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Corporations As Ships: An Inquiry Into Personal Accountability and Institutional Legitimacy*

Art Wolfe**

The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead . . . scholars to compare the evolving 'corporate system' with the feudal system; and to lead other men of insight and experience to assert that this 'master institution of civilized life' is committing it to the rule of a plutocracy. . . . Such is the Frankenstein Monster which states have created by their corporation laws.¹

I. INTRODUCTION

Shortly before first light, on Saturday, February 26, 1972, one-hundred thirty million gallons of sludge and water burst from an earthen dam and rampaged down Middle Fork Hollow, devastating most of the sixteen small villages comprising the community known as Buffalo Creek, West Virginia.² One hundred and twenty-five people, mostly women and children, lost their lives in the thick muddy soup; over 200 adults and 450 children survived, but were physically and

* I wish to thank John Bonsignore, Steve Dow, Tony McAdams, Charles Perrow, and Bart Van Reekin for their time and patience in reading and commenting on early drafts of this article.

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1. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565, 567 (1933) (Brandeis, J., dissenting).

2. Hereinafter the death and destruction that resulted will be referred to as "the Buffalo Creek disaster".

emotionally scarred and sought compensation through the legal system.³ A large energy conglomerate, Pittston Company, paid over \$13 million (or about \$10,000 per plaintiff) in settlement of the charges brought by plaintiffs for the estates and the survivors.⁴ No natural person was held accountable for this death and destruction. In fact, two years later Pittston's president at the time of the disaster was promoted to Chairman of the Board.⁵

Over twelve years later, and half a world away in the Indian Ocean, Electrician's Mate Fireman, Michael P. Smith, reported to sick bay aboard the USS Davidson, a 250-man warship. The independent duty corpsman in the sickbay diagnosed him as having bronchitis, and treated him with Tylenol and bed rest. Smith's condition worsened. The Navy flew him to an aircraft carrier and then to a hospital in Fremantle, Australia, where he died nine days later of respiratory distress syndrome, complicated by pneumonia and pneumothorax.⁶ As a result of this death, the Navy court-martialed the independent duty corpsman in the sick bay, the division officer, the executive officer, and the commanding officer of the USS Davidson, finding them to be in dereliction of duty. These men in positions of responsibility were held accountable; they answered for the death of Michael P. Smith which they had collectively caused.

This article will develop an explanation of why society tolerates the results of the Buffalo Creek disaster. In our society today, examples of death and destruction by large business corporations abound;⁷ yet those in positions of authority in these massive hierarchies hardly look askance at the destruction caused by their organizations. In the

3. Most of the facts in this section of the article about the Buffalo Creek disaster are derived from a book written by Gerald Stern, the chief legal counsel for 625 plaintiffs who sued for damages resulting from the event. See G.M. STERN, *THE BUFFALO CREEK DISASTER* (1976).

4. *Id.* at 274-303 (recounting the terms of the settlement).

5. WALL ST. J., Sept. 30, 1976, at 21, col. 2.

6. 112/8/1002 U.S. NAVAL INSTITUTE PROC. 31-34 (Aug. 1986) [hereinafter NAVAL INSTITUTE].

7. There are many semi-scholarly accounts of death and destruction other than Stern's account of the legal aftermath of The Buffalo Creek disaster. However, I decided to discuss this disaster because Stern was a practicing attorney with one of the most prominent firms in the country, Arnold & Porter, in Washington, D.C., and because I believed his account to be honest, accurate and fair. In much of the book, he quotes from testimony at government hearings, from government reports, depositions and other reliable sources.

Other detailed accounts of foreseeable death and destruction are available. See, e.g., J. GODSON, *THE RISE AND FALL OF THE DC-10* (1975) (discussing the preventability and lack of personal accountability for the deaths of 346 people in the largest single air disaster). See also MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* (1985); S. PERRY AND J. DAWSON, *NIGHTMARE* (1985); PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1986); J. EGGINGTON, *THE POISONING OF MICHIGAN* (1980); NICHOLAS ASHFORD, *CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASES AND INJURY* (1976); MCKINLEY C. OLSON, *UNACCEPTABLE RISK: THE NUCLEAR POWER CONTROVERSY* (1976).

pages which follow I argue that the law as it is structured and applied today is incapable of achieving a measure of human accountability when, like Frankenstein, our business giants become monsters.⁸

This article was written to vindicate my intuition that we can have a gentler, more humane business environment. The law that creates and controls large business corporations is not immutable. The path to a more humane business environment requires us to pay close attention to how we are taught to think about law. If we do, we will learn how our collective thoughts come to us from the ages past, perpetuated in the name of education, science and "expertise," and how these venerated, shared beliefs take on the noble aura of a verity and thus become unquestioned. The ideas of eighteenth-century writers who were responding to the events of their time led to much of today's business-related public policy. The simple fact is, their reality is not ours.

Society must overcome the tradition of unthinking human experience (particularly of the past one hundred years) to choose public policies known to be in its best interests presently. To highlight the role and force of tradition, I contrast the Buffalo Creek Disaster and the USS Davidson incident. I then will dig beneath the surface of current legal responses and public policy expressions to explain the formal, legal response to each event. This article subsequently argues that in a world shaped by the large business corporation, the path to a more humane social environment should be established by resurrecting one of the most fundamental moral notions—that one should have to answer for contributing to the death of another.

Specifically, I present my argument in four parts. Part I outlines the events that caused the Buffalo Creek disaster. I conclude that if a tribunal had found a natural person directly responsible for the collapse of the dam, it would have convicted that person for manslaughter for the 125 deaths. What stands between this result and the result of no human accountability is the fact that the dam was constructed and maintained by a business corporation. I then contrast

8. Throughout this paper, I will refer to the "large business corporation." My thesis applies to the largest 1500 corporations, the shares of which are traded on the New York Stock Exchange. This grouping is somewhat arbitrary. I believe it is necessary, however, to separate those very large business corporations (capable of imposing substantial risks on employees, the environment and others) from small, Mom & Pop corporations. Other scholars have treated large corporations separately as an appropriate grouping. See, e.g., P.I. BLUMBERG, *THE MEGACORPORATION IN AMERICAN SOCIETY* (1975); A.F. CONARD, *CORPORATIONS IN PERSPECTIVE*, 124-151 (1976); W. ADAMS AND J.W. BROCK, *THE BIGNESS COMPLEX* (1986).

the disaster with the court-martial of the four men in the chain of command aboard the USS Davidson in June, 1984. This contrast will show that the response of the law to the Buffalo Creek disaster rests on a history of haphazardly created legal assumptions and conventions. These assumptions are grossly inaccurate, and thus palpably inapplicable to a world of corporate giants that create substantial risks to our health and welfare. The ill-formed public policy of today produces results that run counter to the most fundamental beliefs of the civilized world—the belief that one who uses his own property for his own benefit and kills someone in that process, answers for that death.

“Having to answer” to some authority greater than oneself is what is meant by the verb “to account.”⁹ The officers and enlisted men of the USS Davidson were accountable, while the management of Pittston and its subsidiary Buffalo Mining Company was not. It is this fact, more than any other, which prompts this article.

Part II opines that society does not *directly* view complex, remote social events such as the Buffalo Creek disaster, but views them *indirectly* through a system of overlapping beliefs. This system may be characterized as a kind of mental filter or lens: it enables us to see and give meaning to objects and events far away. This lens has a prescription—that is, a force in our society shapes it in a certain way or grinds the lens to reflect certain facets of a perceived reality. The force that shapes this social science lens is individualism. Individualism, American individualism especially, is more than a philosophy; it is a pervading view of how to live. It shapes individual lives, orders society, and serves as the image which has created much of our public policy.

The most powerful legal expression of American individualism occurred in 1886, when the United States Supreme Court explained that business corporations should be treated as persons for purposes of the Fourteenth Amendment.¹⁰ It did so without discussion, without debate, and without stated reason.¹¹ Over the years, legal knowledge and practice has accepted the view that business corporations like individuals, can be held accountable. With the emergence of this idea, human accountability for death lost its meaning and the idea of natural-person accountability became hidden from view.¹² This view

9. One of the earliest uses of the words “to account” appeared in 1340 in a context where it meant “answering for conduct.” THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (Vol. I, 1971).

10. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886).

11. *Id.*

12. Human beings cause deaths, while corporations, legally artificial persons that are orderly accumulations of assets, do not cause death. But, because we believe corporations to be persons, the humans responsible for death escape accountability. This represents a substantial form of social power. Working one’s will on others without

should be resurrected. In order to enjoy a more tender humane business environment, individual human accountability must be reestablished.

In Part III I argue that belief systems ("lenses") can be changed. Here, the emphasis shifts to the selection of a new shape for the lens — a new way of believing and, thus, seeing the large American business corporation. Society should view these fictional, legal entities as merely an orderly accumulation of tangible and intangible property. They comprise a system of potential energy; a body with mass, power and inertia which is capable of enormous destruction.

Without human direction, however, this mass lacks purpose and meaning. This reality appears in the USS Davidson case. Our Naval tradition, inherited from England and dating back thousands of years,¹³ recognizes the danger in controlling ships, and separates the perception of the ship from the perception of a human controlling the ship. It is the sailors and officers who give a ship its direction and purpose, and it is they who are accountable for their actions or inactions on the ship.

For purposes of achieving the view that human beings control corporations, the large American business corporation should be seen and understood as a ship. By viewing corporations as ships, society may more clearly separate the human thought and action (or inaction) that is the cause of good or evil from the rather inert accumulation of property known as the business corporation. The common belief that a large business corporation is a person is no more or less legitimate than the belief that such institutions are ships.

The last part of this article calls upon one of the oldest ideas in western legal tradition, and advances the argument that several traditional precepts of trust law, as fashioned by centuries of equity court experience, should apply to corporate management. That is, if corporations are seen as ships, then what form should the obligations of management take? I propose that managers of large business corporations should be thought of as trustees, while the corporation (or ship) should be seen as the body of the trust. In most trust arrangements, a trust is created for a third party, the beneficiary. Two levels

being held accountable for death and destruction is a classic form of power, not dissimilar to that developed by the Catholic Church before the Reformation. See Wolfe, *Power in the American Economy: A Review and Commentary*, 27 AM. BUS. L.J. 131 (1989).

13. See E.M. BYRNE, *MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS* 4-5 (1970); W.P. MACK, *NAVAL CEREMONIES CUSTOMS AND TRADITIONS* (1980).

of beneficiaries exist in this model. Shareholders, employees, customers, creditors, and suppliers are primary beneficiaries. Secondary beneficiaries are those in close proximity to the corporation's actions, as well as the local, state, and federal governments.

These beneficiaries should be able to maintain an action against corporate management for dereliction of duty. This is analogous to the conclusion in the USS Davidson case: management is obligated to be informed of the consequences of its action and inaction. When such action or inaction results in risks to a beneficiary leading to death and destruction, managers should be held in dereliction of duty and removed from positions of authority. Hence, in the Buffalo Creek disaster, Nicholas Camicia, the C.E.O. of Pittston, should not have been promoted to Chairman of the Board following the death and destruction caused by a "division" of that conglomerate. He should have been held accountable and dismissed from his position of authority.

Achieving this latter result is the core of this article. To do this, I conclude that society must change basic beliefs upon which our law and economics rest.

II. GENERALIZATIONS ABOUT TWO EVENTS

The Buffalo Creek disaster and the USS Davidson court-martial following the death of Seaman Smith were the subject of public, formal investigations. Consequently, the facts are undisputed. The following summaries are compiled from sworn testimony, official reports, pleadings, and first-hand comments by those involved.

A. *Buffalo Creek*

The Buffalo Creek disaster occurred on February 26, 1972. At that time, Buffalo Mining Company, a West Virginia corporation and one of the largest employers in Logan County, West Virginia, was wholly owned by Pittston Company, a large energy-related conglomerate with corporate offices on Park Avenue in New York City.¹⁴ Pittston owned interests in coal, oil, trucking firms, and the Brinks Armored Car Company. It purchased Buffalo Mining for seven million dollars in 1970, and added the company to its coal group.

The individuals in the corporate hierarchy who are important for purposes of this article are: Steve Dasovich, Buffalo Mining Company operations manager; Jack Kent, Buffalo Mining Company superintendent of strip mining; Irvin Spotte, president of the Pittston Coal Group; and Nicholas Camicia, president of Pittston Company.

Extracting coal from the ground, and cleaning and hauling it is an

14. G.M.STERN, *supra* note 3, at 11.

extremely dangerous enterprise. The coal must be washed and graded before it is marketed. A mine the size of Buffalo Creek must dispose 800 to 1,000 tons of solids, and 400,000 to 500,000 gallons of water containing another 500 tons of solids each day.¹⁵ A natural disposal site for this waste is the closest ravine.¹⁶ Buffalo Mining pumped the liquid discharge into Buffalo Creek itself, and dumped the solids along the banks of the creek.¹⁷ The solid refuse soon choked off the creek, forming an earthen dam across the creek bed.¹⁸ When it became difficult to dump more refuse behind the earthen dam, a new upstream site was selected and the process was repeated.¹⁹

At the time of the disaster, there were three earthen dams. Dam 3, the last dam and furthest upstream, began in 1968.²⁰ It contained approximately 534,000 cubic yards of smoldering refuse, standing 60 feet high, and stretching 450 to 600 feet across a hollow.²¹ It held back over 100 million gallons of water, and stood 250 vertical feet above the closest town of Saunders,²² but removed some distance up the hollow. It was Dam 3 that triggered the failure of the other two dams, and created a 20 to 30 foot wall of sludge that buried everything in its path.²³

Because the risk posed by this dam was substantial, the management of Buffalo Mining Company and Pittston should have known of it. These masses of earth slid down hollows with frightening regularity. This was especially true if the mass was dumped in a hollow with a flowing creek at the bottom. This was the case with the dams built on Buffalo Creek. The following enumerated events should have warned the management of Buffalo Mining and Pittston that the risk of dam failure was substantial. Plaintiffs' counsel used these facts to argue that Pittston should be liable for the damages resulting from the dam's failure.

