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Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions

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Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions

In the aftermath of one of the most highly publicized trials in product liability annals—the celebrated Pinto case—the legal question raised by that litigation remains unresolved. Controversy continues as to whether a corporation should be convicted of homicide when it knowingly markets an unsafe product that results in death. Today the answer is a resounding "no", in light of state statutes defining homicide as the killing of one human being by another, difficulties in finding the requisite criminal intent, and the practical problems of placing a legal fiction behind bars. However, there are recent indications that these present obstacles to a corporate homicide conviction appear to be dissolving.

The author explores the theories of corporate criminal liability as they relate to homicide and examines the attitudes and policies upon which those theories are predicated. Finally, the author examines legislative proposals which attempt to expand present liability schemes aimed at deterring individual acts of reckless disregard for human life to include similar acts inflicted by the corporate body.

I. PROLOGUE

Copp: The attitude was no different in the Ford Motor Company about the Pinto than it was in any other Detroit company. It was basically to get the car on the road, to do it at a minimum cost to meet only those regulations extant or in effect.

Wallace: Even if it was not as safe as you would like it to be?

Copp: Exactly. The Pinto was sold as a 2,000 pound car that would cost $2,000. And that objective was going to be met come hell or high water.[1]

The objective was met and Ford Motor Company proceeded to sell some one and a half million Pintos, vintage 1971-1976, *knowing* that its gas tank posed a dangerous risk of fuel leakage and explosion.[2] The company made no attempt to fix or redesign the gas tank, nor to warn its customers of the hazards until forced to

1. Interview of Harley Copp, a retired Ford executive, by Mike Wallace as broadcast over the CBS Television Network on "Is your Car Safe"? 10 60 MINUTES, June 11, 1978, No. 40, at 5 [hereinafter cited as 60 MINUTES] (unpublished transcript provided by Columbia Broadcasting System.) This testimony by Mr. Copp arising out of the interview with 60 MINUTES is not to be confused with, nor reflect upon any of the testimony elicited during trial. The statements were given prior to the Pinto trial in Indiana and were not subject to cross examination nor to the strict rules of legal evidence.

2. Pasztor, *Ford Loses on Potentially Crucial Point in Pinto Suit but Wins Technical Rulings*, Wall St. J., Jan. 15, 1980, at 2, col. 3.

do so by the federal government.[3] The results were tragic.

Within milliseconds, a van smashed into the back of a 1973 Ford Pinto traveling[4] on U.S. 33 toward Goshen, Indiana.[5] The gas tank impacted against the differential, ripping it open on four protruding bolts; gasoline splashed into the passenger compartment, igniting and engulfing the interior of the car in flames. The two girls trapped inside the Pinto were incinerated; a third girl partially thrown from the vehicle, received burns over ninety percent of her body and died six hours later.[6]

Elkhart County prosecutor Michael Cosentino brought Ford Motor Company to trial on three reckless homicide charges;[7] he claimed the three girls died as a result of a high-level corporate decision to risk human life for greater company profit.[8] Because an appropriate civil remedy did not exist,[9] the county prosecutor

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3. *Id.* A tally by the National Highway Traffic and Safety Administration showed that by May 1978, over 29 civil cases had been filed against Ford in connection with the Pinto fuel system. As of November of 1979, 23 people had lost their lives in Pinto infernos following rear-end collisions. 125 CONG. REC. E5,658 (daily ed. Nov. 15, 1979) (remarks of Rep. Miller).

4. A dispute arose at trial as to whether the car was actually "traveling," or moving during impact. Both hospital orderly Levi Woodard and supervisor Nancy Fogo claimed to have spoken with one of the three teenage accident victims, Judy Ulrich, prior to her death when she was wheeled into the Elkhart General Hospital emergency room the night of the crash. During that unusual deathbed conversation, Ms. Ulrich claimed she had stopped her car immediately before collision to retrieve her gas cap that had fallen off after a service station fill-up. Tybor, *How Ford Won Pinto Trial*, NAT'L L.J., March 24, 1980, at 12, col. 1.

5. Taybor, *The Pinto Prosecutor*, NAT'L L.J., Oct. 30, 1978, at 10, col. 1.

6. *Id.* at col. 2. Pathologists stated that the three young girls would have walked away from the crash if not for the fire, indicating the impact was not great enough, on its own, to cause serious injury or death. *Is Ford Guilty of Homicide? Pinto case ready for jury*, EUGENE REGISTER-GUARD, March 9, 1980, at 14A, col. 1.

A similar accident occurred in May of 1972 on Interstate 15 outside San Bernardino, California. The Pinto, in which 13-year old Richard Grimshaw was riding, stalled and was rear-ended by another car traveling at 35 miles per hour. The gas tank ignited, incinerating the driver of the Pinto so badly, she died of her burns three days later. Passenger Richard Grimshaw barely survived. His burns were abhorently massive, covering 95 percent of his body, taking four fingers, a nose, a left ear and requiring 65 major surgeries. 60 MINUTES, *supra* note 1, at 2; *see also* K. REDDEN, PUNITIVE DAMAGES § 1.2, at 7 (1980). Out of the case arising from the accident came the largest individual award of punitive damages in jurisprudential history—$125 million—granted by an Orange County jury, largely in reaction to proof that Ford knew the Pinto's gas tank was likely to rupture in a collision regardless of the speed of the cars involved. The award was later remitted to $6.3 million. Grimshaw v. Ford Motor Co., No. 197761 (Orange County Super. Ct., filed Nov. 22, 1972). As of this writing the case is docketed for appeal in the Court of Appeal Fourth Appellate District in San Bernardino, No. 4th Civil 20095.

7. A fourth count of criminal recklessness was later dropped at the request of the prosecutors.

8. 60 MINUTES, *supra* note 1, at 2; *see also* Pasztor, *supra* note 2, at 2, col. 3; Tybor, *Pinto Issue: Can a Corporation Kill?*, NAT'L L.J., Dec. 25, 1978, at 5, col. 3.

9. Comment, *Corporate Homicide: A New Assault on Corporate Decision-Making*, 54 NOTRE DAME L. 911, 923 & n.95 (1979).

was forced to bring the case on a new and unchallenged Indiana statute permitting criminal prosecution of a corporation,[10] and in doing so, he took a pioneering step in products liability.[11] Previously, corporations faced criminal sanctions in antitrust, environmental, and securities laws, but never before have manufacturers been criminally indicted for the reckless design of their products.[12]

Indiana's Pinto Case[13] raised for the first time in a legal setting the fascinating issue of whether or not a corporation is capable of committing homicide through the reckless design of its products. It was Ford's contention that the legislature did not intend to charge reckless homicide to a corporation.[14] Instead, they argued the statutes were intended only to prevent *people* from killing other *people*.[15] The prosecutor found fault with Ford's analysis, stating that it "patently exploits the corporate fiction."[16] The state also noted that while it "does not desire to chill manufacturing generally, it does desire to deter outrageous decisions to sacrifice human life for private profit."[17]

Although one of the most bitter[18] and highly publicized trials in product liability history, its ultimate precedential value remains in conflict[19]—the victim of a judicial stalemate. For the first time,

10. IND. CODE ANN. § 35-41-2-3 (Burns 1979) reads in part:

> (a) A Corporation, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority.

The recent origin of this statute, while providing the prosecutor with a cause of action, also proved critical to the eventual outcome of the case. Included in the jury instructions was the proviso that even if the jury found that the automobile was designed with reckless disregard for human life, they would also have to find that Ford failed to warn of the danger after *July 1, 1978*, in order to convict. That was the date the Indiana law permitting criminal prosecution for reckless homicide of corporations went into effect. Tybor, *supra* note 4, at 12, col. 2.

11. Tybor, *supra* note 5, at 10, col. 1.

12. Bodine, *Prosecutors Undeterred by Pinto Acquittal; Defense Bar Says It's in Driver's Seat Now*, NAT'L L.J., March 31, 1980, at 17, col. 1.

13. State v. Ford Motor Co., No. 5324 (Indiana Super. Ct., filed Sept. 13, 1978).

14. Tybor, *supra* note 8, at 5, col. 1.

15. *Id.*

16. *Id.*

17. *Id.* at cols. 2-3.

18. For an interesting discussion of the bitter feud which developed and an insight into the contrasting personalities of prosecutor Michael Cosentino and defense attorney James Neal, *see* Tybor, *supra* note 4, at 1.

19. Lucas County Prosecutor Anthony Pizza has filed a three-count claim in Toledo, Ohio, charging Conrail with aggravated vehicular homicide in the deaths

a court of law has ruled that a corporation can be indicted for the reckless design of a product, opening the door to new theories of corporate liability. Whether this fact is construed as achievement or legal extremism, it is counteracted by the additional fact that Ford Motor Company today stands acquitted of all criminal charges[20]—hence the stalemate.

This is not to say that the same marketing decision by Ford that resulted in acquittal on *criminal* charges in Indiana was not found to be culpable under *civil* liability theories elsewhere. Indeed, the factual allegations in Indiana were hauntingly similar to those raised in *Grimshaw v. Ford Motor Co.*,[21] where the jury found Ford's disregard of human life so blatant as to justify the original $125 million punitive damage award.

The automobile industry is open to the charge that the pursuit of profits often conflicts with social and moral responsibilities, that shareholder interests can and do preclude humanitarian advancements,[22] and what is best for America is not always what is best for business. Yet despite these conflicting goals, efforts to

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of three teenagers whose car collided with a speeding train. Mr. Pizza is confident in spite of Ford's recent victory in the Pinto case. "The verdict didn't say corporations are immune from prosecution. It just said that in that fact situation, the company wasn't guilty." Bodine, *Prosecutors Undeterred by Pinto Acquittal; Defense Bar Says It's in Driver's Seat Now*, NAT'L L.J., March 31, 1980, at 3, col. 3.

20. Perhaps of greater interest than the eventual outcome of the trial was the great evidentiary battle that transpired. The presiding judge would not admit prosecution documents on crash tests that did not pertain directly to the 1973 Pinto, which was the model involved in the accident, even though the 1971-76 models were virtually identical. The ruling precluded the prosecutor from admitting all but 20 of the more than 300 documents into evidence which he contended showed a pattern dating back to 1967 by Ford to cover up the allegedly defective fuel tank design. Tybor, *supra* note 4, at 13, col. 1. One of the excluded documents was a Ford memo which allegedly weighed the costs of fixing the fuel tank against paying damages for burn deaths and injuries for civil cases. *Is Ford guilty of Homicide? Pinto case ready for jury*, EUGENE REGISTER-GUARD, March 9, 1980, at 14A, col. 13.

Defense attorneys also voiced complaints of the evidentiary rulings, most particularly that many adverse rulings were made with the judge neither listening to nor reading the evidence. Tybor, *supra* note 4, at 13, col. 4.

21. Grimshaw v. Ford Motor Co., No. 197761 (Orange County Super. Ct., filed Nov. 22, 1972). Both accidents involved a Ford Pinto that was designed with the fuel tank located behind the rear axel close to protruding bolts and brackets. Upon rear-end impact, the gas tanks of both Pintos were punctured by a bolt on the differential, allowing fuel to spill into the passenger compartment and burst into flames. 60 MINUTES, *supra*, note 1, at 3-4.

22. The landmark decision of Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919), has turned out to be one of the chief bones to stick in the consumer movement's throat. In 1916, Ford Motor Company had its best year ever; it looked forward to a $60 million profit. Henry Ford, president, chairman of the board, and 58 percent shareholder, announced that no stock dividends were to be paid. Instead he planned an expansion program of $11.3 million, and he had determined to dedicate the company more to the welfare of the population by providing more jobs and lowering the selling price of the cars, making them available to more peo-

mold socially acceptable behavior in the free enterprise system normally have presented few problems under current liability theories. Actions such as Ford's, which involve conscious disregard for human life,[23] represent a form of corporate wrongdoing that is insufficiently deterred by present schemes of liability. Thus, it will be the purpose of this article to focus on an entirely unique concept in products liability: the charge of criminal corporate endangerment and, where death ensues, corporate homicide. The initial sections of this article will critically assess particular industries and particular companies in an attempt to set the stage for the discussion which follows. That discussion is premised on a conclusion that the problem addressed here is significant and thus merits the attention of legal scholars. Therefore, while the criticism in these sections may at times appear harsh, it is not meant as a legal indictment, nor is it directed solely at the referenced industries or companies. With this preface in mind, the inquiry will examine: (1) high-level company decisions that knowingly risked and took human life; (2) the attitudes responsible for corporate exemption from criminal sanctions in the product liability field; (3) a discussion of current theories of corporate accountability; (4) conceptual and practical problems with expanding corporate criminal liability; and (5) legislative proposals which address this type of knowing corporate endangerment of both employees and consumers in the product field.

