⁶ Despite the dissimilar objectives of more recent cases, courts have relied on the early cases as authority for the proposition that corporations can and should be punished for man-

¹⁷⁰ See, e.g., *State v. Morris & E. R.R.*, 23 N.J.L. 360 (Sup. Ct. 1852) (indictment brought to compel a corporation to abate a nuisance); *Regina v. Great N. of Eng. Ry.*, 72 Rev. Rep. 262, 9 Q.B. 315 (1846) (indictment brought to compel corporation to repair a bridge); *Regina v. Birmingham & Gloucester Ry.*, 61 Rev. Rep. 207, 3 Q.B. 223 (1842) (indictment brought to compel corporation to construct a bridge).

¹⁷¹ See *id.*

¹⁷² E.g., N.J. CT. R. 1:10 (Contempt of Court and Enforcement of Litigant's Rights Related Thereto).

¹⁷³ See, e.g., *State v. Gilmore*, 24 N.H. 461 (1852) (prosecution of corporation for manslaughter where proceeds of the fine were disbursed to the decedent's survivors).

¹⁷⁴ See *supra* notes 37-43 and accompanying text.

¹⁷⁵ See *id.*

¹⁷⁶ See, e.g., *State v. Six Flags Corp.*, (N.J. Super. filed Sept. 14, 1984) (No. I-0650-9-84). Had the two corporations been convicted of manslaughter, the following provision of the New Jersey Code of Criminal Justice would have been applicable:

a. The court may suspend the imposition of sentence of a corporation which has been convicted of an offense or may sentence it to pay a fine of up to three times the fine provided for in section 2C:43-3 or make restitution authorized by section 2C:43-3.

b. When a corporation is convicted of an offense or a high managerial agent of a corporation, as defined in section 2C:2-7 is convicted of an offense committed in conducting the affairs of the corporation, the court may request the Attorney General to institute appropriate proceedings to dissolve the corporation, forfeit its charter, revoke any franchises held by it, or to revoke the certificate authorizing the corporation to conduct business in this State.

N.J. STAT. ANN. § 2C:43-4 (West 1982).

slaughter.¹⁷⁷ Likewise, legislatures have extended criminal liability to corporate entities in apparent reliance on these early cases, without discussion or comment as to the policy objectives sought to be achieved.¹⁷⁸

B. The Utility of Criminal Prosecutions of Corporate Entities for Homicide

While a number of justifications for imposing criminal liability on corporations have been offered, none are convincing. Deterrence of future corporate misconduct is one oft-cited rationale.¹⁷⁹ It is argued that the threat of heavy fines and the stigma of a criminal conviction help deter corporations from practices that may result in the death of human beings.¹⁸⁰ There are, however, two flaws in this analysis. First, the deterrent effect of a fine on a corporation is illusory: unlike an individual, the corporate entity can pass the fine along to the consumer as a cost of doing business.¹⁸¹ While some authors have suggested that such a practice ultimately will result in the corporation suffering financial hardship due to inability to compete in the marketplace, any deterrence of this nature is indirect at best.¹⁸²

¹⁷⁷ See, e.g. TRANSCRIPT OF PROCEEDINGS, *supra* note 136, at 31-34; *State v. Lehigh Valley R.R.*, 90 N.J.L. 372, 103 A. 685 (1917), *aff'd after remand*, 94 N.J.L. 171, 111 A. 257 (1920).

¹⁷⁸ See, e.g. N.J. STAT. ANN. § 2C:2-7 (West 1982) (providing for the criminal liability of corporations and persons while acting on the corporation's behalf). See also *supra* note 161 and accompanying text.

¹⁷⁹ See, e.g., Maakestad, *supra* note 117. Maakestad argued that "the existence of corporate criminal liability serves to encourage managers to exercise closer supervision of subordinates; individual liability alone would encourage just the opposite, a 'don't tell me I'd rather not know' attitude at the top." *Id.* at 879. *But cf.* Comment, *Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions*, 8 PEPERDINE L. REV. 367, 407 (1981):

Yet the fact remains that corporations do not commit crimes — people do, and thus it would seem more appropriate to proceed directly against the individual perpetrator than the corporation as a whole. While holding the entire corporate body criminally liable for acts of reckless disregard for human life would be a dramatic improvement over present liability schemes, punishment of the particular individual offenders by means of frequently imposed jail sentences, would provide a better mechanism for deterrence.

Id. (footnotes omitted).

¹⁸⁰ See Maakestad, *supra* note 117, at 879-80.

¹⁸¹ *Id.* at 879.

¹⁸² See *id.* at 880. Professor Maakestad argued:

[a]ssuming there is competition in the convicted corporation's industry, prices cannot rise to absorb the fine. If this occurs, profits will go down, debt and equity financing will become difficult, expansion will be curtailed, and investors will look for a more law abiding corporation.