1. One of the first slides of earthen dams was in 1923 in Letcher County, Kentucky, and was reported as the "largest . . . slide in the

15. *Id.* at 29-30 (explaining the cleaning and grading process).

16. *Id.* at 30.

17. *Id.*

18. *Id.*

19. *Id.* at 31.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

history of mining operations” in Kentucky.²⁴ One year later, a slide in southern West Virginia killed seven people, leading a local newspaper to report it as, “[a] tragedy without parallel in the [m]ining [a]nnals of [s]outhern West Virginia.”²⁵ This disaster, which had “striking similarities to the Buffalo Creek disaster,”²⁶ resulted in a law suit against the responsible coal company.²⁷ Recovery for the deaths and property destruction was affirmed on appeal.²⁸ The court stated, among other things, that “it seems clear that the piling of the waste material so as to obstruct a natural watercourse, impounding the water behind the obstruction, and allowing the waste pile to burn for a number of years, constituted negligence.”²⁹

2. In 1955, a corporation owned by Pittston, paid a \$10,000 settlement for damages from a dam failure.³⁰ In 1966, six years before the Buffalo Creek disaster, a sludge slide in Aberfan Wales killed 144 people, including 116 children between the ages of seven and ten.³¹ This disaster attracted major news coverage.³² The U. S. Geological Survey deputized an individual to study this disaster and visit the Buffalo Mining operation, which at that time, had only its first dam across the hollow.³³ His report concluded that “Dam 1 was stable, but, ‘subject to large washout on north side from overflow of lake.’”³⁴ Immediately after this report, Dam 1 overflowed prompting the construction of Dam 2.³⁵

3. In March, 1967, five months after the Wales disaster, a dam failed at Pittston’s Clinchfield Coal Company mine in Dola, West Virginia, damaging one home and some land.

4. In 1968, a prescient resident of the town of Saunders, located beneath the Buffalo Creek dam, wrote to the governor of West Virginia, saying in part: The coal co. [sic] has dumped a big pile of slate about 4 or 5 hundred feet high. The water behind it is about 400 feet deep and it is like a river. It is endangering our homes & lives. . . .

24. *Id.* at 140.

25. *Id.*

26. *Id.* at 59 (explaining that “a refuse pile which blocked a stream gave way during the rainy season”).

27. *Id.*

28. *Id.* at 60. See *American Coal Co. v. DeWese*, 30 F. 2d 349 (4th Cir. 1929).

29. *American Coal*, 30 F.2d at 51-52.

30. G.M. STERN, *supra* note 3, at 220.

31. *Id.* at 61.

32. *Id.* at 62 (explaining that the disaster appeared on the front page of the *Washington Post* and *New York Times*, as well as mentioned in *Time Life* and on *CBS News*).

33. *Id.* at 62-63.

34. *Id.* at 63.

35. *Id.*

Please send someone here to see the water & see how dangerous it is. Every time it rains it scares everyone to death. We are all afraid we will be washed away and drowned. . . . Our lives are in danger.³⁶The letter brought state representatives to Buffalo Creek to meet Mr. Dasovich.³⁷ He agreed to build a new dam, Dam 3, further upstream behind Dam 2.³⁸

5. In 1970, a Pittston manager, Don Jones, was responsible for a corporate memorandum that warned of proposed federal safety regulations that would affect Buffalo Mining by forbidding "the closing off of any stream or the impoundment of water by refuse-pile dams."³⁹ When the president of the Pittston Coal Group learned of the memo, "he ordered him [Don Jones] to collect all the copies of the memorandum and not to send them out."⁴⁰ Don Jones followed orders by disposing of those envelopes he had addressed and by placing the memorandum back in his files.⁴¹

6. In 1971, almost the entire downstream side of Dam 3 slumped forward into the pool behind Dam 2.⁴² This was the third occurrence which caused state inspectors to order Buffalo Mining to build an emergency spillway for extra water.⁴³ Steve Dasovich had ignored each warning.⁴⁴

7. There is little doubt that Mr. Dasovich knew that the dam violated safety standards because Pittston's chief legal counsel admitted in a deposition that prior to the disaster Dasovich had asked him about "specific federal safety standards which prohibited the use of refuse piles to impound water,"⁴⁵ and which "prohibited the construction of retaining dams not of substantial construction."⁴⁶ Not only had Pittston and Buffalo Mining violated state and federal standards, but ironically, it was revealed in a pre-trial deposition that Pittston's managers were involved in drafting the very standards they had

36. *Id.* at 159-60.

37. *Id.* at 160.

38. *Id.*

39. *Id.* at 188.

40. *Id.*

41. *Id.* The memorandum remained in Mr. Jones' files until two days after the Buffalo Creek disaster. *Id.*

42. G.M. STERN, *supra* note 3, at 161.

43. *Id.* at 161-62.

44. *Id.* at 162.

45. *Id.* at 167.

46. *Id.*

violated.⁴⁷

8. Finally, even sources external to Pittston-Buffalo Mining knew of the danger of the failed earthen dam. In the early 1970's the insurance carriers asked coal companies to specifically identify earthen dams that supported coal mining run-offs. Pittston did not identify the three-stage dam on Buffalo Creek as a dam, but reported it as "an impoundment,"⁴⁸ or "embankment,"⁴⁹ or as a "porous impoundment used as a water filtration system."⁵⁰ These disguised terms were probably used in order to avoid substantial increases in premiums.⁵¹

Dam 3 failed after five days of heavy rain. The rain on Monday, February 21, 1972, concerned Jack Kent, the superintendent of strip mining, and led him to check the water level behind Dam 3.⁵² On Wednesday, more rain continued to fall.⁵³ On Thursday, Mr. Dasovich telephoned Mr. Spotte, President of the Coal group, stating that he was "concerned that 'the water was rising in No. 3 impoundment.'"⁵⁴ It continued to rain on Friday, and Mr. Kent found the water had risen another eighteen inches.⁵⁵ He checked the level although Mr. Dasovich had asked him not to recheck the water because his *own* visit to the dam had proven (albeit erroneously) that the water had receded.⁵⁶

The residents of Saunders were quite edgy on Friday, February 25. Several left their homes out of fear the dam would break, and sought shelter for the night in a local schoolhouse.⁵⁷ One resident even called the sheriff's office at 3:30 a.m. on Saturday morning.⁵⁸ She wanted the National Guard to come to warn her neighbors since older residents claimed that the dam would not last until daylight.⁵⁹ After a series of phone calls, an agent of Buffalo Mining was reached.⁶⁰ At about 5:15 a.m., Mr. Dasovich was called and he arrived at the dam at approximately 6:00 a.m.⁶¹ Dasovich saw the

47. *Id.* at 170.

48. *Id.* at 144.

49. *Id.* at 166.

50. *Id.*

51. The intricacies of the money settlement among Pittston, Buffalo Mining and their respective insurance carriers is not clear from the public materials available.

52. G.M.STERN, *supra* note 3, at 266.

53. *Id.*

54. *Id.* at 267.

55. *Id.*

56. *Id.* at 267-68.

57. *Id.* at 269.

58. *Id.*

59. *Id.* at 270.

60. *Id.*

61. *Id.* at 271. Prior to arriving at the dam, Mr. Dasovich enjoyed a leisurely cup of coffee at a nearby coffee shop. *Id.*

water almost over the top of the dam and ordered Mr. Kent to install two twenty-four inch pipes to drain the water.⁶²

Mr. Dasovich saw no danger in the situation. About one hour before the mountain of sludge buried 125 people, he told the deputy sheriff and the frightened people huddled together in the schoolhouse below Dam 3 that they did not "have anything to be concerned about."⁶³ They did not know that Mr. Dasovich was not a civil engineer and had little engineering knowledge; his position of authority with Buffalo Mining and Pittston was sufficient for these residents.⁶⁴ A more formal report was made to the sheriff just thirty minutes before the dam failed. The sheriff recalled Dasovich saying, "he had everything under control . . . that it was all right, that the dam was all right."⁶⁵ The dam failed about 7:00 a.m., February 26, 1972.⁶⁶

The formal legal response to the Buffalo Creek disaster appears substantial. At the state level: 1) The State of West Virginia appointed an Ad Hoc Commission to investigate the incident. It concluded, "[t]he Pittston Company, through its officials, has shown flagrant disregard for the safety of residents of Buffalo Creek and other persons who live near coal-refuse impoundments."⁶⁷ 2) A grand jury was convened, but issued no indictments.⁶⁸ According to persons close to the proceedings, the grand jury believed that "it would be capricious to fix all the responsibility on one man, Mr. Dasovich."⁶⁹ Thus, the grand jury could not indict any one individual unless it could indict Pittston and all of its officers.

At the federal level, there was similar attention: 1) The U.S. Bureau of Mines conducted a study of Dams 1, 2, and 3 which confirmed "that all three embankments were built by methods not in conformance with current practices of the civil engineering profession in the design and construction of water retention dams."⁷⁰ 2) The U.S. Senate held hearings on the causes of the disaster and, among other things, accepted a report from the U.S. Army Corps of Engineers on

62. *Id.* at 272.

63. *Id.*

64. *Id.*

65. *Id.* at 273.

66. *Id.*

67. *Id.* at 70.

68. *Id.* at 73. One of the largest obstacles to obtaining an indictment was piercing the corporate veil. *Id.* at 74.

69. *Id.*

70. *Id.* at 139.

the disaster.⁷¹ It concluded that, from an engineering viewpoint, the general idea and structure of Dam 3 was unacceptable, "it was doomed to failure from the time the first load of refuse was dumped."⁷² 3) The most significant event following the disaster was the filing of a lawsuit by Gerald Stern, a Harvard law graduate and partner on leave from Arnold Porter, one of the largest and most prestigious law firms in the country. He represented over 625 claimants asking for a total of \$64 million dollars.

Pittston's first official response to the disaster was to blame "heavy rains and rising flood waters."⁷³ The company announced that "the break in the dam was caused by flooding — an Act of God."⁷⁴ Coupled with the "Act of God" defense was Pittston's strategy to force survivors to bring their \$64 million claim against only Buffalo Mining Company.⁷⁵ Pittston argued that even as sole owner of Buffalo Mining, it enjoyed limited liability and could not be sued.⁷⁶ Another strategy of Pittston was to encourage its wholly-owned subsidiary to settle quickly and spread the word that it paid claims fairly. In fact, the first settlement, announced by Pittston with great public fanfare, was \$4,000 to a Pittston employee who had lost a six-room house. Generally, the corporation paid about one-half of that claimed.⁷⁷

A more serious defense tactic was to argue that no one was at fault because "the embankment" had been constructed by experienced coal miners in accordance with customary methods and techniques.⁷⁸ This argument was made despite a federal court decision applying West Virginia law⁷⁹ to a case with "striking similarities" to Buffalo Creek,⁸⁰ in which custom and usage were found to be no defense to an action where a refuse pile rushed down a mountain hollow and buried seven people.⁸¹ The court explained that since every coal company should be held liable if every coal company does something wrong, a single coal company should not try to escape liability by claiming other coal companies are equally careless.⁸²

In a practical sense, Pittston's response to the law suit was to make

71. *Id.*

72. *Id.* (quoting Garth Fuguay of the Army Corp of Engineers).

73. *Id.* at 13.

74. *Id.* at 11.

75. *Id.* at 14. Buffalo Mining Company was valued at \$7 million, two years before the accident. It was a wholly-owned subsidiary of Pittston. *Id.*

76. *Id.* at 58.

77. *Id.*

78. *Id.* at 59.

79. *See American Coal Co. v. DeWese*, 30 F.2d 349 (4th Cir. 1929). For a complete discussion, see *supra* notes 26-29 and accompanying text.

80. G.M. STERN, *supra* note 3, at 59.

81. *American Coal*, 30 F.2d at 351.