II. Corporate Decisionmaking

Large business firms have been creators of wealth and jobs, a major reason why our real per capita income has tripled in the

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ple. The minority shareholders brought an action to compel a dividend. In finding in favor of the minority stockholders, the court stated:

> There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profits of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Id. at 507, 170 N.W. at 684.

23. As determined by the Orange County jury in *Grimshaw*. Note 6 *supra*.

past 40 years.[24] Additionally, corporate philanthropy totals some one billion dollars annually or six percent of all philanthropic projects in the country.[25]

Yet, those same firms have also been the creators of widows and widowers. While millions of Americans bolt their doors at night as protection against known dangers which lurk outside, they unwittingly submit themselves to the perils of unsafe products, a frequent source of injury and death.[26] Of chief concern are those manufacturers who are aware, yet choose to keep silent concerning dangers with the products we use.[27]

A. The Pinto Cases

Ford Motor Company made a decision to place on the market a car whose gas tank design was fully expected to injure and kill a substantial number of people.[28] The charge is supported by evidence,[29] much of which comes from Ford's own company docu-

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24. R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 32 (1976).

25. *Id.*

26. It has been estimated by one source that each year consumer products create 30,000 deaths and 20 million serious injuries. Schrager & Short, *How Serious a Crime?* in WHITE-COLLAR CRIME: THEORY AND RESEARCH, 16 (G. Geis & E. Stotland eds. 1980).

27. Corporate knowledge of its own misconduct is not limited to the realm of product safety. "For some period of time Jones & Laughlin's Cleveland steel plant was well aware of the money it saved in effluent treatment costs while still avoiding fines under the Rivers and Harbors Act, by systematically dumping its effluents into the Cuyahoga River in the dead of night." Ehrenreich & Ehrenreich, *Conscience of a Steelworker*, THE NATION, Sept. 27, 1971, at 268.

In 1974, energy companies told the public there were emergency shortages of heating oil and gasoline, and fuel prices soared; then as congressional investigations revealed that oil companies had actually *cut back* refinery production, the companies reported they had boosted their profits by as much as 83% (Shell) and a phenonmenal 174% (Pennzoil) during the first nine months of 1974. Zwerdling, *The Food Monopolies*, PROGRESSIVE, Jan. 1975, at 13-14.

For an example of the extent to which evidence can be suppressed and distorted to result in the endangerment of numerous prescription drug patients, *see* the case of Toole v. Richardson-Merrel, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

28. To be exact, Ford designers anticipated 180 burn deaths and 180 serious burn injuries. 60 MINUTES, *supra* note 1, at 6.

Business welfare in the eyes of the businessmen have on other occasions superseded public safety. Ralph Waldo Emerson recounted an attempt to build a lighthouse to protect ships and sailors from destruction along the rocky coastline: "Went to Nauset Light on the backside of Cape Cod. Collins, the keeper, told us he found obstinate resistence to the project of building a lighthouse on this coast, as it would injure the wrecking business." Mintz & Cohen, *Crime in the Suites*, in THE CONSUMER AND CORPORATE ACCOUNTABILITY 73, 73 (R. Nader ed. 1973).

29. Part of the evidence stems from the testimony of Harley Copp, a former Ford executive who stated that at a meeting on April 22, 1971, Ford executives rejected a plan to spend $6.65 per car to modify the Pinto designed for 1973 production. He said it was rejected for "cost and the effect it would have on profitability."

ments. One of those documents, the Grush-Saunby Report,[30] was prepared for the company in its efforts to lobby the federal government to reduce its fuel tank standards. The heart of that document reveals a typical cost-benefit analysis, which resulted in a company decision not to redesign the Pinto gas tank, despite having the technology to do so.[31] On June 11, 1978, *60 Minutes* was televised with an interview between Mike Wallace and one of the plaintiff's attorneys from the case of *Grimshaw v. Ford Motor Company*,[32] Arthur Hews:

Wallace: Table three is the heart of this document.
Hews: That's right.
Wallace: And it says, "Benefits: savings of 180 burn deaths, 180 serious burn injuries, and 2100 burned vehicles—at a total cost of $49.5 million." What does this mean, "savings", "benefit"?
Hews: All right. The first thing that they are measuring is the value of human lives. They are taking 180 lives and they figure that a human being's life is worth $200,000. So they multiply that out. They then—they—they take 180 serious burns, such as Richard Grimshaw, and they figure that's only worth $67,000—and they multiply that out. And they come out and they say that—that that's worth $49.5 million. They're using numbers to place value on life and burn.
Wallace: All right.
Hews: They then turn around and say it's going to cost us eleven dollars a car to save these 180 lives and to save these 180 burns.
Wallace: And they would come to a total cost of $137 million?
Hews: Yes.
Wallace: And what you're saying is that the Ford Motor Company said they did not want to spend $137 million in order to get a mere $50 million benefit?
Hews: That's correct.[33]

Former executive for Ford critical of Pinto fuel system, EUGENE REGISTER-GUARD, Feb. 8, 1980, at 13A, col. 1.

30. The Grush-Saunby report contains Ford memos, crash tests, reports and financial studies and is thus a very "hot" item not easily obtained. The Chicago Tribune was fortunate enough to receive photocopies of the documents prior to issuance of a protective order against their distribution and since then the Tribune has received several offers to buy them. One of the more noteworthy offers was one of $5,000 for a single document. Strobel & Tybor, *Pinto Papers Hold Key to Ford Trial*, NAT'L L.J., Jan. 7, 1980, at 10, col. 2.

31. Ford Motor Company could not effectively use a "state of the art" defense by arguing that current technology was incapable of designing a safer fuel tank location. Ford had been selling its German import, the Ford Fiesta, during the same period as the Pinto, with its fuel tank in a safer position—forward of the rear axle. The European version of the Fiesta brochure even highlighted the safety feature as a selling point: "Fuel tank located forward of rear axle to avoid spillage in the event of a collision." 60 MINUTES, *supra* note 1, at 8.

32. Attorney Mark Robinson Jr., of the Arthur Hews law firm was the main figure for the plaintiff in the *Grimshaw* case.

33. 60 MINUTES, *supra* note 1, at 6. Ford's contention on the Grush-Saunby re-

Another internal company report, dated April 1971, discussed the added design costs of installing a protective shield between the gas tank and the rear axle.[34] Noting a four dollar per vehicle design cost, the report recommended deferring installation of the protective shield or "flak suit" for two years to reduce overall design costs. "Defer adoption of the 'flak' suit or bladder on all affected cars until 1976 to realize a design cost savings of $20.9 million. . . . Continue with engineering testing and development to assure that final design approaches can be continued *with minimum financial impact*."[35]

Complementing the numerous written documents were films[36] of crash tests conducted by Ford on the Pinto showing that fuel escaped in collisions of low to moderate speeds.[37] The car was tested on five separate occasions[38] by running it into a stationary barrier at speeds of around nineteen and a half miles per hour.[39] The Pinto leaked gas on all five occasions.[40] Ford put the car into production, knowing that it had never passed a fuel tank test.[41] The action was one alleged to be a purposeful and reckless disregard of human life for the sake of company profit margins.[42]

B. Asbestos Litigation[43]

Ford Motor Company is not alone.[44] Dozens of asbestos manu-

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port is that the figures were not set by Ford, but by the National Highway Traffic Safety Administration. Herbert Misch, vice president of environmental and safety engineering at Ford Motor Company had this to say about Table 3 of the report.

> We would never put a number on the cost of life of an individual, and we never have. And we were responding in a—in an appropriate way in the normal rule-making process. It's been taken totally out of context, and people have been led to believe that the Ford Motor Company is so callous that we wouldn't spend eleven dollars to save that many lives, and it's an untruth.

Id. at 7.

34. Kirsch, *Auto Fuel Tank Fires: Pre-discovery Techniques*, 51 N.Y. ST. B.J. 271, 311 (1979).

35. *Id.* (emphasis in original).

36. *Id.*

37. Tybor, *supra* note 5, at 11, col. 2.

38. K. REDDEN, *supra* note 6, § 1.1, at 10 (1980).

39. 60 MINUTES, *supra* note 1, at 3.

40. K. Redden, *supra* note 6, § 1.1, at 10.

41. *Id.*; *see also* 60 MINUTES, *supra* note 1, at 3.

42. 60 MINUTES, *supra* note 1, at 5.

43. Asbestos litigation presents special problems with damage award limitations under workmen's compensation theories which will not be addressed by this article. This section will illustrate the conscious disregard for human life that may be future grounds for criminal indictment.

44. Also included are officials at Occidental Chemical Company who, for years had allegedly deliberately misled California officials by withholding evidence that illegal waste-dumping at their Lathrop, California pesticide plant was poisoning local drinking water. Dating back to 1975, officials conceeded that laws had been broken when pesticides were secretly dumped by the plant into nearby waste

facturers stand close to Ford's side. In cities and towns across the country, wherever there is a shipyard, an asbestos plant, or people who work as contract insulators on construction jobs, the asbestos war is waging. It is one of the most massive onslaughts of product litigation ever to hit this nation.[45]

More than 3,000 cases had been filed as of 1979[46] by plant and shipyard workers, insulators, and "bystanders."[47] Their diseases are as diverse as their exposure levels, including asbestosis, bronchogenic cancer, certain gastrointestinal cancers, and mesothelioma. Each disease can have latency periods of ten to thirty-five years.[48]

The cases acquire great significance because the companies had learned of the asbestos danger decades prior[49] to any warning released to the exposed workers. Yet they had chosen to keep the

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ponds, which contaminated neighborhood drinking wells. After estimating that his company dumped five tons of pesticides a year into the ground, Edson wrote, in a June 25, 1976 memo that "no outsiders actually know what we do and there has been no government pressure on us, so we have held back trying to find out what to do within funds we have available." Hume, *Firm Poisoned Wells with Waste, Kept State in Dark*, L.A. TIMES, June 19, 1979, at 1, col. 3.

An engineering director at General Dynamics sent the following memorandum to his superior a few years ago: "It seems to me inevitable that, in the 20 years ahead of us, DC-10 cargo doors will come open and cargo compartments will experience decompression for other reasons and I expect this to usually result in loss of the airplane." He added that floor changes would be costly, but "may well be less expensive than the cost of damages resulting from the loss of one plane-load of people." The advice was sadly ignored and on March 3, 1974, a Turkish Airlines DC-10 crashed nine minutes after taking off from Paris after its cargo door blew open, killing 346 passengers. R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 26 (1976).

45. Bruck, *The Armies of Asbestos*, AM. LAW., Nov. 1979, at 19, col. 4.

46. In calculating "first generation" claimants, people directly exposed to asbestos in a workplace, it is projected that about 1,300 new actions a year for the next 10 years will arise. Ronald Motley, a law partner in the South Carolina firm of Blatt & Fales, who has 600 of the cases himself, figures there may be three million potential asbestos plaintiffs from the 8 to 11 million American workers who have been exposed to asbestos since World War II. *Id.* at 20, col. 1.

47. The term includes wives who washed out asbestos dust-laden clothing, people who lived near plants, and even secretaries in asbestos companies. *Id.*

48. *Id.* Asbestos fibers which come to rest in the lungs, are virtually indestructible and are said to have a half life of infinity.

49. Evidence of earlier knowledge by others stems even further back. In a publication of the U.S. Department of Health, Education and Welfare, it is noted that in 1918, the practice of American and Canadian insurance companies was not to insure asbestos workers due to the assumed injurious health condition of that industry. *Hearings on Asbestos - Related Occupational Diseases Before the Subcomm. on Compensation, Health & Safety of the House Comm. on Education & Labor*, 95th Cong., 2d Sess. 65 (1978) (statement of George W. Kilbourne) [hereinafter cited as *Health & Safety Hearings*].

information to themselves to avoid anticipated business losses.[50] As with Ford, evidence of prior knowledge is substantial.

In the 1930's and 1940's, the asbestos industry spent thousands of dollars to research the health effects of asbestos on its workers. When the results pointed to potentially fatal effects, high-level executives of major asbestos firms prevented the researchers from publishing the adverse findings.[51] One of those firms was Johns-Manville.