Second, the deterrent rationale rests upon the assumption that a corporate entity is capable of being deterred.¹⁸³ Such an assumption ignores the reality that a corporate entity has "no pants to kick or soul to damn," notwithstanding one jurist's contention that "by God, it ought to have both!"¹⁸⁴ Concededly, the law does treat the corporate entity as a person for many purposes.¹⁸⁵ Nevertheless, the fact remains that such personification is a legal fiction, recognized for purposes of convenience.¹⁸⁶

The corporation is owned by people, people make decisions for the corporation, and people act on behalf of the corporation. Therefore, any punitive effects of a corporate homicide prosecution will fall on people — shareholders, officers, directors and employees.¹⁸⁷ Certainly, it cannot be seriously suggested that all the individuals who would feel the impact of a conviction would be culpable in any given case of corporate homicide. This is especially true when one considers that the composition of these groups may very well change from the time of the alleged wrongful act until the time of conviction. These are the very people who would suffer following the conviction of a corporation for homicide. As such, prosecutions of corporate entities for homicide are overinclusive. Effective and fair deterrence can be attained through prosecution of individuals acting on behalf of the corporation.

The contention that prosecution of the corporate entity provides a useful means by which the community can express its moral outrage should be similarly dismissed. The use of a corporate entity as a legal scapegoat only serves to harm potentially innocent people, a result inconsistent with our law's requirement that guilt be proven "beyond a reasonable doubt."¹⁸⁸

Id. (footnote omitted). Professor Maakestad failed to recognize, however, that a fine substantial enough to have these effects may also result in financial injury to innocent parties, i.e., employees losing jobs and shareholders' devaluation of stocks. See generally Comment, *supra* note 179, at 405-06.

¹⁸³ See generally C. STONE, *WHERE THE LAW ENDS* 3 (1975).

¹⁸⁴ *Id.* (quoting H. MENCKEN, *A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES* 223 (1942)).

¹⁸⁵ See generally Note, *Corporate Personality — A Functional Approach*, 23 U. PITT. L. REV. 172, 173-74 (1961).

¹⁸⁶ See *supra* note 154.

¹⁸⁷ See Maakestad, *supra* note 117, at 879.

¹⁸⁸ See, e.g., N.J. STAT. ANN. § 2C:1-13.a (West 1982), which provides in relevant part: "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt." *Id.*

IV. CONCLUSION

The extension of criminal liability for homicide to corporations is no more than a legal non sequitur. The logic of the earliest corporate criminal indictment cases does not justify an inference that a corporate entity, a legal fiction, is capable of being deterred from criminal conduct. Likewise, the concept cannot be supported by analogy to the tort law doctrine of respondeat superior. As respondeat superior effectively distributes the costs of compensating the victim to consumers through higher prices, imposing a fine on a corporation for tortious injury only results in the cost of the fine being shared by society. Even assuming a fine could be imposed that is so onerous that the corporation could not pass it along to consumers and still remain competitive, the corporation's shareholders, and not the responsible individuals, would suffer in the form of reduced dividends and depreciated stock values. The penalties exacted would therefore have minimal deterrent effect as shareholders of large corporations generally exercise little direct control over the actual operation of the enterprise.

Wrongful acts performed on behalf of a corporation that result in death cannot be condoned. A theory, however, of criminal liability which stigmatizes all members of the organization, penalizing an innocent body of shareholders and having little deterrent effect on future misconduct, is not the answer. Rather, prosecutorial efforts must be directed at punishing responsible *individuals*, notwithstanding the argument that it is often difficult, if not impossible, to identify these persons.¹⁸⁹ The fact remains that human beings control corporations. Punishing a creation of

¹⁸⁹ See Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927). Professor Edgerton argued in support of extending criminal liability to corporations that:

In the first place, it may on occasion, be clear enough that some individuals have committed a crime for corporate purposes, and yet not clear who those individuals are. It is moreover relatively difficult to apprehend and prosecute a number, particularly a large number, of individuals, even if their identity is known; the corporation is always readily available. And the individuals may be financially so irresponsible as to have nothing to fear from a fine, while the assets of the corporation may be abundant. Finally, juries — as has long been notorious in civil cases — are not so reluctant to find corporations guilty as to find individuals guilty.

Id. at 834 (footnotes omitted). If ease of prosecution is a legitimate ground for imposing criminal liability on a corporation for homicide, perhaps the concept has a place alongside "[c]onspiracy, that darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). *But cf. Genesis* 18:26: "If I find at Sodom fifty righteous in the city, I will spare the whole place for their sake."

law is meaningless; punishing those who control the entity, on the other hand, may deter future misconduct on behalf of a corporate entity which results in death.

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