82. G.M. STERN, *supra* note 3, at 59 (outlining the reasoning of the district court opinion).

recovery as difficult as possible for the plaintiffs. For example, Pittston asked the court to schedule depositions for the plaintiffs in Charleston, and then asked all 625 plaintiffs to undergo a physical examination by the defense doctors in Williamston, Kentucky, 100 miles in the other direction.⁸³ This was requested, despite the fact that many plaintiffs were living in mobile homes and were without transportation.⁸⁴

In the process of taking depositions, Mr. Stern discovered that the officers of Pittston believed they were untouchable. Mr. Stern asked Mr. Camicia, the President of Pittston, who had asserted publicly that the failed dam was built "in accordance with the normal and customary practices in the building of such impoundments in the coal fields,"⁸⁵ whether he agreed with the United States Bureau of Mines' comprehensive study of the disaster which reported that the embankments did not conform with current practices of civil engineering.⁸⁶ Mr. Camicia replied that "[he was] not qualified to answer that because [he did not] know how it was built actually."⁸⁷

Despite the apparent intransigence of Pittston management and the uphill legal battle waged by Stern, Pittston and Stern agreed to settle the \$64 million claim for \$13.5 million.⁸⁸ Arnold & Porter put in over 40,000 man-hours of work and earned \$3 million for their efforts.⁸⁹ The plaintiffs, *before the deduction for expenses*, recovered an average of about \$13,000 each.⁹⁰

B. Evaluation and Comment

The hearings and trial following the disaster at Buffalo Creek illustrate the formal response of our legal system. Can we not do better? Better how? Better in the sense of realizing such legal response is inadequate in preventing the recurrence of this type of disaster. *Compensation and prevention are two separate matters.* It is doubtful that even one plaintiff would have traded his quality of life before the dam failure, and his loved ones or possessions for the amount of money received from the law suit. In fact, after the settlement a survivor commented that, "[t]he money can help us live an easier life

83. *Id.* at 119.

84. *Id.*

85. *Id.* at 138.

86. *Id.* at 138-39.

87. *Id.* at 139.

88. *Id.* at 298-99.

89. *Id.* at 302. Stern observed that "[s]ometimes you do well by doing good." *Id.*

90. *Id.* at 301 (emphasis added).

. . . but it can never put our minds completely at ease, because nothing but death can stop our minds from going back to that morning.’”⁹¹ Although Stern surmises that “[m]aybe the cost of our settlement will make them a little more careful in the future,”⁹² *the amount of the money settlement is insufficient to have widespread influence over the structure, incentives, practices, and perceptions of the management of Pittston and similar large corporations.*

Over three years after the event, ABC News reported that Pittston had been assessed over \$2 million in fines under the 1969 Coal Mine Health and Safety Law, yet records showed that none of these fines had been paid.⁹³ More significantly, ABC reported that over eighteen months after the disaster at Buffalo Creek, “‘in hollow after hollow, small towns and villages sit directly in the path of waters dammed up by huge piles of coal slag dumped by neighboring coal operations.’”⁹⁴

The Buffalo Creek disaster paints a vivid picture of our present public policy. This is an excellent illustration of our legal system response. Our public policy following a disaster is as follows: 1) a flurry of public inquiry; 2) a law suit in which, ultimately, the alleged wrongdoer acquiesces and is ordered to pay a form of compensation to the damaged party; and 3) a possible tightening of state and federal standards and enforcement mechanisms. Despite this, the corporate hierarchy, its structure, personalities, patterns of conduct, in short, the “organization,” continues—an engine every bit as capable of destruction as before the event. If a solitary individual had the knowledge of Pittston/Buffalo Mining, and had the construction of the dam been on behalf of an individual rather than a business corporation, the responsible individual would have been indicted for manslaughter for the 125 deaths. He or she would have answered for failing to act in some additional manner besides merely paying damages.

In recent years, scholars have seen organizational structure as a major reason for disaster occurrences. Yale University sociologist, Charles Perrow, in his major study on disasters such as Buffalo Creek, notes that disasters may occur because of “[t]he role of organizations and management in preventing [system] failures — or causing them. Organizations [he argues] are at the center of our inquiry. . . .”⁹⁵ Another widely-regarded sociologist, University of Chicago’s James Coleman, sees the structure of American society as fundamentally altered because of the presence of large corporations

91. *Id.* at 302.

92. *Id.*

93. *Id.* at 191. The television special was entitled “Life, Liberty, and the Pursuit of Coal.” *Id.*

94. *Id.*

95. CHARLES PERROW, *NORMAL ACCIDENTS* 10 (1984).

and large governments,⁹⁶ and calls for a new source of knowledge about them and their control. Noted Harvard economist, John Kenneth Galbraith argues that private sector organizations are the most important source of power today.⁹⁷ Indeed, accounting for one's own actions is a measure of power. The classic definition of power focuses on the ability of one to work his or her will on another. A less-developed notion of power was seen when the single most significant legal actor in Buffalo Creek, West Virginia was not accountable in a meaningful way for devastating that community. Why?

The law viewed the corporation as a person, and held it accountable for its actions to the extent that the corporation agreed to compensate the victims. Thus, the focus was away from the part that individuals played or could have played in this event. This is the paradox of our public policy. The law views Buffalo Mining and Pittston as persons, yet if they were human, they would be in jail.

Understanding business corporations as real people is only a partially useful metaphor. Real people own property, as do corporations. Hence, it is the property similarity that legitimizes the use of the metaphor. After a trial establishing liability, the court orders the wrongdoer to transfer property to the victims. Human accountability for death is buried from view and is out of reach. Is this result inevitable? No, our legal environment need not be structured in this manner. Consider the following event.

C. The Death Of Seaman Smith

On June 23, 1984, U.S. Navy Seaman Electrician's Mate Fireman, Michael P. Smith died in Freemantle, Western Australia.⁹⁸ Nine days earlier, he had reported to the sick bay of the USS Davidson, complaining of cold-like symptoms. The independent duty corpsman in charge of admissions at the sick bay diagnosed Smith's illness as bronchitis. He treated him with decongestants, Tylenol, and ordered bed rest. Over the next three days Smith's condition worsened, and the diagnosis was changed to possible pneumonia. Five days after entering sick bay, he was placed in bed, where he remained for the next two days as his condition continued to deteriorate. On the seventh day, he was flown to a nearby aircraft carrier, and two days later he was transferred to the intensive care unit of a hospital in Freemantle

96. JAMES S. COLEMAN, *THE ASYMMETRIC SOCIETY* (1982).

97. JOHN K. GALBRAITH, *THE ANATOMY OF POWER* (1983).

98. NAVAL INSTITUTE, *supra* note 6, at 31.

where he died. The cause of his death was adult respiratory distress syndrome, complicated by pneumonia and pneumothorax.⁹⁹

Those close to the event preliminarily responded that if Smith had received proper treatment and been flown to the hospital in a timely manner, he would have lived.¹⁰⁰ The formal response of the naval legal system, following an investigation by a Judge Advocate General Manual Investigating Officer, found the independent duty corpsman derelict in the performance of his duty by failing to provide adequate health care, which ultimately resulted in the sailor's death. After reviews of this matter through the chain of command ending with Commander of the Pacific Fleet, courts-martial were convened for the chain of officers involved. The results of these individual court-martials were characterized as follows:

Division Officer: "The facts of the investigation revealed a division officer who failed to carry out his responsibilities toward the deceased who was a member of his 13-man division. Not once during [the deceased's] illness did the division officer visit the man. . . ." ¹⁰¹

Executive Officer: "[The investigation revealed him] as being a disorganized, inattentive individual who at no time during the illness checked up on the deceased. He relied entirely on erroneous reports received from the independent duty corpsman and several casual personal sightings of [the deceased], . . ." ¹⁰²

Commanding Officer: The Commanding Officer's involvement was "inadequate;" moreover, the "detached monitoring by the chain of command falls far short of the judicious attention to the welfare of command personnel" required by Navy regulations.¹⁰³ The Commanding Officer was found guilty, contrary to his pleas, of two counts of violations of Article 92 of the Uniform Code of Military Justice¹⁰⁴ for 1) failing to ensure the provision of adequate medical care to the deceased, and 2) failing to adequately inventory, safeguard, and deliver the personal effects to next of kin.¹⁰⁵

D. Evaluation And Comment

All U.S. Naval officers are presumed to know appropriate chapters of U.S. Navy Regulations. These regulations provide that Navy personnel are entitled to "adequate medical care," which is understood to be "the best medical care available under the circumstances."¹⁰⁶ All of the officers concerned violated this standard because at least one, and as many as five medical officers were within voice communication of the ship.¹⁰⁷ The deceased could have been taken to a ship

99. *Id.* at 31.

100. *Id.* at 32.

101. *Id.*

102. *Id.*

103. *Id.*

104. See 10 U.S.C. § 892(c) (West 1985) (noting that one who is in dereliction of duty is subject to court-martial).

105. NAVAL PROCEEDINGS, *supra* note 6, at 32.

106. *Id.* at 33.

107. *Id.* at 34.

with a medical officer within hours, when time could have made the difference.

In short, the chain of command had a duty to act; it failed to act, and this failure was a proximate cause of the death. The duty is stated in general terms: "A commanding officer is generally accountable for everything that happens on board his ship."¹⁰⁸ He must be curious, and, in the words of the commander who presided over of the court-martial of the Commanding Officer: "The commanding officer must get off the bridge and get about the ship."¹⁰⁹

III. A COMPARISON OF THE TWO EVENTS

In this section I will compare the responses of the respective systems of law and policy to the two events described above. This comparison will raise questions which shape the issues I address in the remaining pages of this article.

A. *The Stark Contrast*

In the Buffalo Creek disaster, 125 people died, over 600 people were injured and entire communities were destroyed, yet no human was held publicly accountable. The measure of accountability (if it can be called that) was a large energy conglomerate, Pittston, and its subsidiaries paying over \$13 million in damages to the plaintiffs in a civil law suit. In the case of the death of a single seaman, Michael Smith, four U. S. Navy men, including three officers with no direct contact with the deceased, were held accountable for their dereliction of duty and removed from positions of authority.

I will not argue a wholesale adoption of the military model of justice used in the case of the death of Seaman Smith; however, the irony exposed by the comparison of these results must be emphasized. Is it not strange that a military unit, the most systems-oriented, impersonal, and allegedly inhumane of all organizational types, holds accountable the entire chain of command for failing to attend to a single, sick member? While, on the other hand, corporate management who created substantial risks to their employees and neighbors, and caused the deaths of 125 men, women, and children, when those risks came to a horrifying, predictable conclusion, walked away unscathed. In fact, the chief executive officer enjoyed a promo-

108. *Id.*

109. *Id.*

tion by the very organization that caused this destruction.¹¹⁰

In the remaining pages of this article I explore the roots of this irony and propose a more sensible solution.

B. *The Causes*

The causes of the deaths in these two events are many and complex, but can be referred to in general terms as the *failure of management to pay attention*. That is, in each case, the wrongs are similar and can be thought of as inattention to the consequences of one's action within a complex social hierarchy. In neither case did those in charge intend the consequences that flowed from their inattention, yet both cases resulted in the deaths of unsuspecting, innocent people.

What are the causes of their inattention? The answer probably lies somewhere between simple laziness or stupidity, at one extreme, and preoccupation with competing concerns, at the other extreme. In large business corporations, the objectives of production and profit compete for the attention of managers with other goals such as the employee and risk minimization. Choosing between such opposing objectives is a difficult task. Public policy should be directed toward developing leaders who are aware of all of the consequences of their actions, both inside and outside of the organization. Deaths resulting from a manager's failure to be aware of risks imposed by an organization should be viewed as an unacceptable form of leadership.

To rephrase the issues: the Buffalo Creek example is not a unique set of circumstances. There are numerous examples in our system of corporate hierarchy where a form of evil resulted from inattention by those in authority.¹¹¹ The problem of inattention by those in authority to the risks created to those possibly affected by corporate management must be addressed.

C. *Conventional Legal Remedies For An Event Such As Buffalo Creek Are Inadequate To Confront The Problem Of Inattention*

The conventional legal remedies which have evolved to respond to

110. This incongruity is not trivial. To observers of the current American political economy such incongruities are rich sources for insight into our society. Recently, Tom Wolfe, author of *The Bonfire of the Vanities*, said he planned to return to non-fiction writing because it is wilder, more unpredictable, and provides more fertile ground for the creative mind than fiction. See THE STATE NEWS (East Lansing, Michigan) Mar. 30, 1989, at 1.

111. For example, the inattention of Exxon management to the quality of its ship captains indirectly caused the 1989 oil spill in Prince William Sound, Alaska. See Bob Connor & Eino Lehnton, *Exxon Should Carry the Blame for the Oil Spill*, NEWSDAY, April 23, 1989, at 2.

events such as Buffalo Creek are inadequate to address the problem of inattention. As a result of the settlement payment of over \$13 million by Pittston, reason and logic dictate that management was aware enough to ascertain other mining operations had stopped up other creeks. This response is so minimal that it is almost meaningless. In a case like Buffalo Creek, the civil law accomplishes one objective, that of compensation. However, other results that might flow from the payment of the settlement are speculative and matters of belief. For example, it is often assumed that product liability judgments result in safer products. Such is not the case. A Rand Corporation study on the impact of product liability judgments on product design concludes, "[a]ll the firms viewed product liability litigation as essentially a random influence, generating no clear signals as to how to adjust design behavior. The extreme version of this . . . the two firms with the largest volume of litigation took steps to insulate design decisions from the influence of litigation."¹¹² In short, the current civil remedies cannot be relied upon to bring about change within large corporations because monetary judgments are not intended to bring about structural change or otherwise affect the awareness of management. Hence, they do not.

What is needed is a public policy which brings persons into positions of authority who are likely to be aware of the impact of their actions and inactions. AWARENESS must be promoted, a general type of awareness, that is a function of the type of person one is. Requiring the firm to pay a money judgment to injured parties does not address the problem of awareness by those in positions of authority. The presently constituted civil remedy is analogous to asking every sailor who was aboard the USS Davidson to pay a small, almost negligible amount, and then asking the owners of the ship, the U.S. Government, to pay the balance to compensate the heirs of Seaman Smith.