In 1934, a medical report funded by Johns-Manville was completed by a Dr. Lanza. After seeing the medical report, Vandiver Brown, a Johns-Manville general counsel in the mid-1930's, wrote a letter to Dr. Lanza urging that "[a]ll we ask is that all of the favorable aspects of the survey be included and that none of the unfavorable be unintentionally pictured in darker tones than the comments justify. I feel confident we can depend upon you and Dr. McConnell to give us this 'break . . . .' "[52]

Disregard of worker safety for the betterment of the company extended all the way to the office of company presidents. Internal documents known as the "Sumner Simpson file" were obtained by plaintiff attorneys in a deposition from Raybestos-Manhattan.[53] The file contained letters between Simpson, the president of Raybestos, and Vandiver Brown. In those letters, the men discussed the need to control the publicity about asbestos-related disease in the trade journals. "I think the less said about asbestos, the better off we are," Simpson wrote Brown. "I quite agree with you," Brown replied, "that our interests are best served by having asbestosis receive the minimum of publicity."[54]

Regarding the *Asbestos Magazine* funded by the industry, Sumner Simpson wrote, "[O]f course, we understand that all this information on asbestos is to be kept confidential and that nothing should be published about asbestos in Asbestos Magazine at present."[55] In 1936, Simpson wrote, that "[y]ou want to stress the fact that we do not want them [medical reports] given to shyster lawyers and doctors so as to be the subject of suits for, as you know, we have had enough adjustments for one company."[56] Through all this secrecy and suppression of information, the em-

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50. *Id.* at 67.

51. *Asbestos and its Lessons*, PROGRESSIVE, Jan. 1979, at 9.

52. *Health & Safety Hearings*, *supra* note 49, at 54 (statement of Kenneth W. Carlson).

53. Bruck, *The Armies of Asbestos*, AM. LAW, Nov. 1979, at 21, col. 2.

54. *Id.* The date of that discussion was Oct. 1, 1935. *See also* 125 *Cong. Rec.* E5657 (daily ed. Nov. 15, 1979) (remarks of Rep. Miller).

55. *Health & Safety Hearings*, *supra* note 49, at 54 (statement of Kenneth W. Carlson).

56. *Id.*

ployees were never informed of the risks until much later.[57]

Lawyers for Johns-Manville claimed that the company knew that plant workers were risking asbestosis in the 1930's and thus, tried to hold down dust levels in the plants. The company, however, did not know that insulation workers were similarly endangered until 1964, when the company began issuing warnings to the workers. Yet even those industrial claims of innocence were disproved by documents discovered last May by two lawyers in an abandoned tool shed at the Saranac Laboratory in Saranac Lake, New York.[58] The documents report a study done in the mid-1940's by Saranac, which was commissioned by Owens-Illinois, another asbestos manufacturer, to find out whether or not the product Kaylo, containing about 15 percent asbestos, would pose any hazard to workers making it or to insulation workers using it. The Kaylo documents specifically addressed the question of hazard to insulation workers which the Johns-Manville lawyers claimed there was no knowledge of until 1964. The papers revealed that as early as 1948, Owens-Illinois received a report saying that "Kaylo . . . is capable of producing asbestosis and should be handled as a hazardous industrial dust."[59]

Placed in perspective, the problem was not that asbestos exposure was potentially lethal, rather, the problem was prior knowledge by the company of the dangers coupled with company efforts aimed at suppressing such information from the public and their own employees.[60] In 1943, Dr. Hueper, who was active in the medical research conducted by asbestos companies addressed the issue of publicity.

> Industrial concerns are in general not particularly anxious to have the occurrence of occupational cancers among their employees or of environ-

57. A list of warning dates were included in the *Health & Safety Hearings*, *supra* note 49, at 56. Of continuing doubt however, is the extent and adequacy of those warnings. These warning dates and the corporations issuing them are as follows:

Johns-Mansville	1964	Celotex, previously Phillip Carey	Oct. 1971
Eagle-Picher	May 1964	Amatex	June 1972
Owens-Corning	1964	Raybestos-Manhattan	July 1972
Fiberboard	1966	H.K. Porter	July 1972
Pittsburg Corning	Nov. 1968		
Keene Corporation	1969		

58. Bruck, *The Armies of Asbestos*, AM. LAW. Nov. 1979, at 21, col. 2.
59. *Id.*
60. *Id.* at 21, col. 2.

> mental cancers among the consumers of their products made a matter of public records. Such publicity might reflect unfavorably upon their business activities and oblige them to undertake extensive and expensive technical and sanitary changes in their production methods and in the types of products manufactured. There is, moreover, the distinct possibility of becoming involved in compensation suits with extravagant financial claims by the injured parties.[61]

Resulting lawsuits aimed at the asbestos manufacturers have, to date, been confined to the civil arena. A case of early note was *Borel v. Fiberboard Paper Products Corporation*,[62] the first major victory for an asbestos insulation worker afflicted with asbestosis and mesothelioma. Borel, who died of these diseases before the case reached trial, sought to hold the defendants liable on four liability theories: negligence, gross negligence, breach of warranty, and strict liability.[63]

Liability theories in the more recent case of *Yandle v. PRG Industries Inc.*,[64] were quite similar to those brought in *Borel*. Both negligence and strict liability were alleged for the failure to warn the employees of the danger in asbestos exposure. Exemplary damages, under the state workmen's compensation laws, were sought for the beneficiaries of deceased employees who died as a result of the asbestos exposure.[65] The case was settled out of court for twenty million dollars.[66]

Damage awards have been even greater in more recent decisions; however, for reasons to be discussed later, civil liability theories and their resulting fines are not designed to deter this particular type of wrongdoing.[67] Absent criminal liability, these actions will likely recur.[68]

Today it is public knowledge that the Ford Motor Company

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61. *Health & Safety Hearings*, *supra* note 49, at 55 (statement of Kenneth W. Carlson).

62. 493 F.2d 1076 (1973). The case is of landmark status, considered by some to be "the Bible" of asbestos litigation.

63. *Id.* at 1086.

64. 65 F.R.D. 566 (1974).

65. The case originally sought $100 million in damages for 445 workers, but the class action attempt was denied and the case was settled out of court for $20 million in late 1977. Bruck, *supra* note 58, at 20, col. 4.

66. *Id.*

67. *See* notes 28-61 and accompanying text *supra* as well as the discussion of punitive damages in the text accompanying notes 126-67 *infra*.

68. This conclusion is based upon the stigma businessmen associate with a criminal conviction and the fear which arises where there is the strong possibility of imprisonment. *See* text accompanying notes 288-91 *infra*.

"Businessmen abhor the idea of being branded a criminal." Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 Stan. L. Rev. 197, at 217 (1965). Moreover, "[t]he very fact that a criminal statute has been enacted by the legislature is a powerful factor in making the proscribed conduct illegitimate in the eyes of a potential actor, even when the actor disagrees with the purpose of the law." *Id.*

knew that an eleven dollar shield around the gas tank would stop Pintos from exploding when struck by another car from the rear, thus saving 180 burn deaths and 180 serious burn injuries.[69] We know today that leading asbestos firms withheld the health hazards of their product for nearly thirty years to avert expensive production changes.[70] As a result, it is estimated that 300,000 American asbestos workers will die of cancer.[71] Such instances of corporate induced deaths have not only represented the worst in corporate irresponsibility, they have created the need for greater deterrent efforts in the form of a new product liability theory: corporate homicide.

III. ATTITUDES AS A MOLDING ELEMENT IN CORPORATE LIABILITY THEORY

A corporation was regarded as a "citizen"[72] early in our history, entitling it to rights and protection the same as any other citizen, including rights of due process,[73] equal protection,[74] and more recently, free speech as interpreted by the first amendment.[75] Incumbent with these rights, the responsibilities of citizenship with its concomitant liability for crime should also attach; however, the law has been reluctant to attach such liability either in tort[76] or under criminal law.[77]

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69. 125 CONG. REC. E5658 (daily ed. Nov. 15, 1979) (remarks of Rep. Miller); *see also* 60 MINUTES, *supra* note 1, at 6.

70. While the U.S. Department of Health, Education & Welfare, and many American insurance companies appeared to be aware of the asbestos danger as early as 1918, *see* note 49 *supra*; it is not known for sure that officials of the asbestos industry had such knowledge until the early 1930's. 125 CONG REC. E5657 (daily ed. Nov. 15, 1979) (remarks of Rep. Miller); Bruck, *The Armies of Asbestos*, AM. LAW, Nov. 1979, at 21, col. 2; *see also* text at pgs. 710-11 *supra*.

71. *Asbestos Standard Revised*, TRIAL Jan. 1976, at 4.

72. Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923). *But see* Paul v. Virginia, 75 U.S. 168 (8 Wall. 1868), which held that corporations did not qualify as a "person" within the privileges and immunities clause, U.S. CONST. art. 4, § 2, col. 2. Bank of Augusta v. Earle, 13 U.S. 519 (13 Pet. 1839).

73. Both due process rights and equal protection were recognized as extending to corporations in New York Central & Hudson River R. Co. v. United States, 212 U.S. 481, 492-94 (1909). For a general discussion of corporate rights analogous to those afforded to biological citizens, *see* Green, *Corporations as Persons Citizens and Possessors of Liberty*, 94 U. PA. L. REV. 202 (1946).

74. Grosjean v. American Press Co., 297 U.S. 233 (1936).

75. First National Bank v. Bellotti, 435 U.S. 765 (1978).

76. The case of Sutton's Hospital, 77 Eng. Rep. 937 (K.B. 1612).

77. Anoymous Case No. 935, 88 Eng. Rep. 1518 (K.B. 1701).

A. A Glance into History

Today's difficulty in dealing with the corporate "person" vividly contrasts with the historical view that society was comprised of an aggregation of families rather than a collection of individuals.[78] Ancient law was framed around a "system of small independent corporations."[79] Author Christopher Stone noted that as late as Anglo-Saxon times, blood feuds were still being instituted on the assumption that the clan rather than the individual perpetrator, might be liable for the offense.[80]

More modernly, the law has seemed to concentrate its locus of punishment on the individual and has lost sight of the group.[81] Part of this shift is due to the increasing reliance on individualized penalties which effectively preclude group punishment.[82] The conceptual dichotomy becomes evident through the words of Blackstone.

> [A]ll personal rights die with the person; and as the necessary forms of investing a series of individuals, one after another, with the same identical rights would be very inconvenient, if not impracticable; it has been found necessary . . . to constitute artificial persons, who may maintain a perpetual succession and enjoy a kind of legal immortality.[83]

Granted perpetual life by the state, they also enjoyed limited liability. A corporation cannot commit treason, felony, or other crimes in its corporate capacity.[84] Nor, as H.L. Menken gravely observed, could a corporation be excommunicated, for it had no soul.[85]

Corporations then were not accountable for crimes against the Crown; therefore, they could not be tried by the King's Bench, and they remained exempt from summons by the ecclessiastical courts.[86]

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78. MAINE, ANCIENT LAW 121 (1864).

79. *Id.* at 122. Carrying the analogy further, Maine wrote: "Corporations *never die*, and accordingly primitive law considers the entities with which it deals . . . the partriarchal or family groups, as perpetual and inextinguishable." *Id.* (emphasis in original).

80. C. STONE, WHERE THE LAW ENDS 8 (1975). For a comical judicial restatement of another feud between the Montagues and Capulets, *see* Tricoli v. Centalanza, 100 N.J.L. 231, 126 A. 214 (1924).

81. C. STONE, *supra* note 80, at 9.

82. *See* W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 637 (1902); 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 449-62 (2d ed. 1898); 2 *id.* 495-97.

83. W. BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 608 (B. Gauit ed. 1941).

84. Case of Sutton's Hospital, 77 Eng. Rep. 937 (K.B. 1612).

85. The legal fiction has "no pants to kick or soul to damn and, by God, it ought to have both!" As quoted in STONE, *supra* note 80, at 3: *citing* H.L. Menken, A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 223 (1942).

86. Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

B. The Double Standard of Criminal Justice

C. Wright Mills once observed that "[i]t is better, so the image runs, to take one dime from each of ten million people at the point of a corporation than $100,000 from each of ten banks at the point of a gun."[87] This observation reflects today's prevailing attitude that indicted corporate defendants are not criminals but respected citizens.[88] An article appearing in the *Atlantic Monthly*, noted that

> [t]he business criminal tends to counterfeit the good citizen, taking care to meet all the conventional tests—flag worship, old soldier sentiment, per fervid patriotism. Full well he knows that giving a fountain or a park or establishing a college chair in Neolithic drama . . . will more than outweigh the dodging of taxes, the grabbing of streets and the corrupting of city counsels.[89]

What has emerged is a legal justice system that represents a class prejudice so evident that it leads citizens to question the fairness and the integrity of our system of justice.[90] "Throughout history the magnitude of the crime has been lessened by the magnitude of the criminal."[91] The resulting double standard perme-

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87. C. MILLS, POWER ELITE 95 (1956).

88. *See* Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L.C. & P.S. 40 (1978).

89. Ross, *The Criminaloid*, 99 ATLANTIC MONTHLY 44, 48 (1907), cited in Geis, *Criminal Penalties for Corprate Criminals*, 8 CRIM. L. BULL. 377, 378 (1972). Differences exist in views of the corporation's role in society. During testimony at a senate hearing consumer advocate Ralph Nader was espousing on the deficiencies of the corporation. "If there are criminal penalties for the poor and deprived when they break the law, then there must be criminal penalties for the automobile industry when its executives knowingly violate standards designed to protect citizens from injuries and systematic fraud." L.A. TIMES, May 11, 1971, pt. 1, at 5, col. 1.

At that, an angry Senator Ted Stevens (R-Alaska) slapped his hand down and interrupted, "You look for the worst in people and not in what's good that's happening in our country. You're not giving credit to American industry . . . ." *Id.*

Nader retorted; "Do you give credit to a burglar because he doesn't burglarize 99 percent of the time?" *Id.*

90. *See* Cook, *The Corrupt Society*, NATION, June 1, 1963, at 453.

91. W. DURANT, THE LIFE OF GREECE 405 (1939) cited in Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L.J. 377, 388 (1972); *see also Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. pt. XIV, at 10137 (1979) (statement of M. Green) [hereinafter cited as *Criminal Code Reform Hearings*]. The idea has been put into prose by poet Robert Graves:

> It is a sin to steal a pin
> But Guineas are fair game
> The hound who hounds a million pounds
> Writes 'Lord' before his name.

Geis, *supra*, at 388 (citing R. GRAVES, THEY HANGED MY SAINTLY BILLY 57 (1957)).

ates the realm of criminal justice.[92]

If antitrust enforcement is indicative of corporate criminal enforcement as a whole, then any effort to expand the criminal sanction to include the product field need hardly give corporate officials any alarm. The history of antitrust enforcement indicates that severe criminal penalties have rarely been imposed directly upon policy makers. During the first five decades of the antitrust laws 252 criminal prosecutions resulted; from which twenty-four incurred jail sentences of which thirteen were imposed on union leaders. Of the eleven cases involving businessmen, ten dealt with such infractions as threats, intimidations, and violence. In the one remaining case, the jail sentence was suspended.[93]

The double standard is further evidenced in sentencing discrepancies. In 1961, seven electrical manufacturers were sent to jail for thirty days for a conspiracy which took from the public more than all other robberies and thefts that year combined. One year later a man in Ashbury Park, New Jersey, stole a $2.95 pair of sunglasses and a one dollar box of soap and was sent to jail for four months.[94] Other examples exist, such as the case of George Jackson who was sent to prison for ten years to life for stealing $70 from a gas station (his third offense), and Joseph Sills, who received a thousand - year sentence for a robbery netting $73.10. Yet as of 1972, the *total* amount of time spent in jail by all businessmen who violated the antitrust laws was less than two

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92. For an amusing look at the double standard, here is an excerpt from Art Buchwald's *The Acquittal of Murder Inc.*, quoted in *Criminal Code Reform Hearings*, *supra* note 91, at 10149-50:

> Let me ask you something, Sargeant. If someone came into your house and started sprinkling arsenic on your food and fed your dog DDT and poured cyanide into your children's milk, would you arrest him?
> Damn right, I would, and I'd see he got sent up for life.
> What's the difference between that and a company doing the same thing to an entire community?
> We have no authority to arrest company officials just because they have no way of getting rid of their pesticides.
> Then you mean the average citizen has no recourse when a large corporation knowingly tries to kill him?
> If the government thinks they're doing anything wrong they have ways of punishing people who dump their waste in the wrong place.
> What's the punishment?
> I think its a $5,000 fine. It could be less, But [sic.] you better be careful before you make wild charges such as you have.
> Why?
> I can arrest you for harrassing a respectable business establishment.

93. Comment, *Increasing Community Control Over Corporate Crime, A Problem in the Law of Sanctions*, 71 YALE L.J., 280, 291 (1961), (citing, *Staff Report to the Monopoly Sub-committee, House Committee on Small Business, United States versus Economic Concentration & Monopoly*, 79th Cong., 2d Sess. 257 (Staff print 1946)).

94. M. GREEN, THE CLOSED ENTERPRISE SYSTEM 168 (1972).

years.[95]

Given the outrageous conduct of Ford Motor Company and the asbestos manufacturers cited earlier, it would appear that such sentencing discrepancies are without justification. Seemingly, the principle difference between corporate induced deaths and those incurred in back alleys by gun-wielding individuals is that with companies, the *corpus delecti* is provided by internal company documents, which contain the smoking pistol, spent cartridge, and the body all rolled into one.

Yet there are differences between corporations and individuals. First, deaths resulting from business practices can not be considered premeditated in the same manner as back alley shootings.[96] While Ford officials clearly acted in conscious disregard of the expected outcome, that is not to say that the intent in designing the Pinto was to kill their customers. Secondly, the kind of business practices of concern here, while of a violent effect are *indirect* in nature and evoke less concern. Therefore, it could be surmised that these discrepancies in attitudes toward crime stem in large part from our fear of, and contempt for acts of *direct* violence.

Nevertheless, current double standards appear to overcompensate for the indirect nature of corporate crime. Judges often treat corporate criminals with mild indulgence while giving stricter sentences to street offenders.[97] The reasoning behind this phenomenon was expressed by a District of Columbia judge: "I will not penalize a businessman trying to make a living when there

95. *Id.* at 169.

96. Black's Law Dictionary defines "premeditated" in the context of homicide cases as "[t]he mental purpose, the formed intent, to take human life." BLACK'S LAW DICTIONARY 1062 (5th ed. 1979).

97. "It should be pointed out that 75 percent of all corporate crimes are in the environmental/labor protection area, and according to LEAA, penalties against corporate officials are far less severe than those against ordinary lawbreakers; fines are nominal, prison sentences are frequently suspended, and probation is easily granted." 125 CONG. REC. E5657 (daily ed. Nov. 15, 1979) (remarks of Rep. Miller); *see also* Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. Crim. L.C. & P.S. 40 at 42 (1978).

For a specific example, consider the following contrast in sentencing. On September 18, 1973, Jack Clark, corporate chairman of the Four Seasons Nursing Centers of America, was convicted for stock fraud after cheating shareholders out of $200 million. Clark was sentenced to one year in prison and became eligible for parole in four months.

The next day, in Brooklyn Supreme Court, an eighteen year old Puerto Rican named Hector Ortiz was sentenced to five years in prison for stealing a car worth $100. He was not found to have used violence or a gun. J. NEWFIELD, CRUEL AND UNUSUAL JUSTICE xiii (1974).

are felons out on the street."[98] Whether the reasoning behind this phenomenon lies with the white collar, the tie, or the carefully shined shoes is unknown, but the history of the judiciary's solicitious treatment of business felons is a long one.[99] For example, one Judge Woodward, when sentencing real estate executives for mail fraud said "[y]ou are men of affairs, of experience, of refinement, and culture of excellent reputation and standing in the business and social world."[100] More recently, federal district court judge, Warren Ferguson wrote, "all people don't need to be sent to prison. For white collar criminals, the mere fact of prosecution, pleading guilty—the psychological trauma of that—is punishment enough."[101]

Jurors evidently agree. In many trials involving corporate defendants, a process known as jury nullification occurs whereby a jury will sympathize with the individual corporate defendant as a result of his impecable manners and mode of dress.[102] The result is that imprisonment is rare.[103] "[E]ven when the evidence is strong, a form of jury nullification can occur, where the jurors realize that a well-dressed, white, wealthy, articulate father of three, might actually go to jail with unkempt, non-white, poor, uneducated street criminals."[104] When imprisonment does occur, most if not all corporate officials are sent to the relatively "luxurious" prison facilities. Many white collar criminals are sentenced to the

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98. Geis, *supra* note 91, at 390 (citing Katz, *The White-Collar Criminal*, 5 WASHINGTONIAN 40, 65 (1970)).

99. Since 1890, 461 individual defendants have been sentenced to prison . . . . In all but 26 criminal cases between 1890 and 1969, . . . the sentences were immediately suspended. Of these remaining 26, only *three* involved pure price-fixing by businessmen. The first prison sentence ever actually served for pure price-fixing by businessmen (*i.e.*, without the involvement of labor or violence) occured in *1959*. From fiscal 1960 to fiscal 1970 there have been only two cases, out of 188 criminal cases brought (counting all of the electrical-equipment cases as one), where some business defendants have served jail sentences of from one to 60 days: the electrical-equipment cases and the plumbing-fixtures case. (emphasis in original).

M. GREEN, *supra* note 94, at 167.

100. *Criminal Code Reform Hearings*, *supra* note 91 at 10137.

101. *Id.*

102. Comment, *supra* note 88, at 48; Ball & Friedman, *The Use of Crimnal Sanctions in the Enforement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965); *see also* United States v. Austin-Bagley Corp., 31 F.2d 229, 233 (2d Cir. 1929), *cert. denied*, 279 U.S. 863 (1929), in which the incredulous judge exclaimed: "How an intelligent jury could have acquitted any of the defendants we cannot conceive."

103. *See*, Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L.C. & P.S. 50 (1978); *see also* M. GREEN, THE CLOSED ENTERPRISE SYSTEM 167-68 (1972). In 1976, 91% of those convicted in federal court for bank robbery went to prison while only 17% of those sentenced for embezzlement received a prison sentence. L. FLORER, CRIMINALS AND VICTIMS 198 (1980).

104. M. GREEN, THE CLOSED ENTERPRISE SYSTEM 167-68 (1972).

Allenwood Federal Prison Camp, a low-security facility with no fences, bars or even locked doors to keep the inmates from leaving.[105]

While the double standard in criminal sentencing encompasses the thinking of jurors and judges alike, of far greater concern are the businessmen's own attitudes of innocence. In 1961, 1700 executive readers responded to a survey by the *Harvard Business Review*.[106] In response to one question, four out of every seven respondents believed that businessmen "would violate a code of ethics whenever they thought they could avoid detection."[107] Half of the survey respondents felt that "the American business executive tends to ignore the great ethical laws as they apply immediately to his work. He is preoccupied chiefly with gain."[108] The same year, a corporate executive convicted of an antitrust violation told the Wall Street Journal, "One of the problems of business is what is normal practice, not what is law. . . . If it is normal practice, it's ethical—not legal, but ethical."[109]

Activities such as price-fixing and bribery of foreign officials, for example, are well-entrenched in the conventional businessman's "moral code."[110] Herbert Packer, in his book, *The Limits of the Criminal Sanction*,[111] wrote that such behavior as price-fixing or bribery fails "to excite the necessary sense of indignation and outrage that it takes for criminal sanctions to be unsparingly applied." Even after being convicted, some businessmen fail to perceive themselves as "criminal." A former vice-president of General Electric, following his conviction of price-fixing as a result of his activity in the massive electrical equipment price-fixing conspiracy of the early 1960's, wrote, "All of you know that next Monday, in Philadelphia, I will start serving a thirty day jail term,

105. Comment, *supra* note 88, at 48. The Berrigans, the Hollywood Ten, the Watergate felons, and similar white-collar offenders have all spent brief terms at Allenwood. Thomas F. Clendenin, who served a brief sentence there said, "This is a piece of cake." L. FORER, CRIMINALS AND VICTIMS 201 (1980).

106. Comment, *supra* note 88, at 48.

107. G. GEIS, WHITE COLLAR CRIMINAL 119 (1968); *see also* M. GREEN, *supra* note 94, at 148.

108. *Id.* Such statements tend to make Greek historian Polybius appear clairvoyant as he noted two millennia ago, "[a]t Carthage, nothing which results in profits is regarded as disgraceful." THE HISTORY OF POLYBIUS 393 (1923), cited in G. GEIS, *supra* note 107, at 119.

109. Cook *The Corrupt Society*, NATION, June 1, 1963, at 458.

110. Comment, *supra* note 88, at 41, (citing, *U.S. Chamber of Commerce, White Collar Justice*, 759 ANTITRUST & TRADE REG. REP. (BNA 1976) pt. II, at 3).

111. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 359 (1968).

along with six other *businessmen* for conduct which has been *interpreted* as being in conflict with the *complex* antitrust laws."[112]

Evidence appears to indicate that the discrepancies between criminal sanctions for lower class individualized crime and that of upper echelon business and corporate crime, reflect a double standard.[113] Consumers are beginning to understand the nature of corporate crime, particularly when they perceive the economic and physical injury which may flow to them.[114] Moreover, when the public is made aware of what has been termed "white collar crime," the use of criminal sanctions is clearly favored.[115] Surveys indicate that people feel the wearing of a white collar is a privilege which should carry with it a kind of public trust, a fiduciary relationship, which when violated, requires criminal punishment.[116]

A large portion of today's public believes there is institutional favoritism; a favoritism which affects our judges, our jurors and ultimately our policies of law enforcement.[117]

IV. CURRENT THEORIES OF PRODUCTS LIABILITY

Indicative of its label, products liability is concerned with the responsibility of a manufacturer who places or allows a defective[118] product to be placed into the stream of commerce. It has

112. Comment, *supra* note 88, at 42 n.15 (citing G. GEIS, DETERMINING CORPORATE CRIME, THE CONSUMER & CORPORATE ACCOUNTABILITY 337, 349 (R. Nader ed. 1973)). The remarks of the president of the Allen Bradley Company, which was one of the companies involved in the clandestine operation, did not have the same impression of innocense that was conveyed by General Electric's vice-president. "No one attending the gatherings was so stupid he didn't know the meetings were in violation of the law. But it is the only way business can be run. It is free enterprise." Cook, *supra* note 109, at 457.

113. "The typical white-collar criminal is a white, middle-aged, and well educated business or professional man. He is unlikely to go to jail, regardless of the extent of his crime. He may have embezzled more than a million dollars, but he will be placed on probation. The typical street criminal is young, non-white, male, poor and uneducated. His robbery or burglary may yield only ten dollars, but he is likely to be sentenced to jail." L. FORER, CRIMINALS AND VICTIMS, 195 (1980); *see also* text accompanying notes 94-97 *supra*.

114. The U.S. Chamber of Commerce estimated in 1974 that white-collar crime directly costs the U.S. over $41 billion a year, a figure 200 times the amount stolen by all bank robbers that year. *Id.*

115. Comment, *supra* note 88, at 43.

116. Comment, *supra* note 88, at 43 n.23. The Joint Commission on Correctional Manpower found a strong public disposition to sentence accountants who embezzle more harshly than either young burglars or persons caught looting during a riot. *Id.* (citing G. GEIS, DETERRING CORPORATE CRIME; THE CONSUMER & CORPORATE ACCOUNTABILITY 337, 343 (R. Nader ed. 1973)).

117. M. GREEN, *supra* note 94, at 147.

118. A "defect" can be comprised of numerous types, but is generally one of four: (1) defect in manufacture in which liability is based on the negligence of one party within the manufacturing process; (2) defect in design in which the product

been, from its inception with *Winterbottom v. Wright*,[119] roughly 140 years ago, perhaps the single most progressive area of the law. Commencing with Coachman Winterbottom's fall from atop a royal mailcoach onto the English countryside below, products liability has been the consumer's civil guardian against errant manufacturers.[120]

While certainly progressive, product litigation has nonetheless followed three well recognized theories of recovery: negligence,[121] breach of warranty,[122] and since the 1962 decision of *Greenman v. Yuba Power Products*,[123] strict liability.

Such civil liability theories, while adequately addressing the loss distribution problems that arise from injuries sustained by a defective product, are inadequate to deal with problems at the extreme end of the culpability scale.[124] The instances of corporate

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itself is inpuned; (3) express or implied warranty where the product does not live up to the express promises of the seller or to the implied warranty of merchantability or fitness for a particular purpose; and (4) defective warning, which is given were not sufficiently clear, conspicous or failed to sufficiently create apprehension in the consumer to appreciate the danger. *See* D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY 359 (1976).

119. 152 Eng. Rep. 402 (Ex. 1842). The statement actually is a misnomer since people have been injured by products for as long as there have been products to be injured by. Winterbottom v. Wright, however, has withstood the test of time as being the traditional starting point in any discussion of products liability.

120. For an amusing view of products liability, *see* R. Sloan, *Daisey Wiffle v. Twitter Bird Seed Company, reprinted in* PROSSER, THE JUDICIAL HUMORIST 20 (W. Prosser ed. 1952).

121. "The rule that has finally emerged is that the seller is liable for negligence in the manufacture or sale of any product which may reasonably be expected to be capable of inflicting substantial harm if it is defective." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 643 (4th ed. 1971).

122. Warranties are of two types: express and implied. Material misrepresentations of the seller's product, even if innocently made in the contract itself, advertisements or product labels, upon which a buyer has reasonably relied is considered breach of an express warranty.

If the buyer relies upon the seller to provide a product reasonably fit for the particular purpose it was made, the law imposes upon a seller, even in the absence of express provisions, implied warranties of mechantability and fitness for a particular purpose. D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY 36 (1976).

123. 59 Cal 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) While using a combination power tool, a piece of wood flew out from the machine striking the plaintiff in the head and inflicting serious injury. In imposing strict liability, the court stated: "A manufacturer is strictly liable in tort when an article he places on the market knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 700.

124. When corporate officers consciously decide to risk human life for added profit, the focus must be one of deterrence instead of compensation. "Moral culpability is of secondary importance in tort law—immoral conduct is simply one of

misbehavior endanger not just one individual but the public as a whole. As such, to charge corporate defendants with a tort rather than a crime does not address the public wrong which has been done. Tort actions involve only the notion of individualized compensatory reparation aimed at private wrongs while crimes entail a public wrong with public penalties.[125] As a consequence of the compensation goal inherent under civil liability theory, efforts to deter the type of gross misconduct addressed in this article rely upon the concept of punitive damages.

A. Deterrent Effects of the Punitive Damage Award

Taken from criminal law,[126] the award of punitive or exemplary damages is the one remedy available to the products liability field to punish[127] and deter[128] conduct, which seriously endangers human life. The doctrine is characterized by both an ancient origin[129] and a nearly complete acceptance in this country.[130]

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the various ways in which individuals suffer economic damage. But the penal law . . . the immorality of the actor's conduct is essential . . . ." HALL, PRINCIPLES OF CRIMINAL LAW 203 (1947), *reprinted in* Meuller, *Mens Rea and the Corporation*, 19 U. PITTS. L. REV. 21, 38 (1957).

125. The dichotomies between torts and crimes were addressed by noted torts scholar William Prosser who noted:

> A tort is not the same thing as a crime, although the two sometimes have many features in common. . . . A crime is an offense against the public at large , . . . [t]he purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, ...
>
> The civil action for a tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered . . . .

W. PROSSER, THE LAW OF TORTS 7 (4th ed. 1971).

126. For an excellent discussion of goal similarities between criminal law and punitive damages, *see* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967). Consider further the following obiter dictum: "We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of like crime." Cook v. Ellis, 6 Hill. 466, 41 Am. Dec. 757, 757-58 (N.Y. 1844).

127. *See, e.g.*, Campbell Estates, Inc. v. Bates, 21 Ariz. App. 162, 517 P.2d 515 (1973); A WATSON, A TREATISE ON THE LAW OF DAMAGES FOR PERSONAL INJURIES, § 714, at 846 (1901); Schmidt v. Central Hardware Co., 516 S.W.2d 556 (Mo. Ct. App. 1974).

128. *See, e.g.*, Jolley v. Puregro Co., 94 Idaho 702, 708-09, 496 P.2d 939, 945-46 (1972); Fletcher v. Western Natl. Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

129. It appears that the earliest recorded system of law to employ the punitive remedy dates back as far as 2000 B.C. with the code of Hammurabi. Other early systems included the Hittite Law in 1400 B.C. and the Hindu Code of Manu in 200 B.C.. The Bible too makes reference to damages in excess of actual harm available under the Hebrew Covenant Code of Mosaic Law. *See Exodus* 22:1; R. PFEIFFER, INTRODUCTION TO THE OLD TESTAMENT 210 (1948); *see also* K. REDDEN, PUNITIVE DAMAGES 24-25 (1980).

The first case to articulate the theory of punitive damages in English law was Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763). Of even greater historical intrigue

As a consequence of the deterrent-punishment goal, the basis for an award of punitive damages is the defendant's mental state, not his conduct.[131] Courts have used a plethora of terms to describe the required state of mind: "malicious,"[132] "reckless,"[133] "oppressive,"[134] and "wilful or wanton."[135] While these terms have not been precisely defined nor consistently applied,[136] two elements common among them are a culpable state of mind and the existence of extreme conduct which substantially deviates from the norm.[137]

Despite the intended purpose of punishment and deterrence, punitive damage awards are afflicted with several handicaps which preclude their effectiveness in combating the type of corporate wrongdoing addressed by this article.

1. The Insurability of Punitive Risk

The objective of deterrence can be attained only to the extent appropriate wrongdoers are in fact punished. The effect of indemnification agreements[138] is to shift the punishment to third par-

is the confusion brought about nearly 100 years later in the case of Day v. Woodworth, 54 U.S. 363 (1951). It was in the *Day* decision that the United States Supreme Court, failing to cite authority, made reference to the punitive damage award having received judicial support "for more than a century." 54 U.S. at 371. That simple remark sent historians scurrying to the library since the reference indicated a punitive damage consideration at least 12 years prior to *Huckle*. Either the *Day* Court was in error, or the historians were poor detectives, for today scholars have yet to uncover the referenced decision.

130. As of this writing all but four states allow for punitive damages. Those that reject the doctrine are Louisiana, Massachusetts, Nebraska, and Washington.

131. *See* D. DOBBS, REMEDIES 205 (1973). The necessary mental state necessitating a punitive damage sanction is either an awareness of, or indifference to an unnecessary risk of danger. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1362 (1976). This would include a manufacturer's intentional misrepresentation of the safety of its products. *Id.* Examples of cases involving the element of mental culpability would have to include the MER/29 cases which are excellently discussed in Owen, *supra* at 1330-1334; *see, e.g.*, Sabich v. Outboard Marine Corp., 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

132. *See, e.g.*, Achenson v. Shafter, 107 Ariz. 576, 490 P.2d 832 (1971); Satterfield v. Rebsamen Ford, Inc., 253 Ark. 181, 485 S.W.2d 192 (1972).

133. *See, e.g.*, Augustine v. Hinnen, 201 Kan. 710, 443 P.2d 354 (1968); Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719 (Mo. 1966).

134. *See, e.g.*, Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Jolley v. Puregro Co., 94 Idaho 702, 496 P.2d 939 (1972).

135. *See, e.g.*, Friedman v. Jordan, 166 Va. 65, 184 S.E. 186 (1936).

136. K. REDDEN, PUNITIVE DAMAGES 78 (1980).

137. D. DOBBS, REMEDIES 206 (1973).

138. A 1974 survey of the Fortune 500 list revealed that 80% of those companies

ties; however, this also shifts the retributive and deterrent effects.[139] Thus deterrent function is, at least partially, lost.[140] Public policy goals are further thwarted because some manufacturers regard liability insurance as a cost-saving substitute for product safety programs.[141] Some commentators believe indemnification from penal liability should be prohibited, discounting the arguments that such indemnification should be available to assure compensation for victims of product accidents and to protect those manufacturers guilty only of inadvertent errors against unpredictable future losses.[142] But it is an entirely different matter when a manufacturer, guilty of an aggravated act of misconduct, can insure itself against the punishment of that conduct. In this situation, the accident victim presumably has already received compensation for his injuries under traditional civil remedies, thereby leaving the only remaining question as whether or not public policy should allow an insured to indemnify himself against the penal aspect of his conduct.

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carried indemnification insurance. R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 107 (1976).

139. In the words of one commentator:

> The deterrent function of the law of torts was severely, perhaps fatally, undermined by the advent of liability insurance. . . . The basic assumption of the penal theory had always been that the financial impact of an adverse verdict would serve to warn the tortfeasor and others against the consequences of substandard conduct. But it could have such an educative effect only so long as he would feel that deterrent lash. Liability insurance cushioned him against its impact in advance, and thus removed the primary incentive toward the observance of care. . . .

Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823-24 (1967).

140. There are several factors which prevent the retributive and deterrent effect from being completely lost. Due to dramatic increases in products liability claims, insurance premiums have risen, as have policy cancellations. As reported by a recent U.S. Department of Commerce study, "[i]ncreases reported (to the Small Business Administration) in 1975 ranged from 100 percent to over 800 percent . . . . Cumulative increases over the past seven years have been reported to be in excess of 5000 percent." BUREAU OF DOMESTIC COMMERCE, U.S. DEPT. OF COMMERCE, PRODUCT LIABILITY INSURANCE - ASSESSMENT OF RELATED PROBLEMS AND ISSUES 7, 72 (1976). The ultimate effect of increased product liability litigation is beneficial because it forces manufacturers to improve product safety despite being insured against product injury claims. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1310 (1976).