To alter the system of causes which lead to events such as Buffalo Creek, we must change our thinking about present civil law. The result achieved by the civil law in such cases is fatuous in that it maintains the very same persons, the very same organizational structure, the whole system of incentives, values, and objectives, together with the general level of awareness that initially produced the catastrophe. The conventional civil law remedy that requires the business corporations to pay the damage it caused is not wise or efficacious

112. G. EAADS & P. REUTER, *DESIGNING SAFER PRODUCTS, CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* 107 (1983).

public policy. While the law provides some economic relief to the victims, it stops far short of the possibilities.

Nor is the application of criminal law any more efficacious in circumstances like the Buffalo Creek disaster. Why should it be? The criminal law, like the civil law was fashioned in an age when the primary actors were individuals, and the purpose of the law was to punish the evil intent of the wrongdoer. The criminal law could be adapted swiftly and applied with great clarity even when a single human unintentionally caused death. Recently, former Olympic diver Bruce Kimball was charged with a form of homicide when, while driving under the influence of alcohol, he struck and killed two teenagers in Florida.¹¹³ In a matter of months following the deaths, he was sentenced to 17 years in the state prison.¹¹⁴ There was no intentional wrong here, just a sorrowful action by a lone individual, resulting in the deaths of two people. Justice, if it be called that, was certain; accountability was achieved.

In the case of the large business corporation, however, the application of the criminal law becomes very problematic.¹¹⁵ A corporation has no mind and is therefore incapable of manifesting the intent required in the typical criminal prosecution. Moreover, when there is no wrongful intent and horrible death results from mere inattention, the current conceptions of criminal law are enormously frustrated. The corporation can be fined if it violates a regulatory statute, but this route leads to the same results as an application of civil law. The people in authority who were unaware enough to cause the violation, remain in authority. The criminal law has been applied to individuals within the corporation in only a few situations.¹¹⁶

The overall problem with applying criminal law to individuals within a large, complex hierarchy is that no one individual should, in all fairness, be held responsible for the actions of a collection of individuals. As the spokesperson for the grand jury said in the Buffalo Creek case, "it would be capricious to fix all the responsibility on one man, Mr. Dasovich."¹¹⁷

The stark fact is that people behave differently in groups than they do individually.¹¹⁸ Mr. Dasovich may have been a very humane indi-

113. See *Courts*, WASHINGTON POST, March 31, 1989, at B2 (Fanfare).

114. *Id.*

115. For a thorough discussion of the application of the criminal law to Ford Motor Corporation, see F. T. CULLEN, S. J. MAAKESTAD & G. CAVENDER, CORPORATE CRIME UNDER ATTACK 145-309 (1987).

116. *Id.* at 325-337 (discussing the criminal prosecution in the Film recovery cases).

117. G.M. STERN, *supra* note 3, at 74.

118. See S. MILGRAM, OBEDIENCE TO AUTHORITY (1974). The behavior of people subject to the authority of others or the authority of group values was confirmed by Milgram, but earlier writers, most notably LeBon and Freud, laid the theoretical groundwork. See S. FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO (1920).

vidual, but he did not pay attention to the risks created by Buffalo Mining. He stood on the dam just hours before it collapsed and was so unaware of the risk, he believed that everything was "under control" and the "dam was all right."¹¹⁹ An effective public policy must look to the mind of a person like Mr. Dasovich and ask what it was perceiving and believing at a given time. Of course, this is impossible. However, we can fairly judge that the incentives, corporate values and patterns which caused him to see what he saw were not altered by the public policy response which followed. Therefore, both the civil and criminal sanctions failed to address the important causes of the Buffalo Creek disaster—the inattention of management to the severity of risks it created.

D. *Is The Status Quo Acceptable?*

There are three related answers to this question. The first is that the status quo may be acceptable if there are no reasonable alternatives for handling the causes of events, such as the Buffalo Creek disaster. However, it appears that there is a reasonable alternative, which was illustrated by the legal system's response to the death of Seaman Smith.¹²⁰ There is no reason, other than the press of history, to prevent society from adopting a more efficacious approach to this problem. We can do better; therefore, we should do better.

Secondly, bound up as one are the vague, general assumptions of what it means to be a human being, and the apparent legitimacy of our current economic system resting as it does on institutional action. To be human, to engage in a human enterprise involves awareness or consciousness of one's actions.¹²¹ It also involves accountability if one injures another through the use of one's property. To be accountable means to answer in a personal sense to some authority,¹²² and being accountable is a substantial reason why systems of authority appear to have legitimacy. If this were not so, human action, especially institutional action, would appear uncontrollable, and thus arbitrary and even capricious. Events such as the Buffalo Creek disaster, where there is no human accountability, diminish slightly, but perceptively, the public faith required to maintain modern corporate hierarchies. If there was no shared, public perception that large

119. G.M. STERN, *supra* note 3, at 273.

120. See *infra* notes 214-217 and accompanying text.

121. For a discussion of what it means to be a responsible human, see CHRISTOPHER STONE, *WHERE THE LAW ENDS* 113-15 (1976).

122. See WEBSTER'S NEW WORLD DICTIONARY 9 (2d ed. 1970).

business corporations served the public good, corporations would not endure.¹²³ “Serving the public good” partly means answering to some superior authority—the law—in the name of the public.

If society does not establish a better system of public accountability for corporate actions which cause death, then over a period of decades an erosion of the public faith necessary to maintain these institutions will follow. There is a perception that life itself is cheapened when group action is not accountable for the life it takes. The status quo system in which money from an institution is exchanged for a life seems to intensify this perception. This response threatens the integrity and the legitimacy of the corporate system. Therefore, we should act, in a public sense, while we can.

Lastly, the status quo leaves in tact all of the corporate values, beliefs and arrangements which caused the Buffalo Creek disaster. This should illustrate that these arrangements create risks for each of us every day. That is, the actions in the Buffalo Creek disaster represented a very serious pattern of conduct, rather than an isolated instance. It is substantial evidence of a pattern of institutional and human arrangements which create risks which threaten everyone.

E. Arguments For Not Changing Our Public Policy To Establish More Accountability

What legal arguments stand in the way of achieving the same accountability illustrated in the USS Davidson case? The answer is rather insignificant. Arguing that those in authority in a corporate hierarchy should be removed if their inattention causes death violates no constitutional principles nor does it violate any well-reasoned, debated notions of public policy.¹²⁴ As I argue, below, the current public policy is reached through a fairly thoughtless, unexamined accumulation of court cases announced by the U.S. Supreme Court without any reasoning that corporations were to be seen and treated as individuals. This created the present circumstance where, following a lengthy and costly court battle, corporations are held accountable through the payment of money to victims.

The arguments opposing the suggested change in policy come most forcefully from those directly impacted by the proposed change—corporate managers. They argue that talented managers will no longer seek positions of authority if they can be held accountable for inattentiveness which results in death. There are two responses to this argument. First, it appears that the U.S. Navy does not lack talented

123. The time span I have in mind is one of decades. If public accountability disappears for a period of 20 or 30 years, this will be long enough to erode the bed of faith the public has in the system.

124. The public debate on abortion, for example, presents fairly well-reasoned arguments on both sides.

officers desiring to be commanding officers of ships. Second, those presently in authority assert that, if they were held accountable for the risks they created, then some of the current risks might not be present (with, of course, the perceived attending benefits). The response to this position is that, if no one is accountable for a risk, then the benefits of the risk and the risk itself are unnecessary. This means that corporations will take fewer risks, resulting in less death and destruction, and fewer benefits.¹²⁵

The arguments against changing the present policy are minimal. Law is a very human institution which is why it is possible to have a humane environment through law. Law is not remote, it lives in us and can be changed. John Noonan makes an eloquent point:

No person itself, the law lives in persons. Rules of law are formed by human beings and applied by human beings to human beings. The human beings are persons. The rules are communications uttered, comprehended, and responded to by persons. They affect attitude and conduct as communications uttered from persons to persons. They exist as rules—not as words on paper—in the minds of persons.¹²⁶

F. What Are The Obstacles to Change?

In a sense, our law works the opposite of how it should work. As hierarchy expands, physically and emotionally removing managers from the impact of their decisions, their personal accountability actually decreases.¹²⁷ There is little logic or reason to this outcome. We tolerate it, however, because it appears to be the natural result of the historical evolution of public affairs. The status quo, the conventional view of social and economic matters, develops a logic of its own. At first, only intuitively-appealing arguments exist. Then a

125. Calculating the costs and benefits of the automobile to society, for example, could lead to more extensive public transportation and safer means of transportation.

126. JOHN THOMAS NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 4 (1976).

127. A severe problem in assessing accountability in any hierarchy appears. While our civil and criminal law have evolved to allow corporate management to escape accountability in events like the Buffalo Creek disaster, the same result occurs for top government officials who often escape accountability for their negligent acts. For example, the Federal Tort Claims Act, ch. 753, § 401, 60 Stat. 842, 842-47 (1946) (codified as amended in scattered sections of 28 U.S.C., including sections 1291, 1346, 1402, and 1504 (West 1988 and Supp. 1991), would impose liability on the federal government for the negligent operation of a mail truck. The operator would also be personally liable through conventional notions of civil law. If an American president were negligent, neither the federal government nor the president could be held liable. See *Dalehite v. United States*, 346 U.S. 15 (1953) (where the federal government was not liable for the deaths of 560 people). Good faith action also shields state officials from individual accountability. See *Scheuer v. Rhodes*, 416 U.S. 232 (1973). Thus, the larger the hierarchy, the less the chances for establishing personal accountability.

rhetorical mode, complete with a formal vocabulary and a pervasive logic and vocabulary, becomes institutionalized in the coursework of our major educational institutions, thereby becoming part of the collective consciousness. Out of this collective consciousness, our public policy is constructed.

How does such public policy change? In general, our public policy is based on a set of public, shared beliefs about how to arrange matters and institutions. As John Kenneth Galbraith pointed out some years ago, shared beliefs or "conventional wisdom" is not challenged by academic arguments in favor of change, but by the march of events.¹²⁸ An event will come that challenges the public consciousness and exposes how traditional theories have become palpably inapplicable. One such an event was the disaster at Buffalo Creek. Events are the agents of change; publicly held and shared beliefs are the obstacles to change.

It is reported that in 1610, Galileo discovered new heavenly bodies. A learned professor at the University of Padua revealed, literally, how blinding the beliefs of the scientific community had become and denied the existence of what was seen through Galileo's telescope, reasoning:

We know that there are seven planets and only seven, because there are seven openings in the human head to let in the light and air: two eyes, two ears, two nostrils, and a mouth. . . . Besides, the stars are invisible to the naked eye; therefore they do not influence human events; therefore they are useless; therefore they do not exist.¹²⁹

This reasoning is as ludicrous as the reasoning behind current public policy, illustrated in the Buffalo Creek case. The biggest obstacle to change is our beliefs about how our legal system should operate, coupled with our fear of the unknown. We must realize that where we are today is a result of the conditioning of unthinking human experience. This experience is lodged in our collective minds as a set of beliefs supporting apparently immutable rules. However, beliefs can change, and rules are not immutable.

IV. THE CAPITALIST PARADIGM, INDIVIDUALISM AND THE FORMULATION OF OUR LAW AND PUBLIC POLICY

A. *How We View And Understand Remote Social Events*

In this part of the article I trace the development of civil law as applied to business corporations. I conclude that Americans' abiding belief in individualism has so shaped their beliefs about public policy that massive hierarchies of human beings are viewed as single per-

128. JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 11 (4th ed. 1984).

129. W. ADAMS & J. BROCK, *THE BIGNESS COMPLEX* at xiii (1986) (citing F. H. KNIGHT, *INTELLIGENCE AND DEMOCRATIC ACTION* 57 (1960)).

sons, consequently hiding human accountability. How did this come about?

The explanation began innocently enough in 1886, when the U.S. Supreme Court held, in *Santa Clara v. Southern Pacific Railroad*, that business corporations were to be considered persons who were entitled to receive the protections of the Fourteenth Amendment.¹³⁰ What justifies the law to view corporations as persons?¹³¹ *Corporations are not, in fact, persons.*

A more accurate assessment of the nature of a corporation was stated by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*:¹³² "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."¹³³ But, the popular and accepted view is that corporations are persons. Why has the law sought to view the American business corporation in a human image when more suitable, educationally informative alternatives were and are available?

The proposition that corporations should be treated, interpreted, and comprehended as persons has been accepted as intuitively obvious and has not been the subject of analysis. There is no better evidence for this proposition than the words of Chief Justice Waite who, before argument and decision in *Santa Clara County*, announced: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, . . . applies to these corporations. We are all of opinion that it does."¹³⁴

This famous pronouncement was made by one of the most significant public policy institutions in our government without conscious thought or debate. This significant association of corporations with humans has not gone unnoticed. In 1949, Justice Douglas said in a dissent:

It has been implicit in all of our decisions since 1886 that a corporation is a "person" within the meaning of the Equal Protection Clause of the Four-

130. 118 U.S. 394, 396 (1886).

131. Professor Alfred F. Conard, examined numerous images of the corporation and concluded,

All these views have validity, and all are useful in deciding some questions which corporations present to the legal system. They do not, however, cast great light on the more routine questions of how corporations should be fitted into a juridical order whose sentences speak of individual human beings. For these questions, the most important fact about corporations is that they are composed of people.

ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 441 (1976).

132. 17 U.S. 518 (1819) (4 Wheat).