141. Such an assertion percolated from research conducted for the National Commission on Product Safety. That same research report found that, "[i]n some instances, the manufacturers apparently do not even inform themselves of the final resolution of the [products liability] claims, and for these manufacturers it is obvious that a court decision will have no direct effect on product design or warning decisions." Owen, *supra* note 140 at 1308 n.340, *citing* Whitford, PRODUCTS LIABILITY, 3 NATIONAL COMMISSION ON PRODUCT SAFETY, SUPPLEMENTAL STUDIES - PRODUCT SAFETY LAW & ADMINISTRATION: FEDERAL, STATE, LOCAL AND COMMON LAW 221, 228 (1970).

142. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1313 (1976).

One view is set forth in the case of *In re Guardianship of Estate of Smith*.[143]

> Where exemplary damages are awarded for purposes of punishment and deterrence, as is true in this state, public policy should require that payment rest ultimately as well as nominally on the party who committed the wrong; otherwise they would often serve no useful purpose. The objective to be obtained in imposing punitive damages is to make the culprit feel the pecuniary punch, not his guiltless guarantor.[144]

The *Smith* court placed stress upon the negative impact insurance has on the deterrent effects of punitive damages.[145]

A contrary view focuses on the insurers' contractual obligation to compensate the insured for those amounts which the insured becomes legally obligated to pay as damages.[146] In *Abbie Uriguen Oldsmobile Buick Inc., v. United States Fire Ins. Co.*,[147] Justice Donaldson reasoned that insurance coverage of punitive damages verdicts actually promotes law enforcement by encouraging plaintiffs to sue defendants guilty of particularly antisocial conduct.[148] This analysis, however, fails to recognize that private enforcement of the law is desirable because of its punitive and deterrent impact on the wrongful behavior. The argument of Justice Donaldson is therefore circular. The rule allowing insurance coverage for punitive damages is adopted in part because it promotes the secondary goal of encouraging litigation of wantonly inflicted injury; in turn, litigation of these claims is desired to advance the primary goals of punishment and deterrence; yet punishment and deterrence are now shifted to a third party, the insurer.

Equally enlightening as arguments of public policy is the language contained within the insurance policy itself. The general language of most property and liability policies provide coverage for "all sums which the Insured shall become legally obligated to pay as damages because of bodily injury."[149] A minority of courts

143. 211 Kan. 397, 507 P.2d 189 (1973); *see also* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

144. 211 Kan. at 405, 507 P.2d at 196.

145. In Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, Judge Wisdom addressed the paradox of allowing a defendant to pass the punishment to his insurer who, in the form of higher premiums, passes it to the public. "Society would then be punishing itself for the wrong committed by the insured." *Id.* at 441.

146. Price v. Hartford Accident & Indemn. Co., 108 Ariz. 485, 502 P.2d 522 (1972) (en banc); Abbie Uriguen Oldsmobile Buick Inc. v. United States Fire Ins. Co., 95 Idaho 501, 511 P.2d 783 (1973); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964).

147. 95 Idaho 501, 511 P.2d 783 (1973).

148. *Id.* at 509, 511 P.2d at 791.

149. K. REDDEN, PUNITIVE DAMAGES 681 (1980).

have held that because punitive damages are awarded as punishment to the defendant and as a deterrent to others, they arise from the defendant's grievous conduct and not "because of bodily injury."[150] The clear majority of courts, however, construe the general insuring language broadly so as to resolve the issue in favor of coverage.[151] A good illustration is the South Carolina courts' interpretation of a typical automobile policy as providing coverage for punitive damages.[152] The court determined that punitive damages were clearly a sum the insured was "legally obligated to pay" and found that such an obligation arose as a result of "bodily injury," a term contained within the policy's language.[153]

In response to those court holdings that exemplary awards were to be covered, the insurance industry formulated and endorsed a specific punitive damages exclusion.[154] For various reasons, however, national acceptance was never received and the Insurance Services Office withdrew the exclusion.[155]

Yet, absent an express insurance policy exclusion, it remains arguable that the general language of most insurance policies does not include punitive damages.[156] This was brought out in *Crull v. Gleb*,[157] which found that punitive awards are beyond the scope of ordinary damages because bodily injury is involved and these injuries arise out of the defendant's aggravated conduct. Nevertheless, typical policy language, runs the counter argument, does not forewarn the insured that there is no coverage for puni-

150. Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. Ct. App. 1971); Caspersen v. Webber, 298 Minn. 93, 100, 213 N.W.2d 327, 331 (1973); Crull v. Gleb, 382 S.W. 2d 17 (Mo. Ct. App. 1964).

151. *See generally* Annot., 20 A.L.R. 3d 343 (1968); *see e.g.*, Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co. v. Thorton, 244 F.2d 823 (4th Cir. 1957); Glen Falls Indem. Co. v. Atlantic Bldg. Corp., 199 F.2d 60 (4th Cir. 1952); Ohio Casualty Ins. Co. v. Welfare Finance Co., 75 F.2d 58 (8th Cir. 1934) *cert. den.* 295 U.S. 734 (1935).

152. Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965).

153. *Id.* at 205, 139 S.E.2d at 910; *see also* Concord Gen. Mut. Ins. Co. v. Hills, 345 F. Supp. 1090 (D. Me. 1972).

154. Insurance Information Institute, Insurance Services Office News Release (March 29, 1978); *see also* Chiardi & Koehn, *Punitive Damages in Strict Libility Cases*, 61 MARQ. L. REV. 245, 250-51 (1977).

155. K. REDDEN. PUNITIVE DAMAGES 687 (1980).

156. *Id.* at 688.

157. 382 S.W.2d 17 (Mo. Ct. App. 1964). In *Crull*, the Missouri court stated:

> There is no language in the policy that provides for the payments of judgments for punitive damages. The policy covers only damages for bodily injury and property damage sustained by any person. Punitive damages do not fall in this category. The $2,000 award of punitive damages to plaintiff was to punish defendant for his wrongful acts and as a warning to others. It was not to compensate plaintiff for bodily injury or property damages.

382 S.W.2d at 23.

tive damages.[158] Since the insurer drafted the policy and could have made clear its intention to exclude coverage for punitive damages, the rules of construction require the insurer to bear the burden of the ambiguity.[159] Until general policy language is reformulated into a clearer statement of coverage intent, public policy goals of punishment and deterrence will continue to be shifted to third parties.

2. Punitive Damages in Actions for Wrongful Death

As previously noted, Ford Motor Company and the asbestos manufacturers possessed a conscious and reckless disregard for consumer and worker safety which ultimately led to the death of several hundred people.[160] It is therefore of critical import that under present liability schemes, as many as thirty-one states do not allow punitive damages where the plaintiff dies from his injuries.[161] The apparent rationale is that the legislative intent behind wrongful death statutes is compensation rather than punishment,[162] and thus, absent specific statutory authority to the contrary, courts interpret the statutes narrowly.[163]

Denial of punitive damages in such circumstances stems from the English common law rule in Lord Campbell's Act, which did not permit an action for wrongful death.[164] The result is that today a majority of American courts adhere to a liability theory which reduces business' incentive to improve its products.[165]

A better reasoned view is that represented by the minority position which allows for the punishment and deterrent effects of exemplary damages to apply where death is the result.[166] Only

158. K. REDDEN, PUNITIVE DAMAGES at 688.

159. *Id.* at 688.

160. *See* notes 28-70 *supra* and accompanying text.

161. K. REDDEN, PUNITIVE DAMAGES 87 (1980); Note, *Constitutional Law-Wrongful Death*, 8 CUM. L. REV. 567, 574 (1977).

162. *See* Kollin v. Shaff, 79 Misc. 2d 49, 359 N.Y.S.2d 515 (Sup. Ct. 1974).

163. *See, e.g.*, Mangus v. Miller, 35 Colo. App. 335, 535 P.2d 219 (1975).

164. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808). Reluctance was due to the English maxim that the "death" of personal tort actions coincided with the death of either the plaintiff or the defendant. *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 576 (3rd ed. 1923).

165. *See* Martin v. United Security Serv., Inc., 314 So. 2d 765 (Fla. 1975); McClelland & Truett, *Survival of Punitive Damages in Wrongful Death Cases*, 8 U.S.F.L. REV. 585 (1974).

166. *See* Note, *Constitutional Law-Wrongful Death*, 8 CUM. L. REV. at 575 (noting as many as eighteen states which follow the minority rule). The following states have enacted statutes specifically permitting punitive damages in wrongful

nineteen minority jurisdictions have upheld the traditional goals of punishment, deterrence and the protection against reckless or malicious conduct.[167] The majority view of liability is insufficient to address this type of culpability and its punishment. The need to address these conflicting goals of liability insurance and the punishment of wrongdoers presents a need for a new theory in products liability.

V. The Legal Hurdles of Corporate Criminal Liability

Anglo-Saxon jurisprudence has long recognized the existence of two types of persons: juristic and natural.[168] In reality, the "juristic person" is not a person at all, but an artificial entity created by the state, while the term "natural person" embraces all humans.[169] The study of corporations therefore is the study of an enigma. They are at once the movers of mountains, the builders of skyscrapers, and the creators of jobs while, at the same time, considered "artificial beings" and "legal fictions."[170] The result has been the development of several conceptual barriers which must be pierced before any thoughts of corporate criminal homicide may be entertained. Perhaps of even greater importance are considerations of the practical problems which perpetuate the conceptual. Both perplexities are discussed below.

A. The Conceptual Dilemmas

1. The Missing Link of Corporate Intent

Behavior can be punished as criminal only if associated with a certain mental state.[171] Early writers reasoned that a fictitious

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death actions: Kentucky, Massachusetts, Mississippi, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Texas, and Wyoming. States permitting punitive awards by judicial interpretation of their death statute include: Arizona, Arkansas, Florida, Missouri, Montana, Tennessee and West Virginia.

167. *See* Comment, *Punitive Damages & Their Possible Application in Automobile Accident Litigation*, 46 Va. L. Rev. 1036, 1039 (1960). Representing an apparent hybrid view is the case of Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972). In *Smith*, the Maryland court applied the traditional reasons for permitting punitive damages in the context of a survival action, but was careful to distinguish wrongful death actions as inapplicable since a survival action is an extension of the decedent's cause of action, while the wrongful death action is a separate cause of action.

168. Machen, *Corporate Personality*, 24 Harv. L. Rev. 253, 262-63 (1911); *see also* C. Elliott: A Treatise on the Law of Private Corporations 9 (1900).

169. *Id.*

170. Origin of the "fiction" theory extends as far back as the 13th century with Pope Innocent IV (1243-1254) receiving personal credit. Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655, 665 (1926); *see also* Comment, *Corporations: Recent Treatment of the Corporate Fiction*, 13 Cornell L.Q. 99, 105 (1927).

171. Traditionally signified by the term mens rea or guilty mind; *see* Smith v.

being, existing only in the eyes of the law, was incapable of intentionally, knowingly, or wilfully doing anything.[172] Corporations were deemed immune from criminal activity of any sort.[173]

Herein lies the misconception, noted by legal scholar Arthur W. Machen Jr.: "A corporation cannot be at the same time 'created by the state' and fictitious. If a corporation is 'created', it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination."[174] "Artificial" and "fictitious" can not be equated with "non-existence." Corporations are indeed as real as their impact on society demonstrates. They are a composition of individuals working as a finely-tuned group, the conduct of which can be vastly different when acting in a collective capacity than in the capacity of individuals.[175]

In the civil realm, this point was judicially recognized by the theory of respondeat superior, which reasoned that strict liability can be imposed on a corporation because of the acts of its officers and agents.[176] Those acts of the officers are the response to purposes, motives, and intent that are as much a part of the corporation as are the tangible acts done.[177] Respondeat superior in the context of civil proceedings, imputed the requisite acts and intent of its human agents to that of the corporate master. The doctrine was never originally applied to the criminal arena.

California, 361 U.S. 147, 150 (1959); *See* 4 W. BLACKSTONE, COMMENTARIES 28 (1890); Karlen, *Mens Rea: A New Analysis*, 9 U. OF TOL. L. REV. 191 (1978).

172. Taken from the opinion in New York Central R.R. v. United States, 212 U.S. 481 at 492 (1909).

173. *See* Chief Justice Holt's decision in Anonymous, 88 Eng. Rep. 1518 (K.B. 1701) wherein he observes, "a corporation is not indictable but the particular members of it are." *See also* 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 476 (4th ed. J. Andrews 1899) ("A corporation cannot commit treason or feloney or any other crime in its corporate capacity . . . .")

174. Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 257 (1911). Gierke noted the following: "A *'universites'* (corporate body) . . . is a living organism and a real person, with a body and members and a will of its own. Itself can will, itself can act . . . it is a group person and its will is a group will." O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE xxvi (F. Maitland trans. 1902) (cited in Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 658 (1926)).

175. Comment, *Corporations: Recent Treatment of the Corporate Fiction*, 13 CORNELL L.Q. 99, 100 (1927).

176. The acts must be "done for the benefit of the principal, while the agent is acting within the scope of his employment," before they will be imposed on the corporation. *New York Central supra*, note 172 at 493.

177. *New York Central supra*, note 172 at 492-93, *citing* Bishop's New Criminal Law § 417 [sic].

It was of great consequence when the decision in *Telegram Newspaper Co. v. Commonwealth*[178] issued respondeat superior into the criminal setting. The factual background entailed a corporation held liable for criminal contempt in publishing a newspaper article about a trial and distributing copies of the paper at that trial. The Massachusetts Supreme Court affirmed the trial court and noted the policy that intent cannot be imputed to a corporation in a criminal setting: "We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil."[179]

The *Telegram Newspaper* holding was clarified somewhat by the United States Supreme Court in *New York Central & Hudson River R. Co. v. United States*.[180] The railroad company was accused of subverting a special tariff rate between New York and Detroit by paying rebates to sugar companies making shipments along that route. The Court delineated the requirements that the act must not only be done within the scope of the agent's employment, but it must also be done to benefit the principal corporation.[181] In this case the Court found both requirements fulfilled and advanced the extension of respondeat superior to the criminal setting.

> Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.[182]

The common law barrier to corporate criminal liability is merely conceptual in nature and can therefore be removed either by imputing the intent in criminal cases[183] or by disposing of the intent

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178. 172 Mass. 294, 52 N.E. 445 (1899).

179. *Id.* at 297, 52 N.E. at 446.

180. 212 U.S. 481 (1909).

181. *Id.* at 493. The term "scope of employment" is clarified by the Restatement of Agency.

> Conduct of a servant is within the scope of employment if but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master; and,
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1957).

182. 212 U.S. at 494.

183. This was the alternative chosen by Justice Hough in United States v. MacAndrews & Forbes Co., 149 F. 823 (C.C.S.D.N.Y. 1906):

> It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. . . . The same law that creates the corporation may create the crime, and to assert that the

requirement altogether.[184]

Today the barrier of intent is opaque, if not completely transparent, with exceptions being continuously carved out to allow for corporate criminal liability in areas where courts deem the public policy need is sufficiently great. Criminal intent is no longer an obstacle for crimes of larceny[185] or false pretenses,[186] and the modern trend is toward greater expansion where justified by reasons of public policy.[187]

Under circumstances evincing a reckless disregard for human life, exemplified by the corporate homicide charge, every reason in public policy is provided to take one step further to either impute the mens rea of the agents or to dispose of the intent requirement entirely.[188] The law should no longer shut its eyes to

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legislature punish its own creature because it cannot make a creature capable of violating the law does not, in my opinion, bear discussion.

Id. at 836.

184. This second option has been given viability by the United States Supreme Court. In United States v. Park, 421 U.S. 658 (1975), the Court sustained the principle first set down in United States v. Dotterweich, 320 U.S. 277 (1943) to hold that no criminal intent need be shown to establish a violation of the Federal Food, Drug & Cosmetic Act of 1938, 21 U.S.C. §§ 301-392 (1970); Comment, *supra* note 88, at 40.

185. *See, e.g.*, State v. Turax, 130 Wash. 69, 226 P.2d 59 (1924); People v. Hudson Valley Const. Co., 217 N.Y. 172, 111 N.E. 475 (1916).

186. *See, e.g.*, State v. Ice & Fuel Co., 166 N.C. 366, 81 S.E. 737 (1914).

187. United States v. Carter, 311 F.2d 934, 941 (6th Cir. 1963) held that a corporation could be criminally liable for the act of its president in making an unlawful payment of corporate funds to a union representative. In State v. Willard, 54 So. 2d 183 (Fla. 1951) (en banc), a Florida corporation was held to have violated the gambling laws.

188. The public policy of protecting human life from products marketed by manufacturers who (1) profit by the transaction, (2) are aware of the product's dangers, (3) have the means to diminish the dangers, and (4) choose not to, seem greater than the public policy question involved in *New York Central*. In that case a railroad company was convicted for the illegal payment of rebates to sugar refinery companies in contravention of interstate commerce. In holding the corporation criminally responsible, reference was made to the issue of public policy.

> We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. [T]he law . . . cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

the fact that a great majority of business transactions are conducted through corporate bodies and that millions of consumers are entrusted to their care. Courts need to ascribe to the obvious logic that "[i]f you can imagine a corporate entity is a person, you can also imagine that this person has a mind."[189]

2. Incapacity to Suffer the Prescribed Penalty

A second conceptual problem in indicting corporations on a criminal homicide charge is the corporation's incapacity to suffer the prescribed penalties of imprisonment or death.[190] While this reason alone is seldom regarded as sufficient to maintain criminal immunity, it is certainly seen as a major factor in determining whether the legislative intent was to include corporations within the criminal field of homicide.

Two cases are of particular note in this discussion, for they deal with the same issue yet reach opposite conclusions. In *United States v. Van Schaick*,[191] a steamship corporation was indicted for manslaughter for furnishing defective life preservers to 900 passengers who ultimately drowned when compelled to jump from the burning ship. The court considered the conceptual difficulty in placing a legal fiction behind bars under a federal statute which provided that "every owner . . . through whose fraud, connivance, misconduct or violation of law the life of any person is destroyed shall be deemed guilty of manslaughter and upon conviction, shall be sentenced to confinement by hard labor."[192] The corporation claimed that the omission by Congress to specify a penalty suitable for a corporate entity, *i.e.*, fines, was evidence of the legislature's intent to exclude corporations from the crime. The *Van Schaick* court, however, rejected the argument with an interesting line of reasoning. The court stated that the absence of an appropriate punishment did not bar liability because the omission was indicative of a congressional oversight and not an intention to immunize corporations under the statute.[193] In doing so, the *Van Schaick* court side-stepped a traditional barrier to criminal prosecution under criminal statutes, namely, the absence of an appro-

212 U.S. at 495-96.

189. Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 668 n.17 (citing Machen, *Corporate Personality*, 24 HARV L. REV. 253, 347-48 (1911)).

190. In United States v. MacAndrews & Forbes Co., 149 F. 823 (C.C.S.D.N.Y. 1906), the court noted, "[t]here is the obvious physical difficulty of rendering a corporation amenable to corporate punishment. . . ." *Id.* at 836; *see also* 1 W. BURDICK, LAW OF CRIME 223 (1946).

191. 134 F. 592 (C.C.D.N.Y. 1904).

192. *Id.* at 594.

193. *Id.* at 602.

priate penalty.[194]

More recently, in *State v. Pacific Powder Co.*,[195] the court considered a more tenuous statutory dilemma. In the summer of 1959, a Pacific Powder dynamite truck was parked near an old wooden building while the driver left to get something to eat. While gone, the wooden building caught fire, lit up the truck's cargo, and resulted in a devastating explosion killing one man.[196] Under the state law at that time a corporation was defined as a "person" unless the context of the statute required otherwise.[197] The Oregon Supreme Court reasoned that the idea of corporations being included within the definition of "person" was not all encompassing, but legislatively qualified by the provision that such inclusion should be used unless "the context requires otherwise."[198]

Whether or not the context required otherwise was determined by the prescribed penalties.[199] While *Van Schaik* found the statutory omission to be an inadvertent oversight, *Pacific Powder* concluded that the inherent inability of an artificial person to be imprisoned was evidence that the legislature did not intend for corporations to be guilty of the crime.[200]

The conceptual inability of a corporation to suffer the punishment will likely present few problems as applied today. First, the problem has seldom been the sole basis for any judicial holding which leads to the apparent conclusion that courts do not find the argument conclusive.[201] Second, the trend is to recognize the

194. The case involved demurrers to each of the criminal indictments brought against the steamboat company. The *Van Schaick* court overruled the demurrers, granting leave to plead over. Thus the court made no decision as to what should be the penalty against a corporate defendant in the absence of an appropriate sanction.

195. 226 Or. 502, 360 P.2d 530 (1961) (en banc).

196. *See also* Note, *Corporate Criminal Liability in Oregon: State v. Pacific Powder And the New Oregon Criminal Code*, 51 OR. L. REV. 587 (1972).

197. OR. REV. STAT. § 161.010 (1953) reads in part: "As used in the statutes relating to crimes and criminal procedure, unless the context requires otherwise: . . . . 'Person' includes corporations as well as natural persons." Law of Oct. 19, 1864, ch. 53, § 724 (1845-1864). Gen Laws Or. 577 (repealed 1971).

198. 226 Or. at 505, 360 P.2d at 532.

199. *Id.* at 505, 360 P.2d at 532. "[T]he intent of the legislature is to be found in the penalty prescribed for the crime of involuntary manslaughter."

200. *Id.* at 505, 360 P.2d at 532. "No doubt should lie in anyone's mind that the legislature ever considered making corporate entities criminally liable for murder, for the only penalties provided are either death or imprisonment, penalties incapable of execution in the manner prescribed by law."

201. *See* Note, *supra* note 196, at 594.

agent's and officer's ability to suffer the penalty on behalf of the corporation that employs them by way of a vicarious criminal liability.[202]

3. Corporations as "Persons" under the Statutory Definition of Homicide

Perhaps a more compelling reason courts have refused to sustain corporate indictments for acts of physicial violence has been because the common law and statutory definitions of the crime speak in terms of the slaying of one human being by another. Since a corporation is not a human being, but only a "juristic person," it is not the intent of the common law or the legislature to make a corporation answerable for criminal homicide.[203]

The American Law Institute provides little guidance in the semantic battle waged on behalf of the artificial person. According to the Model Penal Code, "a person is guilty of criminal homicide if he purposely, knowlingly, recklessly or negligently causes the death of another human being."[204] Within these definitional parameters the juristic concept of the corporate person appears to be excluded. Upon close scrutiny of the Code's general definitions, however, this apparent clarity is transformed into murky waters of confusion. Within the criminal homicide section, the Code defines "human being" as "a person who has been born and is alive,"[205] yet prefaces that definition with the phrase, "unless a different meaning plainly is required," leaving the reader minimal guidance.[206] By turning to the Code's general definitions, "person" is defined as "any natural person and, where relevant, a corporation, or an unincorporated association."[207] The problem becomes the determination of the term "where relevant." A comment to the Code suggests the term pertains to what the drafters refer to as "serious crimes,"[208] and while that would certainly seem to include homicide charges, the drafters never make the delineation.[209]

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202. *See* Annot., "Corporations Criminal Liability for Homicide", 83 A.L.R. 2d 1117, 1120 (1962).

203. This was the conclusion reached in People v. Rochester Railway and Light Co., 195 N.Y. 102, 108, 88 N.E. 22, 24 (1909).

204. MODEL PENAL CODE § 210.1(1) (Proposed Official Draft, 1962); *see also* Comment, *supra* note 9, at 917.

205. MODEL PENAL CODE § 210.0(1) (Proposed Official Draft, 1962).

206. *Id.*

207. *Id.* § 1.13(8).

208. *Id.* § 2.07 Comment (Tent. Draft No. 4, 1955).

209. Actually, the lack of clarity is more academic than practical for the drafters enumerate several offenses, including involuntary manslaughter which has resulted in criminal prosecution. *Id.*

Case law has been similarly confused on the subject. That a corporation could be liable for homicide was recognized early by a New York court in *People v. Rochester Railway and Light Co.*[210] *Rochester Railway* drew upon the Supreme Court's language in *New York Central & Hudson River R. Co.*[211] to acknowledge that corporate liability in civil proceedings for an agent's conduct is only a step removed from criminal liability.[212] Premised upon the idea of respondent superior, the Court seemed greatly tempted to accept this novel idea that a corporation could commit manslaughter,[213] but it ultimately determined that the decision would be based only on the language of the New York Penal Code.[214] Thus, the focus shifted to the statutory language, which defined homicide as "the killing of one human being by the act, procurement or omission of another."[215] The court reasoned that in that particular context, the word "another" was meant to limit liability for the manslaughter charge to human beings.[216]

Four years later a similar conclusion was reached in *Commonwealth v. Illinois Central Railroad Co.*[217] That case arose out of a rare corporate indictment for involuntary manslaughter following a train accident in which a passenger was killed. The attorney general in Kentucky alleged that the fatal accident stemmed from

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210. 195 N.Y. 102, 88 N.E. 22 (1909).