133. *Id.* at 636.

134. *Santa Clara County*, 118 U.S. at 396.

teenth Amendment. . . . The Court was cryptic in its decision [in *Santa Clara*]. It was so sure of its ground that it wrote no opinion on the point. . . . There was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary.¹³⁵

Why was the United States Supreme Court so thoughtless about making this metaphor such a significant part of our public policy?¹³⁶ What lies beneath this surface of the Court's action here? The answer lies in the way we come to know what we know. That is, the answer is essentially epistemological. I will now turn to an explanation of how public policy is formed, and develop the argument that the shared belief system we call capitalism is founded on the assumption that all significant economic action in the private sector is to be viewed as natural, individual actions.

1. The Conventional Wisdom, Public Images And Ideology

This part of the discussion is based on a key idea from one of John Kenneth Galbraith's best-selling books. He asserts that "[t]he first requirement for an understanding of contemporary economic and social life is a clear view of the relation between events and the ideas which interpret them."¹³⁷ Galbraith suggests that between an observer and some remote event such as the Buffalo Creek disaster, for example, there is an arrangement of ideas—the conventional wisdom, that serves as a mental lens through which we see and interpret the event.

Galbraith maintains that conventional wisdom associates what is desirable in a social policy sense with what is acceptable and familiar. American notions of what is economically and legally desirable are organized around and based upon what the entire community finds acceptable and convenient.¹³⁸ We approve of and promote that which is the familiar.

This publicly-oriented epistemological scheme is affirmed by other writers. Some thirty years ago, Kenneth Boulding, one of this country's greatest social scientists, argued that as we proceed from very simple observations to more complex levels of generalization, such as what should be done about the Buffalo Creek disaster, the concept of the image becomes increasingly important.¹³⁹ The image of reality is a theoretical model of not only how an observed phenomenon should

135. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-77 (1949) (Douglas, J., dissenting).

136. A few cases expressly held that for purposes of applying the constitutional doctrine, corporations are not persons. *See, e.g., Wilson v. United States*, 221 U.S. 361, 382-386 (1911) (denying corporations the privilege against self-incrimination); *California Bankers Assn. v. Shultz*, 416 U.S. 21, 65-67 (1974) (finding that corporations should not be accorded the same privacy rights as individuals).

137. GALBRAITH, *supra* note 12B, at 6.

138. *Id.*

139. KENNETH BOULDING, *THE IMAGE* 64 (1956).

work, but how, in fact, it does work. More importantly, he asserted that group action and societies are possible due to the existence of shared public images, the common visions of most people.¹⁴⁰

Boulding wrote that there is a "stock of public images" in a society established from "transcripts" which are permanent records of how a group should act and see.¹⁴¹ These transcripts are created over generations by an educational system tempered by experience.¹⁴² Finally, Boulding argued that the major institutions of society derive their power from this stock of public images.¹⁴³ Ironically, he also argued, that the most successful of these public images becomes the most dangerous.¹⁴⁴ Both ceremonial and coercive organizations institutionalize their public image: "it acquires thereby a spurious stability. As the world (and the organization) move on, the image does not."¹⁴⁵

Boulding's writings on the significance of images, especially his conception of the public image, and Galbraith's "conventional wisdom" have remarkable similarities. They both conceptualize an approach to understanding public policy. Both public images and conventional wisdom are created by history, are shared by most members of society and are very resistant to change. However vague, they are the key elements to understanding the more abstract phenomena in our social life.

In 1975, Harvard Business School Professor, George C. Lodge devoted most of his book, *The New American Ideology*, to America's shared belief system under the rubric of "ideology." He defined an ideology as a collection of ideas that makes explicit the nature of the good community.¹⁴⁶ But, he argued that ideology is more than this; it is the theoretical framework by which a community defines and applies values, such as self-respect, fulfillment, and justice. No community can be without an ideology because the ideology defines the community. At any one time, some parts of the ideology may be sharp and clear, and other parts obscure; some elements may be con-

140. *Id.*

141. *Id.* at 68-70.

142. *Id.*

143. For further development of this argument, see *infra* notes 191-194 and accompanying text.

144. BOULDING, *supra* note 139, at 79.

145. *Id.* My arguments demonstrate his point. The public image of corporations as persons was created in the 19th Century. While the image holds fast, the corporation has become vastly more powerful than most individuals and in ways not dreamed of in the mid-to-late 19th Century.

146. GEORGE C. LODGE, *THE NEW AMERICAN IDEOLOGY* 7 (1975).

scious, and others unconscious or implicit.¹⁴⁷ Lodge's point confirms the thesis of this article: viewing corporations as persons is an obscure, though very important element in our ideology.

Lodge does acknowledge the vital place of the natural person in our society,¹⁴⁸ but misses the point by saying that the large American business corporation has no place in the older ideology. He does not focus on the legal "fact" that corporations are persons. Rather he sees corporations as beyond the conventional wisdom, the set of public images, our ideology, and our lens. Thus, he believes corporations lack legitimacy.¹⁴⁹ Lodge concludes that the large American corporation is a sort of "collective, floating in philosophic limbo, dangerously vulnerable to the charge of illegitimacy and to the charge that it is not subject to control in the best interests of society."¹⁵⁰ Lodge overcomes the pejorative connotation that the studies of ideology took on at the hands of the Marxists. His purpose was to direct scholarly and popular thought to American ideology and to the reality that it, like Galbraith's conventional wisdom, is at the heart of understanding why this country allows certain policies. Thus, Lodge correctly suggests that the rich literature on the place and function of ideology in a society is applicable to understanding our business environment,¹⁵¹ and our public policy foundation.

2. The Capitalist Paradigm

Galbraith, Boulding and Lodge all argue that we do not view remote complex social events directly. Rather, we view such events through a kind of social-psychological lens of meaning and value that renders remote events comprehensible. Thomas Kuhn, a science his-

147. For a clear summary of Lodge's theses, see Lodge, *Managerial Implications of Ideological Change*, in *THE ETHICS OF CORPORATE CONDUCT* 79-105 (Clarence Walton ed., 1977).

148. LODGE, *supra* note 146, at 9.

149. The difference between Lodge's view and mine may be minor. He sees the large American business corporation as beyond the stock of public images that compose our ideology. I believe it is within the stock but buried from view—hiding behind the image of a natural, individual actor.

150. LODGE, *supra* note 146, at 18.

151. Although beyond the scope of this paper, I wish to acknowledge that the considerable body of scholarly literature on ideology and its place and form in any society are applicable to the creation and maintenance of the lens through which we view remote events. See generally KARL MANNHEIM, *IDEOLOGY AND UTOPIA* (Louis Wirth et al. trans., 1968); KARL MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* (1940); J. PLAMENATZ, *IDEOLOGY* (1970). Additionally, classics by Hegel and Marx and their progeny are helpful.

Modern writing in ideology seems to contain a more pronounced political science focus. See, e.g., W. CONNOLLY, *POLITICAL SCIENCE AND IDEOLOGY* (1967); R. LOVE, *POLITICAL IDEOLOGY* (1962); P. CORBETT, *IDEOLOGIES* (1965); M. MANN, *CONSCIOUSNESS AND ACTION AMONG THE WESTERN WORKING CLASS* (1973). See also Seider, *American Big Business Ideology: A Content Analysis of Executive Speeches*, 39 AM. SOC. REV. 802 (1974) (which provides a less comprehensive and more concise framework).

tory scholar arguably offers the best known work in this area. After years of studying how physical science grows, expands, or changes, he concluded that all sciences are collections of beliefs,¹⁵² not unlike the social-psychological lens which conceivably represents the views of Galbraith, Boulding, and Lodge. Granted, the physical sciences have a great capacity to achieve concrete results (the landing of person on the moon, for example), but they change, grow, and are established in much the same way that social sciences grow. Kuhn refers to his system of shared beliefs as a "paradigm" with two different meanings. He writes that:

On the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science.¹⁵³

In the first sense, a paradigm is the set of beliefs and values that the members of a scientific community (or any community) share. Conversely, the paradigm defines a scientific community. This set of beliefs makes possible research, communication, and ultimately, a measure of understanding about complex phenomena. It is needed because when an individual scientist takes a paradigm for granted, he or she need no longer attempt to build the field anew, starting from first principles and justifying the use of each.¹⁵⁴ A paradigm in this sense is similar to the conventional wisdom, or a stock of shared images, or an ideology. It is, simply, a way of believing that makes communication (especially among scholars) possible.

Kuhn is cited because of his development of the second facet of a paradigm. He admits that this is one of his major contributions.¹⁵⁵ In this second sense, a paradigm is a shared model or exemplar, usually in the form of a puzzle or set of puzzles with proper solutions. It is the conception of puzzles and proper solutions which, more than formal statements of belief, guide scientists in their work.¹⁵⁶ For example, chemists create and maintain their discipline through a set of puzzles and solutions about how the physical elements relate. Simi-

152. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1976).

153. *Id.* at 175.

154. *Id.* at 19.

155. *Id.* at 187.

156. Kuhn's work is not without criticism. See, e.g., Masterman, *The Nature of a Paradigm*, *GROWTH OF KNOWLEDGE* (1978); Shapere, *The Structure of Scientific Revolutions*, *PHILOSOPHICAL REVIEW* 383-94 (1964). Shapere's article is also cited by Kuhn in his postscript. See KUHN, *supra* note 152, at 174.

larly, economists, accountants, and professors of management “science” establish and perpetuate their discipline in this manner.

It is thus quite legitimate to speak of a “capitalist” paradigm. The capitalist paradigm refers to the fundamental beliefs shared by teachers, scholars, public policy commentators, politicians, and others who speak and write about capitalism. While these beliefs are occasionally clearly expressed, most often they are not. The beliefs include: the central place of private property in the economy; the legitimacy of profit as a return for risking private property in a public venture; and the efficacy of profit for measuring both the efficiency and the utility of the use of private property. The capitalist paradigm also includes beliefs about the proper role of government in the system of private property, and the dominant view that the objective of the entire scheme of private property exchanges is to maximize the public welfare by enhancing freedom of individual choice and expression.

The capitalist paradigm is taught in business schools and colleges, and to a lesser extent in the public schools, as a science with each business discipline such as economics, accounting, marketing, business law, and management teaching students to derive the proper answers to the puzzles which define that particular “discipline.” At the Ph.D. level, one is admitted to the paradigm when he or she can successfully solve the puzzles proffered. Even at this level, there is little discussion of the beliefs that give meaning to the puzzles. These core beliefs are accepted on their face and pass for a measure of truth.

Although Kuhn did not write of social sciences, his point applies to the teaching of law to illustrate that the legal paradigm is both the set of beliefs about what law is, and the way we write and communicate and teach about law. Hence, law is communicating through law journals by means of articles constructed in a particular way, using an agreed upon source to guide the reader, and in its more substantive elements, focusing on reported appellate cases. The characteristic that makes legal scholars “legal scholars” is the ability to study, write about and apply law in the same way. The current legal paradigm governs the types of questions that can be asked (the puzzle formulation), as well as the kinds of answers that are permissible.¹⁵⁷ At the heart of the creation and perpetuation of a paradigm is the textbook. Kuhn believes that textbooks establish paradigms and are the single most important source or authority in creating a scientific community.¹⁵⁸

In summary, three business and public policy scholars, plus science

157. Since this article asks non-standard questions, most legal practitioners and scholars would not regard it as a “legal” article. Since it does not comply with the accepted and familiar way of formulating legal problems, they might assert that it is of little value.

158. KUHN, *supra* note 152, at 143.

scholar Thomas Kuhn have reached similar conclusions as how to recognize and respond to remote social events like the Buffalo Creek disaster. These events are viewed through a complex set of ideas, a mental lens, shaped by traditions and images of expectations and value. Textbooks, puzzles, and solutions play a substantial part in shaping this lens. If this is the form or structure of the process by which we learn about remote social events such as Buffalo Creek, what is the substance? Looking at the lens itself, what is its shape? If we could look into the lens, what would we find?

B. What We See In Remote Social Events Involving Business Corporations: Individual Action

No significant intellectual force shapes our public policy more than the belief about the nature and purpose of humankind. This collection of beliefs about the ultimate meaning of life is an intellectual force embodied in one word, individualism. Individualism denotes the expressed ethos of the American people. It is the prevalent tone and sentiment forming our national character. It would distort the proportions of this article to write about all of the facets of individualism, and their subsequent, embodiment in our personal and institutional objectives.¹⁵⁹ Such attempt would amount to an intellectual and popular history of the last four hundred years. Instead, the contributions of a few of the most important writers will be sketched in order to form a reasonable presentation of why remote social events involving business corporations are viewed as a display of individual action.

Modern American individualism had its roots in the demise of the Middle Ages and the beginnings of the religious revolution of the Reformation.¹⁶⁰ At the center of the beliefs creating this pervasive religious movement in Northern Europe was the idea that an individual believer does not need intermediaries, that worshipers would reach their own relationship with their own God in their own way and through their own effort. This social revolution was pervasive and influenced life beyond traditional worship in churches. Scholar Sacvan Bercovitch stated:

The tradition of humanist personal literature, extending from the fourteenth, through the seventeenth centuries . . . is concerned exclusively with the au-

159. For a discussion of eleven separate divisions of "individualism," which includes the religious, political and epistemological facets, see 2 *DICTIONARY OF IDEAS* 594 (C. Scribner's Sons ed., 1973).

160. See R.N. BELLAH, ET AL., *HABITS OF THE HEART* 142-63 (1985).

tonomous secular self. Leaving the questions of sainthood to theologians, each of these writers declares the primacy of the single separate person, and justifies his self-study on its intrinsic merits, without pretense at religious or even moral instruction. He assumes that what he has thought and done will interest others because it is authentically his, the product of *his* own personality in all its rich uniqueness.¹⁶¹

In a standard scholarly work on Protestantism, the religious by-product of the Reformation, editor J. Leslie Dunstan, wrote:

The transition from the medieval to the modern age came about through [] an action of man's spirit. Man took control of life; he saw himself as a person in his own right, he grew aware of the mastery over life that was possible for him, and he began to live by his own inner power. The modern age began not with some event which can be dated specifically, but within the spirits of men, as men became self-conscious and alive as persons.¹⁶²

Religious dogma as such did not disappear. However, a substantial change was the development of the view of man as independent from the institution of the established Catholic church. Man was at once free of the influence of the church, but dependent upon God's expressed wishes in the Bible. Since God did not exist in or through the church, each person had the potential to realize God directly. This was concisely expressed by Martin Luther who admonished, "I first lay down these two propositions, concerning spiritual liberty and servitude: A Christian man is the most free lord of all, and subject to none; a Christian man is the most dutiful servant of all, and subject to everyone."¹⁶³

Directly challenging the authority of the Church, Luther wrote and preached that each man has the individual capacity to become the vehicle to experience God:

If a little company of pious Christian laymen were taken prisoners and carried away to a desert, and had not among them a priest consecrated by a bishop, and were there to agree to elect one of them . . . and were to order him to baptize, to celebrate the mass, to absolve and to preach; this man would as truly be a priest as if all the bishops and all the Popes had consecrated him.¹⁶⁴

Martin Luther (1483-1546) and John Calvin (1509-1564) helped to institutionalize in religious writing the separateness of man from his spiritual institutions. Calvin, writing on the nature of man, urged his readers and listeners to know themselves first:

There is much reason in the old adage which so strongly recommends to man the knowledge of himself. For if it be thought disgraceful to be ignorant of whatever relates to the conduct of human life, ignorance of ourselves is much more shameful, which causes us. . . , to grope our way in miserable obscurity, or even in total darkness.¹⁶⁵

The enhanced view of the primacy of the individual, espoused by

161. SACVAN BERCOVITCH, *THE PURITAN ORIGINS OF THE AMERICAN SELF* 11-12 (1975) (emphasis in original).

162. *PROTESTANTISM* 19 (J.L. Dunstan ed., 1962).

163. *Id.* at 41.

164. *Id.* at 48.

165. *Id.* at 57.

the writers of the Reformation, found support in the writings of philosophers in Northern Europe and England. Rene' Descartes (1596-1650) whose famous pronouncement, "Cogito Ergo Sum" (I am thinking, therefore I exist), joined the chorus of those chanting the refrain of the primacy of the individual, and emphasized the powers of reason inherent in the nature of humanity. In 1690, John Locke (1632-1704) reasoned that each person possesses oneself absolutely.¹⁶⁶ Therefore, that which one man mixes with his labor becomes his.¹⁶⁷ Thus, Locke based his argument for the existence of modern "private property" on his enhanced view of the autonomous individual in nature, reaching into his environment and converting everything he labored on to his use. The impact of Locke's ideas on Thomas Jefferson and the authors of our Constitution is established beyond question, but is mentioned here to acknowledge that individualism was becoming institutionalized in this country during that time.

The writings of Jean-Jacques Rousseau (1712-1778) also contributed substantially to the development of American individualism. Rousseau saw a fundamental antipathy between eighteenth-century French society and the nature of man. He saw society, especially the "High Society" of the Bourbon dynasty, as working at cross purposes to the fundamental nature of the need of all human beings. He believed man was endowed with free will and subject to perfectibility if he only pursued his own natural instincts. Where could this be performed in its purest form? In the colonies of the "New World," where man was engaged in the very real pursuit of carving out an existence from the forests and mountains of a rugged, primeval land.

Last of the European philosophers, chronologically, but first in terms of enduring influence on American individualism, is Adam Smith (1723-1790), the Scottish moral philosopher whose *The Theory of Moral Sentiments* and *An Inquiry into the Nature of Causes of the Wealth of Nations* emphasized the core idea that serving the general welfare was the purpose of social arrangements and government. The most desirable way to achieve the best for each individual was to permit persons to act on their own impulses in pursuit of their own interests. Smith argued that each person, if left alone to trade for his own gain, would be led by an invisible hand to promote the general

166. See JOHN LOCKE, *ESSAY CONCERNING HUMAN UNDERSTANDING* (1689); JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (1690).

167. *Id.*

welfare.¹⁶⁸ Thus the proper function of government was to promote the free exchange of goods between individuals, and it could best accomplish this by staying out of the way.

The religious writers who formed the basis of the Puritan movement that settled the colonies in and around Massachusetts in the early 17th century transformed the European and English ideas of the autonomous individual into the expressed essence of the American experience. Early American literature established the Puritan vision that settlers in this new land were modern day Israelites.¹⁶⁹ Thus, expelled from their homeland, they summoned their individual strength and, pursuing the word of God, triumphed over the crude American environment. On the impact of the Puritan view of life, Professor Bercovitch concludes that:

The New England Puritans gave America the status of visible sainthood. The subsequent impact of their concept cannot be overestimated. Whatever the extent of its influence, it contributes significantly to the link between the New England and the American Way, to the usurpation of American identity by the United States, and to the anthropomorphic nationalism that characterizes our literature. . . . American dream, manifest destiny, redeemer nation, and, fundamentally, the American self as representative of universal rebirth.¹⁷⁰

The religious and political writers in the mid-to-late eighteenth century advanced a set of universal claims for Americans that referred to the actual or imminent realization of the final stage of recorded human progress. This final stage was to be based upon a new form of empire in which individual self-development, individual freedom and dignity were to reign.

Visiting this new land in the early 1830's, the Frenchman, Alexis deTocqueville was the first to use the word "individualism" to refer to the American spirit. In *Democracy in America*, he said that American individualism is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to suit his taste, he gladly leaves the greater society to look after itself.¹⁷¹

A few years later, in 1841, one of America's foremost essayists and writers, Ralph Waldo Emerson wrote *Self Reliance*, the now classic statement of American individualism. He said that:

Whoso would be a man, must be a non-conformist. He who would gather immortal palms must not be hindered by the name of goodness, but must explore if it be goodness. Nothing is at last sacred but the integrity of our own

168. ADAM SMITH, *THE THEORY OF MORAL SENTIMENT* (1759); ADAM SMITH, *AN INQUIRY INTO THE NATURE OF CAUSES OF THE WEALTH OF NATIONS* (1776).

169. See COTTON MATHER, *MAGNALIA CHRISTI AMERICANA* (1702) (which recounts the life and times of William Bradford and John Winthrop, the first governors of Plymouth Bay and Massachusetts colonies).

170. BERCOVITCH, *supra* note 161, at 108.

171. See BELLAH, *supra* note 160, at 37.

mind. Absolve you to yourself, and you shall have the suffrage of the world."¹⁷²

Summarizing the views of Rousseau and Locke, Emerson wrote, "[n]o law can be sacred to me but that of my nature. . . the only right is what is after my constitution, the only wrong is what is against it."¹⁷³

In the last few decades of the 19th century, while America endured the impact of individualism writ largely in the form of the robber barons of our nascent industrial age, our Supreme Court held that American business corporations are to be seen and understood as persons.¹⁷⁴ The famous English poet, William Ernest Henley, captured the spirit of the age in his poem *Echos* when he concluded:

It matters not how great the gate.
How charged with punishment the scroll.
I am the master of my fate.
I am the captain of my soul.¹⁷⁵

At the turn of the century, American individualism was becoming imbedded ever deeper in our popular culture. The idea that meaning in life was a sort of a lonely struggle against the forces of nature and other dark forces, intent on restraining the individual against his own true spirit, found popular expression in books like *The Call of the Wild* and *White Fang* by Jack London, the first American writer to make one million dollars from his writing.¹⁷⁶

In sum, the great ideas about the primacy of the individual, articulated by Luther and Calvin, spread from religious spheres to the intellectual circles of Europe. These ideas then crossed the Atlantic where they found expression in the law and custom of the new America. Today, they are the dominant spirit of our age. Our modern heroes are Lee Iacocca, who triumphed over a sloppy and lifeless bureaucracy at Chrysler, and to a lesser extent, Donald Trump, who emerged in the 1980's as a sort of Master of Manhattan, triumphing over the apparent chaos known as New York City. Further, the *Rocky* and *Rambo* films, as well as the enduring popularity of Louis L'Amour novels¹⁷⁷ are evidence that individualism still grips the

172. RALPH W. EMERSON, SELF RELIANCE (1841) (quoted in THE NORTON ANTHOLOGY OF AMERICAN LITERATURE) 891 (2d ed. 1985).

173. *Id.*

174. See *supra* notes 130 and 133 and accompanying text.

175. WILLIAM E. HENLY, ECHOES (1988).

176. See COLUMBIA LITERARY HISTORY OF THE UNITED STATES 540 (Emory Elliott ed., 1988).

177. It is reported by him that he has sold over 165 million novels (most of which pit the lone cowboy against the forces of evil), with 85 novels each selling over one million copies. His work has been translated into 12 languages, and over 390 films and

American imagination. For example, in one of his last bestsellers, L'Amour summarized over 300 years of thought about American individualism. His protagonist Joe Mack, an American Indian and one of America's foremost testpilots, had been lured over Siberia by the Russians and was shot down. He was without weapons, clothes, and food while being pursued by the entire Russian Army who tracked him with its high-tech sensing devices. Mack had to decide to either fight all of them or to rely on his internal, well-developed natural instincts and face a lone trek of hundreds of miles across Siberia in the dead of winter. L'Amour concludes:

He must go. To stay was to die. And to stay was to be defeated. . . . He could fight them alone [in the woods]. He had always been alone. It was one of the reasons he had liked flying the aircraft he had flown. He was up there alone, dependent upon nothing but himself. When he had roamed in the forest as a boy, he had been alone. When he went away to school, the only Indian, he had been alone. But he never minded. He was the stronger because of it.¹⁷⁸

Individualism is a multifaceted philosophical, historical, and very practical notion that is a key to understanding the relationship between the ideas we have of our social reality and the reality itself. Individualism is the core concept upon which our politico-legal system is founded and is at the root of understanding our popular culture. Yet, it is so embedded in our collective consciousness that, according to leading sociologists, it took a foreign observer, Tocqueville, to identify it.¹⁷⁹

While individualism has shaped our view of the world, this system of shared beliefs that makes possible discourse about the world is becoming obsolete. Our modern economic society is dominated by large, powerful business corporations and governments, not properly understood through that individualistically shaped lens. American group reality is now without a belief system or conceptual framework to comprehend it. Thus, our perceived, individualistically-oriented capitalist paradigm is an ideology with little reality. The result is a deep moral frustration based on a misconception of what we think we know. Noted sociologist Robert Bellah and his colleagues have expressed this frustrating impact of individualism:

The extent to which many Americans can understand the workings of our economic and social organization is limited by the capacity of their chief moral language to make sense of human interaction. *The limit set by individualism is clear*: events that escape the control of individual choice and will not coherently be encompassed in a moral calculation. But that means that much, if not most, of the workings of the interdependent American political economy, through which individuals achieve or are assigned their places and relative power in this society, cannot be understood in terms that make coherent

television movies have been created from his work. *Preface to Louis L'Amour, THE LAST OF THE BREED* (1986).

178. *Id.* at 139.

179. BELLAH, *supra* note 160, at 147.

moral sense.¹⁸⁰

To sharpen these generalities, a more pointed consideration of individualism and its impact on our civil law will be addressed.

C. Individualism And The Law

It is difficult to be precise about the impact of individualism on the shape and structure of American law. Individualism defines the spirit or collective consciousness by which law developed. Legal scholarship offers minimal disciplined analysis and reflection on the impact of this consciousness in the development of law.¹⁸¹ There are off-hand comments by scholars such as Dean Roscoe Pound, who wrote that, "[i]f we look narrowly at our legal tradition we shall see that it has two characteristics. On the one hand, it is characterized by an extreme individualism. . . . On the other . . . by a tendency to affix duties and liabilities independently of the will of those bound. . . ."¹⁸² Arthur Sutherland, quoting Sir William Blackstone in his inaugural Vinerian Lecture in 1758, stated that, "[t]he only true and natural foundations of society are the wants and fears of individuals."¹⁸³

Modern legal history classics, such as Lawrence Friedman's *A History of American Law*,¹⁸⁴ do not contain an entry under "Individualism" in the index, but do contain several columns of entries under such topics as "Illinois," "Lawyers," and "Land." This indicates that legal historians view law not so much as an expression of human self image, but as a body of principles shaped by economic, political and historical forces which attach "rights" to roles played by people and to things in the environment and institutions.¹⁸⁵

180. *Id.* at 204 (emphasis added).

181. Of course, there is a huge body of scholarship on parts of our law such as the Bill of Rights, developed to protect and enhance the individual, but my point refers to the wider influence of individualism on the way we conceive of the role and structure of law itself.

182. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 13 (1921).

183. ARTHUR E. SUTHERLAND, *THE LAW AND ONE MAN AMONG MANY* 3 (1956).

184. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985).

185. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 103 (1977). One entry under "Individualism" refers to the case of *Thurston v. Hancock*, 12 Mass. 220 (1815) as an example of the early impact of individualism on the development of American law. In this case, the court held that the proprietor of land had entire dominion, not only of the soil, but of the space above and below the surface to any extent he may choose to use or occupy it. Horwitz maintains that this decision is a good expression of individualism, because the judge refused to examine the social utility of the actor's conduct and decided in favor of a bold assertion of owners' rights against the world or any external force.

Given the pervasive influence of individualism at the heart of the capitalist paradigm, it was reasonable for the United States Supreme Court in *Santa Clara* to hold without argument or stated reason that corporations were persons for purposes of the Fourteenth Amendment.¹⁸⁶ What alternative images were available? The conventional wisdom, the stock of public images that explained social reality, our ideology, and our collection of beliefs and extant social science puzzles and solutions permitted only one model. We understand, appreciate, and promote that which is the most familiar. We use metaphors of the familiar to comprehend the unknown. Of course, corporations like Buffalo Creek or Pittston or Exxon are persons. That is all we know.

The published scholarship on the impact of the *Santa Clara* case is not extensive. Except for a recent piece by Harvard Legal Historian, Morton Horwitz,¹⁸⁷ and a book edited by Warren J. Samuels and Arthur S. Miller,¹⁸⁸ the last major piece on the subject was written forty years ago by the philosopher John Dewey.¹⁸⁹ Dewey opined that it made little sense to accept the *Santa Clara* statement as a legal theory about corporate personality because such theories were infinitely manipulable.¹⁹⁰ Horwitz makes a similar point and argues that because the *Santa Clara* case predated the so-called "natural entity" theory of corporations (which says that corporations are not fictional or artificial entities but are "real" or "natural" people), *Santa Clara* cannot be read as an expression of this theory.¹⁹¹ No where does he mention that the holding of the case merely formalized inchoate notions about the significant actors in our society. Thus, it was natural for the United States Supreme Court to accept and state that corporations were persons. No perceived alternative metaphors existed.¹⁹²

D. Institutionalizing Individualism

The holding of *Santa Clara*, coupled with the more general view

186. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886).

187. Morton Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985).

188. CORPORATIONS AND SOCIETY (Warren J. Samuels and Arthur S. Miller eds., 1987).

189. John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

190. *Id.* at 669-70.

191. Horwitz, *supra* note 186, at 174.

192. At this point, I wish to acknowledge that it may be an overstatement to say that business corporations are viewed as persons or individuals for purposes of our law. This statement leaves unexplored numerous other decisions of courts and legislative enactments that hold that business corporations may be some other form of being, such as a partnership. I will not explore these decisions because the thrust of my thesis is the damaging aspect of corporations as persons.

that business corporations are entities which can contract, sue, and be sued like a person are consciously taught as "sciences" in our colleges and business schools. Thomas Kuhn's observation about the role of textbooks in the establishment of a paradigm is very significant in understanding the public policy of the Buffalo Creek disaster. Kuhn states that the reliance on textbooks or their equivalents are inevitable concomitants of the emergence of a first paradigm, making them the single most important source or authority in creating communities of belief.¹⁹³ The capitalist paradigm is established largely through textbooks — the textbooks we use in training for business and, to a lesser extent, for law.

In this country, about 310,000 students trained in business graduate each year, including about 67,500 MBA's¹⁹⁴ who rapidly achieve positions of prominence in our business community. Over the past ten years, we have graduated about three million students with training in business.¹⁹⁵ One may assume that all of these students took at least two courses in economics, and one or more courses in business-related law, whether it be called business law, legal environment or legal studies. A core concept in economics is the idea of a rational actor. This is, of course, an idealized version of a reasonably intelligent individual. Moreover, no distinction is made between the rational corporation and the rational individual. In the guise of a corporation or an individual, the rational actor has but one objective: to maximize individual happiness.

In the study of law, formal instruction includes the notion that corporations are to be treated just like individuals. This applies not only in constitutional doctrines, but in common, garden-variety legal transactions. In law, a key concept is "reasonable action." No distinction is made between reasonable corporate action and reasonable human action.¹⁹⁶ In teaching economics and law to millions of students, some who become our corporate leaders, professors indiscriminately mix puzzles and solutions involving large business corporations and natural persons. This is the chief reason corporate

193. KUHN, *supra* note 152, at 137, 143.

194. U.S. BUREAU OF CENSUS: STATISTICAL ABSTRACT OF THE UNITED STATES 162 (110th ed. 1990).

195. *Id.*

196. There is, of course, a very real difference. It may have been reasonable for Pittston and Buffalo Creek to maintain the dangerous dam at Buffalo Creek. It only cost them \$13 million to keep it as it was. It may have cost more to find an alternative site. As I have suggested, if this same action (keeping a risk-creating dam) was done by an individual, which resulted in 125 deaths, he or she would probably spend a decade or more in state prison.

action is seen as individual action. We are taught to see it that way. *We need not teach this way.*

It is generally agreed that besides the individual, there are three institutional power centers in our society: the modern, large business organization; various governments and organized religion. The point is that we do not view governments or organized religion as individuals. Each institution has its own set of characteristics, idiosyncracies, and impacts on us and our social system. How we view institutions external to ourselves is a matter of how we wish to see them. It is a matter of both vision and belief, or more appropriately, belief and then vision. It is also a matter of choice. We choose what to believe and what to see. More importantly, we choose what and how to teach what we wish to believe.

E. Individualism In Law Masks Human Accountability For Action Or Inaction In The Name Of A Business Corporation

We have been taught to believe the equivalent of the assertion that trees are grass or elephants are ants. Although trees may be like grass (and elephants like ants), in many significant ways they are not alike. It advances few elements of human understanding and knowledge to believe that large business corporations are human beings. Our policy "sciences" of economics and law fail miserably when they confuse the two. There is a categorical difference between the action and being of a large business corporation like Pittston and individual human action and being.

In what Pulitzer Prize winner Ernest Becker called "the single most potentially liberating tract that has ever been fashioned by man,"¹⁹⁷ Sigmund Freud (relying on his own intuition and other sources) concluded that:

Whoever be the individuals that compose it, however like or unlike be their mode of life, their occupations, their character, or their intelligence, the fact that they have been transformed into a group puts them in possession of sort of (a) collective mind which makes them feel, think, and act in a manner quite different from that in which each individual of them would feel, think, and act were he in a state of isolation.¹⁹⁸

It is beyond the scope of this article to explore how society would be shaped if we had more entrenched paradigms of group behavior. However, our social reality may be divided into two realms of experience—that which we experience individually and that which we experience when in groups of various sorts. We are all both individualistically and group oriented. We exist sitting at a desk with our own thoughts (writing a letter, for example), and we exist in a

197. ERNEST BECKER, *THE DENIAL OF DEATH* 132 (1973).

198. SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* 73 (1949).

family, sports club, university, corporation, hospital, or church. While our policy sciences have not recognized the more group-oriented, social side of our existence because of the pervasive influence of individualism, they probably will in the future.

Inserted into this picture of a dual reality is the very real notion that business corporations are understood as people. This public policy phenomenon muddies any possible clear thinking about the proper place, function and role of the business corporation in our society. The extent of this muddle is illustrated clearly in the Buffalo Creek disaster: death, destruction, suffering, yet the perpetrator is allowed to continue just as before the disaster. In 1974, the year of Pittston's settlement with the Buffalo Creek claimants, the net income of Pittston was \$107,446,000,¹⁹⁹ up from 1973,²⁰⁰ but short of its 1975 income of \$200,146,000.²⁰¹ It seems Pittston and its management hardly skipped a step because of the Buffalo Creek settlement. Not only was there no human accountability, but Pittston did not appear to suffer in any material way. This result is typical.²⁰² The currently structured capitalist paradigm is substantially flawed. Buried in the swirl of beliefs, popular puzzles and solutions is a significant conceptual error. In fact, corporations are not individual persons. The belief that they are creates a social dynamic that is a cancer on the body politic and it must be excised. One way to achieve this is to believe that the corporation is something other than a person. We desperately need a new metaphor.

V. CORPORATIONS AS SHIPS

A. *The Use Of Parables And Metaphors In The Formulation Of Public Policy*

In section III I argue that we view remote social events through a lens, and in section IV I argue that the lens was ground or structured so not to differentiate between human and corporate action. I also proposed that the formal educational system helps establish what is seen through the lens by failing to distinguish between the reality of

199. *Digest of Earnings*, WALL ST. J., Jan. 29, 1975, at 13.

200. *Digest of Earnings*, WALL ST. J., Jan. 30, 1974, at 18.

201. *Digest of Earnings*, WALL ST. J., Jan. 28, 1976, at 20.

202. I am aware of the maneuver by some corporations that have been especially hard hit by court judgments to escape accounting for their wrongdoing by filing for bankruptcy. The Manville Corporation (judgments from asbestos-related law suits) and Texaco (judgment from Penzoil for interfering with contract) obviously felt the impact of the law. These instances are the exception, not the rule.

corporate and natural person action. There is at least one more facet to the operation of the internal structure of this lens.

Close to each of us are concrete, physical forms and life experiences used to define and understand more remote or abstract ideas. Life experiences are often reduced to simple stories which are discussed, told, and retold as a way of teaching and learning. The dynamic, simple stories are called parables. If the experience is more static, the simple reference to some object is referred to as a metaphor. Parables and metaphors are important in understanding how we view remote social events. Thus, they are very important in understanding our public policy. Robert Reich, said in a recent book:

The realm of parable and metaphor, the source of our collective vision, spreads out on the conceptual terrain where public problems are defined and public ideals forged. To dismiss this realm as "ideological" — meaningless because irrational and unempirical — is to miss the point that value, not fact is the currency of the realm.²⁰³

Reich describes four parables that dominate American thinking on matters of public policy. One of these parables he labels "The Triumphant Individual." This is the story of the "little guy who works hard, takes risks, believes in himself and eventually earns wealth, fame and honor . . . he's a loner, a maverick, true to himself, plain speaking, self-reliant, uncompromising in his ideals; he gets the job done."²⁰⁴ Later Reich calls this parable "a myth" that "colors the prevailing view of how our economy works."²⁰⁵

The way Reich recounts this parable illustrates an important point in at least three dimensions. First, the meaning of the word "individualism" is seen in a rather concrete form. Second, the parable makes no distinction between natural persons and business corporations. The third dimension is most important if our social policy is built on parables. Arguing that a parable is an inadequate means for comprehending our business environment is an incomplete argument unless a replacement parable is found.

Parables and metaphors perform the same function in the interpretation of our public policy. Metaphor is the use of one thing to understand and experience another kind of thing.²⁰⁶ Metaphors are more often used to comprehend a single thing than to comprehend an event.²⁰⁷ The claims supporting their use are extravagant. One scholar stated that "[w]hat . . . will be revealed is that the examination of metaphor is one of the more fruitful ways of approaching fundamental logical, epistemological, and ontological issues central to any

203. ROBERT B. REICH, *TALES OF A NEW AMERICA* xi (1987).

204. *Id.* at 9.

205. *Id.* at 105.

206. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (1980).

207. *See, e.g.*, *ON METAPHOR*, (Sheldon Sacks ed., 1978); *THE LANGUAGE OF IMAGES* (W.J.T. Mitchell ed., 1974).

philosophical understanding of human experience."²⁰⁸ In a major new study on the nature of conceptualization and reasoning, linguistics Professor George Lakoff asserts that:

In domains where there is no clearly discernable preconceptual structure to our experience, we import such structure via metaphor. Metaphor provides us with a means for comprehending domains of experience that do not have a preconceptual structure of their own. A great many of our domains of experience are like this. Comprehending experience via metaphor is one of the great imaginative triumphs of the human mind.²⁰⁹

*The metaphor of a natural person on which we have built public policy regarding large American business corporations is, in hindsight, a grave conceptual error. A more accurate metaphor is needed. Large business corporations should be treated as large ships!*²¹⁰

B. Ships Are Better Metaphors For Business Corporations Than Natural Persons

There are two reasons why ships provide a better metaphor for business corporations than persons. First, large business corporations should be viewed as ships for purposes of comprehending their impact on our society. Second, this implication highlights the fact that natural persons are responsible for the actions of large business corporations and should be accountable for their actions or inactions.

I wish to summarize briefly. In this article I have addressed one central problem: the problem of human accountability. Accountability is a key to legitimacy which is crucial for the survival of any institution. In a series of lectures at the University of Virginia in 1969, legal historian James Willard Hurst addressed this problem: "[T]hat an institution with power must be accountable to some judgment other than that of the power holders-expresses the prime emphasis this culture puts on the individual as the ultimate measure of institutions."²¹¹

Society acts through many institutions, and the ultimate control of the institutions comes not from the law, but from individuals. The Buffalo Creek experience reveals that we have masked human accountability with institutional accountability. In this process, our chief instrument of capitalism suffers a lack of legitimacy. We can

208. PHILOSOPHICAL PERSPECTIVES ON METAPHOR (M. Johnson ed., 1982).

209. GEROGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS 303 (1987).

210. The phrase, "The captains of industry," reveals the ship metaphor may already exist in the public consciousness.

211. JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 58 (1970).

restore this legitimacy by teaching that large business corporations are to be viewed as ships. Why ships?

Ships are concrete in form and universally recognizable. Both corporations and ships are built by people, but they stand inert and lack both purpose and meaning without human direction. The large business corporation has mass (its assets), and inertia (the force of its procedure which becomes habit), and is capable of great human damage without proper guidance. The same is true of ships. A ship produces movement while a corporation produces a product or service. Both are concrete, physical, and inert, and incapable of movement without some external, human intervention.

Also, ships are very large structures and can profoundly affect their environment. They may carry hope and joy or may be a vehicle of mass destruction.²¹² Ships can be sued in their own name. A leading scholar points out that “[t]he ship herself is so far a legal person that she may be liable, herself, in rem, when her owner is not liable in personam.”²¹³ Ships exist after the death of their owners. The set of traditions which apply to ships is ancient.

Why is this metaphor necessary? Thomas Kuhn explains that in the history of science, one paradigm (or metaphor) does not merely fade into oblivion. Rather the paradigm must be forcefully replaced with another.²¹⁴ Similarly, the popular beliefs that serve as the basis of public policy do not fade away. Beliefs must be challenged, and if the problem is serious enough, consciously replaced by another more efficacious popular belief. The belief that corporations are individuals must be confronted, exposed and then replaced by the belief that corporations are ships.

What if we believed corporations were ships—a sort of land-bound ship, yet capable of leaping oceans to exist wherever it decided. In a sense, corporations exist wherever there is water for it to locate.²¹⁵

If a business corporation was a ship, how would we punish the ship if it caused death and destruction to unsuspecting, innocent people? What? Punish a ship? How absurd! Some of the assets could be sold to compensate victims, but, one cannot punish a ship. We should change the forces, the reasoning that led to the damage. *People, not ships, cause damage.* Removing the persons who cause damages is the most effective method of handling those forces that caused incidents such as the Buffalo Creek disaster. Pittston and Buffalo Min-

212. On April 16, 1947, a ship loaded with fertilizer exploded and burned in the port area of Texas City, Texas, killing 560 people and injuring thousands. Damage claims exceeded \$200 million. See *Dalehite v. United States*, 346 U.S. 15 (1953).

213. G.H. ROBINSON, *ADMIRALTY LAW*, 363 (1936).

214. KUHN, *supra* note 152, at 44.

215. Hence, it is a legal system that recognizes and protects its economic incentives. Corporate ships float on a sea of legal principles.

ing as legal structures are not inherently evil. Management, through its inattention to human life, is the force upon which to focus.

A realistic first step in perpetuating the view that corporations are ships is to establish it in the classroom. Educators can begin to teach about the prominence of parables and metaphors in our public life. They can suggest alternative parables and metaphors. Hence, if a metaphor makes sense, it will gain acceptance.

However, the argument is not yet complete. How can corporate management, faced with circumstances similar to the Buffalo Creek disaster, reach a result analogous to that of the USS Davidson case. Achieving this task will be addressed in turn.

VI. MANAGEMENT AS TRUSTEES

In the USS Davidson court-martial case, two standards of conduct exist. The first is stated in Navy Regulations:

The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority. . . . while he may, at his discretion, delegate his authority to his subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his responsibility for the safety, well-being and efficiency of his entire command.²¹⁶

This standard was clarified by the Chief of Naval Operations in 1976:

[T]he Commander's responsibility for his command is absolute and he must and will be held accountable for its safety, well-being and efficiency. That is the very foundation of our maritime heritage, the cornerstone of naval efficiency and effectiveness and the key to victory in combat. This is the essence of the special trust and confidence placed in an officer's patriotism, valor, fidelity and abilities.²¹⁷

The second standard is found in the Uniform Code of Military Justice. It provides that a commanding officer may be found "in dereliction of duty" for failing to provide adequate medical care.²¹⁸ In surveying the legal landscape for similar legal notion and duties, I have found that the law of Trusts is most applicable.

A. *Trustees Have A Duty Of Accountability*

The *Restatement of the Law of Trusts* states that "[a] trust is one of the several judicial devices whereby one person is enabled to deal

216. Naval Reg. 0702.1 (1973).

217. Memorandum from Chief of Naval Operations to all Flag Officers and Officers in Command (Oct. 2, 1976) (reprinted in W.P. MACH & A.H. KONETZNI, *COMMAND AT SEA* 484-88 (Appendix X) (1982)).

218. UNIF. CODE OF MILITARY JUSTICE art. 92.

with property for the benefit of another person.”²¹⁹ More formally, a trust is “a fiduciary relationship with respect to property, subjecting the person by whom the title of the property is held [the trustee] to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.”²²⁰ The position of management in the large American business corporation can be characterized as a trust relationship. Management “deals” with property for the benefit of others and itself. State-based corporation law could provide the best framework for the duties discussed. The duties of management under state-based corporation law have been exhaustively treated.²²¹ What is not exhaustively treated, however, is the idea that management should be removed from its position of authority when a death results from activities related to the corporate purpose. It is this result that should be achieved.

1. Who Is “Management?”

In defining “management,” I adopt the idea used by the Supreme Court in *United States v. Park*, the modern classic on the criminal liability of management.²²² It held that criminal liability of corporate management should affix to “those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary” to prevent the illegality in question.²²³ Those so positioned have a “responsible share” in the violation.²²⁴ Thus those responsible for managing the enterprise when it caused damage should be accountable for that damage. In the Buffalo Creek case, this group would include: the President of Pittston, Nicholas Camicia; the President of the Coal Group, Irwin Spotte; and the on-site agents and operators of Buffalo Mining, Steve Dasovich and Jack Kent, who had authority to substantially alter the risk posed by the construction of Dam 3. This definition of “management” is equivalent to the concept of “command” used, but not defined, in the public documents relating to the death of Seaman Smith.

219. RESTATEMENT (SECOND) OF TRUSTS § 107 (1959).

220. *Id.* at § 2

221. See Melvin Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CALIF. L. REV. 4 (1969) (providing the best analysis of this point).

222. *United States v. Park*, 421 U.S. 658 (1975).

223. *Id.* at 672.

224. *Id.*

2. What Form Of Accountability Will Management Suffer For A Breach Of Duty?

It is probable that any single individual held liable for the damages settled upon in Buffalo Creek could not pay them. In the scheme I propose, the corporation would be liable for the damage award, but the responsible persons would be held accountable in the form of dismissal from their authority positions. *Achieving the measure of accountability that puts at risk one's professional life is not unreasonable in the case of a resulting death.* It is the standard applied in the very large and complex social system of the United States Navy. Therefore, the principles in the *Restatement* dealing with liability of a trustee²²⁵ for money damages are unimportant. However, the principles on removal of a trustee are quite relevant.²²⁶

B. Removal Of Trustees (Management) For Substantial Breaches Of Trust

The Restatement of Trusts provides that a trustee may be removed by a proper court or by one authorized to remove the trustee.²²⁷ The grounds for removal include "the commission of a serious breach of trust."²²⁸ A breach of trust occurs when the trustee violates any duty owed to the beneficiary.²²⁹ A trustee owes beneficiaries a duty to "exercise such care and skill as a person of ordinary prudence would exercise in dealing with his own property," unless the trustee procures the appointment as trustee "by representing that he has greater skill than that of a man of ordinary prudence" in which case there is a "duty to exercise such skill."²³⁰ These legal principles could serve as the basis for the removal of management when a breach of trust occurs.

These suggestions have not violated conventional notions of corporation law, trust law, or other bodies of law generally applicable to the issues set forth. It does not, for example, violate conventional notions of law, to suggest that management be treated by the law as trustees, with the body of the trust being the corporation. Nor does it

225. RESTATEMENT (SECOND) OF TRUSTS §§ 205-26, 261-65 (1959).

226. RESTATEMENT (SECOND) TRUSTS § 16A (1957) states that "[t]he officers and directors of a corporation, do not hold the title to the property of the corporation and therefore are not trustees. They are, however, in a fiduciary relation to the corporation."

227. *Id.* at § 107.

228. *Id.* at § 107 cmt. b.

229. *Id.* at § 201.

230. *Id.* at § 174.

violate traditional concept of trust law to suggest that the beneficiaries of the trust be thought of in two levels.²³¹

Primary beneficiaries are those who receive substantial direct benefits from the corporate form of enterprise. These are natural persons or groups who are the shareholders, the employees, including management, the suppliers and creditors, and the consumers of the corporation's work product.²³²

Secondary beneficiaries are members of the public who live close to the corporation's activities (for example, the residents of Buffalo Creek), and who may suffer any adverse consequences of risks imposed by the corporation. As representatives of the public, this may include the local governmental body, the state government in which the action of the corporation is manifest, and the federal government.

All of these beneficiaries may seek to impose a measure of accountability by removal of management. *When death to a beneficiary results from activities associated with the very reason the corporation was chartered, then this violates the duty of the trustees (management) to exercise care and skill in the operation of the business corporation.* Further, ignorance of that particular risk which resulted in death should not be a defense. The Supreme Court rejected this defense in *Park*²³³ and *Dotterweich* cases.²³⁴ Further, the U.S. Navy did not allow lack of knowledge as a defense by the Commanding Officer of the USS Davidson.

Is this standard too severe? Several Naval officers have stated that because a commanding officer can be removed for the dereliction of duty by a lower ranking officer, commanding officers and executive officers are more prone to hire professionally competent personnel and to treat all persons on board the ship with respect and dignity. Thus, this proposed standard may make the entire organization more sensitive and more humane.

The final segment of this section addresses how and where to achieve this result. The *Restatement* provides that a trustee may be removed by a proper court or by the person so authorized by the terms of the trust.²³⁵ A state court using its equity powers and stan-

231. By first conceptually separating management from the corporation and then adopting a trustee-beneficiary arrangement to impose duties on management, I avoid the considerable scholarly literature on whether corporations as collections of natural persons have a separate moral existence apart from the natural persons. The best writing on this topic is M. DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATIONS* (1986). See also, *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY* (Peter A. French ed., 1972); *COLLECTIVE AND CORPORATE RESPONSIBILITY* (Peter A. French ed., 1984).

232. A related approach identifying employees, suppliers and customers as "stakeholders" is presented in R.E. FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984).

233. *United States v. Park*, 421 U.S. 658 (1975).

234. *United States v. Dotterweich*, 320 U.S. 277 (1944).

235. *RESTATEMENT (SECOND) OF TRUSTS* § 107 (1959).

dards of proof should remove corporate management when a death results from corporate action or inaction. A board of directors could impose a similar standard in its corporate by-laws.

What if no one seeks positions of responsibility if severe notions of accountability are imposed? Will this proposal result in a failure to undertake some activities because they are too dangerous and too risky, when loss of one's authority or job is probable? The human ego will not tolerate this result, but if it does, then sociologist Charles Perrow concludes that some of activities may indeed be too risky.²³⁶

VII. CONCLUSION

In this article I have developed two different, but related notions. The first is that large business corporations should be seen as ships. This metaphor should be used in the stories we tell about their operation and their impact. A metaphor becomes a parable, a parable becomes an inextricable part of taught puzzles and solutions, and these components become the conventional wisdom. Out of this grows our public knowledge and our public policy. Our public policy is what we, as a commercial society, do about things. The Buffalo Creek tragedy is a fair expression of how we handle death and destruction in the context of our legal system when a large business corporation is the actor.

Business corporations are treated as natural persons. Our shared public images of these entities assume them to be persons. They can sue and be sued; they have constitutional rights; they own property; and they are held accountable for "their" actions: they may voluntarily pay or are ordered to pay compensation for death and destruction. But this process masks the accountability of those natural persons who make the large business corporation move.

We must expose the fact that, for purposes of imposing accountability for death, corporations are not like humans. They are fictional legal entities that can pay judgments. However, those natural persons ultimately responsible must also be held accountable. This may be accomplished by teaching, writing, and discussing corporations as ships. These public discussions will expose the fact that corporations, like ships, are guided by natural persons.

The second notion, a concomitant of the first, is how to assess the accountability once management is seen as the human agent that drives these huge vessels through our midst. We may borrow from

236. PERROW, *supra* note 95, at 349.

trust law the idea that in cases of involving death of a beneficiary, we remove those in management who had a responsible share in the corporate conduct causing the death. Certainly this would include the president of the corporation and such subordinates with the authority to deal with the death-causing activity.

And, for what end? What does this achieve? The first notion of corporations as ships should result in more accurate, efficacious thought and communication about large business corporations. Based on this, we would construct a more enlightened public policy. Enlightened in that it would make us all more humane. At the base of our religious and moral teachings about life is the dignity and worth of each natural person. Life, as manifested in and through natural persons, must be venerated and respected above all else. This respect, dignity, and worth is diminished when life is taken by a foreseeable event, and no other natural person answers for this.

The death and destruction at Buffalo Creek is a national tragedy. The results of it, especially the legal results, exemplify a failure of human intelligence. Events such as this are preventable. The concept of personal accountability does not deemphasize the chief objective of our civil law, compensation, so much as it raises the probability that corporate managers may be more careful if they are accountable. Being informed, being aware, being careful is what it means to be a responsible human. And, in some cases, mistakes are made. To err is also to be human. But, to err by exposing others to risk and not answering for a death that results from the risk need not be tolerated.

We can have a more humane business environment. Our law is a human construct and can change. The courts-martial of the men and officers of the USS Davidson are unhappy, but enlightening reminders that we can achieve accountability for human-driven destruction and death.