211. *See* note 180 *supra* and accompanying text.

212. 195 N.Y. at 105, 88 N.E. at 23.

> But a corporation generally speaking is liable in civil proceedings for the conduct of the agents through whom it conducts it business so long as they act within the scope of their authority, real or apparent, *and it is but a step further* in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf.

(emphasis added).

213. Court *dicta* revealed the extent of the temptation. Following a lengthy discussion of authorities allowing for corporations to be subject to a homicide charge, the court made the following comment:

> Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corportion, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in death, and amongst which very probably might be included conduct in its substance similar to that here charged against the respondent.

Id. at 107, 88 N.E. at 24.

214. The Court relied mainly on Penal Code language contained within sections 179, 180 and 193.

215. *Id.*

216. "We think that this final word 'another' naturally and clearly means a second or additional member of the same kind or class. . . ." *Id.*

217. 152 Ky. 320, 153 S.W. 459 (1913).

the conduct of the agents of the railroad who had operated the train at such unreasonable speed as to constitute "gross and willful negligence."[218] In analyzing the validity of the indictment, the Kentucky Supreme Court in *Illinois Central* noted the lack of statutory guidance in Kentucky where manslaughter was not defined. The court applied the common law of Kentucky: "Involuntary manslaughter is the killing by one person of another person in doing some unlawful act not amounting to a felony, nor likely to endanger life, and without an intention to kill; or where one kills another while doing a lawful act in an unlawful manner."[219] While Kentucky statutes had extended the meaning of "person" to include corporations, *Illinois Central* rejected the contention that a corporation was capable of committing homicide.[220] The court's words are instructive: "in a case of homicide, though it be involuntary manslaughter, it would, we think, be giving the word 'person' a tortured meaning to say that it includes a corporation."[221]

In *State v. Lehigh Valley Railroad Co.*,[222] the New Jersey Supreme Court was one of the first courts to reverse the trend and sustain an indictment returned against a corporate defendant for criminal homicide. In its denial of a motion to quash the indictment, the *Lehigh Valley* court recognized that a corporation is ordinarily to be held accountable under the criminal law unless something in the nature of the offense, the penalty provided, or the essential elements would render corporate culpability impossible.[223] Noting that section 109 of the Crimes Act provided for a fine as an alternative to imprisonment, the court concluded that a corporation could be criminally liable for its own negligence under a manslaughter statute.[224]

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218. *Id.* at 321, 153 S.W. at 460.

219. *Id.* at 321, 153 S.W. at 461. The court cited the persuasive authority of Thompson on Corporations acknowledging that corporations can not be indicted for crimes requiring evil intent,

> [b]ut beyond this, there is not good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done.

220. *Id.* at 325, 153 S.W. at 461.

221. *Id.* at 325, 153 S.W. at 461-62.

222. 90 N.J.L. 372, 103 A. 685 (1917).

223. *Id.* The court suggested that a corporation could not be prosecuted for perjury, treason, murder or any crime requiring a "corrupt intent or malus animus." *Id.*

224. *Id.* at 374, 103 A. at 686.

Of greater difficulty was the definitional aspect of the case. In dealing with the traditional definition of homicide as the killing of one human being by another human being, the court observed that numerous definitions of homicide had been promulgated.[225] Focusing upon Blackstone's definition which encompassed acts of suicide, the *Lehigh Valley* court held that by including the example of suicide, the traditional definition of homicide, that being the killing of one human being by another, was "inaccurate."[226] The New Jersey Supreme Court then adopted a more flexible definition of homicide, and by doing so, it circumvented the semantic barriers confronted by *Rochester Railway* and *Illinois Central*.[227]

One of the more recent courts to consider the idea of corporate homicide was a New York court in 1974. The case is *People v. Ebasco Services Inc.*,[228] involving a corporation charged with negligent homicide which resulted when a cofferdam collasped killing two workmen engaged in construction work on a river bottom. In attacking the indictment, Ebasco Services claimed that a corporation could not be indicted for criminally negligent homicide. Placing heavy reliance on *Rochester Railway*, the court found needed precedent for the concept of corporate culpability for homicide.[229]

The court's main concern hinged, however, on a question of legislative intent, making the validity of the indictment in *Ebasco* dependent upon whether the legislature intended the negligent homicide statute to apply to corporations.[230] Again, statutory expression became critical. At issue was New York Penal Law section 125.10 which set forth the vague parameters for homicide. "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."[231] The statute went on to define "person" as a "human being who has been born and is alive," but the definition was qualified as referring only to homicide *victims*.[232] The corporate defendant asserted that the limitation for the word "person" to human beings applied to all uses of the term within the homicide definition, including the party liable for the death. The *Ebasco* court, however,

225. *Id.* at 375, 103 A. at 686.
226. *Id.*
227. *See* notes 210-21 *supra* and accompanying text.
228. 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974).
229. *Id.* at *786*, 354 N.Y.S.2d at 810.
230. *Id.*
231. *Id.*
232. *Id.*

felt this conclusion contradicted the definition on its face; the court found that the limitation applied only when "person" referred to the victim. The *Ebasco* opinion, moreover, indicated that the only purpose of this limitiation was to exclude abortions from the definition of homicide.[233]

Unable to find a definition of "person" in the homicide section, the court employed the broader meaning supplied in the general definitional section of the penal code: " 'Person' means a human being, and where appropriate, a public or private corporation. . . ."[234] The *Ebasco* court concluded that since *Rochester Railway* authorized the legislature to subject corporate entities to criminal liability for homicide, there was no manifest impropriety in applying the broader definition of "person."[235]

In essence, the opinions of *Ebasco* and *Lehigh Valley* reflect judicial bodies that are not willing to frustrate the adaptation of the criminal law to prevailing social realities.[236] The *Lehigh Valley* decision was particularly intriguing in that it refused to recognize artificially created conceptual barriers founded on theoretical objections and statutory construction. This position was articulated in the following critique of *Rochester Railway*:

> The case is a good illustration of the way in which the proper growth and development of the law can be prevented by the hard and fast language of a statute, and of the advantage of our own system by which the way is open for a court to do justice by the proper application of legal principles.[237]

Indeed, all the legal hurdles discussed to this point are conceptual in nature, and while the law often becomes engrossed in the conceptual problems of legal history, such a focus tends to address more the interests of theoretical integrity rather than the interests of practicality.

B. Practical Considerations

Opponents of corporate criminal liability advance several justifications for retaining the limited scope of this liability. One rea-

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233. *Id.* at 787, 354 N.Y.S.2d at 810-11. "As the revisers make clear, the definition contained in section 125.05(1) of the Penal Law was inserted merely to insure that the death of a 'person' would not include the abortional killing of an unborn child." *Id.* at 787, 354 N.Y.S.2d at 811.

234. *Id.*

235. *Id.* This approach actually begs the question. Since "person" includes corporations only "where appropriate" the question is whether the legislature intended the homicide statute to apply to corporations. *Rochester Railway*, which extends liability for homicide to corporations by dicta, does not mean that such liability was in fact created or intended by the statute.

236. *Id.*

237. 90 N.J.L. at 376, 103 A. at 686.

son is the resulting inequity to innocent parties.[238] Shareholders, are one such group, who in the final analysis feel the sting of any verdict against a corporation. Yet they are most likely innocent of personal wrongdoing and incapable of exerting any effective control over actions of the corporate agents.[239]

While innocent shareholders are similarly "stung" by civil damage awards, it is critical to understand that corporate liability is achieved by the concept of vicarious liability which arose in the civil arena. As such, a criminal liability theory that penalizes innocent shareholders is a "substantial departure from the ordinary rule that a principal is not answerable *criminally* for the acts of his agent without the principal's authorization, consent or knowledge."[240]

In addition to the basic unfairness theory was the idea of an "historical quid pro quo."[241] Since the investor already had to deal with the inherent economic risk, the courts did not choose to impose an additional legal risk as well, in fear that capital investments would be curtailed.[242]

In actual practice, however, criminal liability may not be the substantial departure that was originally presumed. If it is true that decisions to market "defective products in flagrant disregard of excessive dangers spring from the intensity of the profit motive rather than from animus toward consumers,"[243] then such behavior could be impliedly consented to and authorized by the shareholder who seeks a high return on his investment. Moreover, any impact upon the shareholder is minimized in at least two ways.[244] First, shareholder losses are limited only to the amount of individual capital investment.[245] Secondly, it is believed by some that corporations often transfer the costs of fines to the consumer in

238. Owen, *Punititive Damages in Products Liability Litigation*, 74 MICH. L. REV. at 1301; *see also*, W. PROSSER, LAW OF TORTS 12 (4th ed. 1971).

239. *See* note 265 *infra* and accompanying text.

240. W. LAFAVE & A. SCOTT JR., CRIMINAL LAW 231 (1972) (emphasis added).

241. C. STONE, *supra* note 80, at 23.

242. *Id.*

243. Owen, *supra* note 140, at 1304.

244. Actually there is a third way but it requires affirmative action on the part of the shareholder. Shareholders can protect themselves from wrongful acts of management by means of derivative actions discussed in N. LATTIN, THE LAW OF CORPORATIONS 410-62 (2d ed. 1971).

245. It is fundamental hornbook law that one of the magnetic features in corporate development has been the concept of limited shareholder liability. H. HENN, LAW OF CORPORATIONS 79 (1961).

the form of higher product prices.[246]

Another concern is the impact of placing criminal liability on unknowing corporate directors, on the theory that the wrongful activity occurred as a result of the principal's failure to exercise due care and attention to corporate affairs.[247] Directors who are primarily concerned about long term planning and company goal setting, may never become aware that the product they recently marketed had failed all its safety tests or for some other reason is dangerously defective. Given the complexity of many corporate bureaucracies, a director cannot possibly know of the day to day details which surround the marketing of the company's products.[248] This expanded liability of directors has stopped many able businessmen from accepting directorships in large companies. "[S]cores of men are politely declining offers they once would have jumped at to serve on prestigious boards. . . . There now is a real shortage of competent men willing and able to serve as directors."[249]

Even within the narrow scope of this article (the conscious disregard for human life resulting from an active effort to suppress the dangers of consumer products and services), indirect implication of directors remains a concern. The Grush-Saunby report, the Sumner Simpson file and the Kaylo documents discussed above established that corporate knowledge extended far, yet only to high level officers. And while the evidence indicates that high level company officials were similarly aware of the perils at Love Canal,[250] in California water tables,[251] and with Firestone's

246. W. LAFAVE & A. SCOTT JR., CRIMINAL LAW at 232.

247. C. STONE, *supra* note 80, at 59; *see also* United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), where the court justified conviction of a corporation for an antitrust violation on grounds that high management officials *most likely* participated in the violation or were at least aware of it.

248. The point is supported by *dicta* in Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 41 Del. Ch. 78 (1963), where the court noted that it is not practicable for the Board to consider in detail specific problems of the various divisions.

249. Gartner, *Many Executives Reject Proffered Board Seats As Perils of Post Mount*, Wall St. J., March 13, 1969 at 1, col. 6; *see also* W. KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS 590 (3rd ed. 1978), which speaks of the problem in the context of indemnity.

250. Residents at Niagra Falls, New York, were forced to evacuate their homes due to the health hazards posed by toxic wastes which seeped out of the Hooker Chemical Company's old dumping ground at Love Canal. Evidence gleaned from Hooker's own company files revealed that the company had known of the dangers of the toxic chemicals and that they were escaping from the ground several years without warning the nearby residents. "Hooker's top management knowingly authorized pollution violations and that the company fudged test results and hid data from authorities." 125 CONG. REC. E5658 (daily ed. Nov. 15, 1979) (remarks of Rep. Miller).

251. For years, Occidental Chemical Co. management was dumping pesticides

500 radial tires,[252] nowhere is there evidence that extends culpability to the directors.

While there is validity to the claim that unknowing directors might become implicated by the stigma of a criminal fine, it is well to realize that an unsuspecting director usually will not suffer personal economic harm in the capacity of a director. Often fines assessed upon a corporation will be paid out of the corporate coffers.[253]

Yet the fact remains that corporations do not commit crimes—people do,[254] and thus it would seem to be more appropriate to proceed directly against the individual perpetrator than the corporation as a whole.[255] While holding the entire corporate body criminally liable for acts of reckless disregard for human life would be a dramatic improvement over present liability schemes, punishment of the particular individual offenders by means of frequently imposed jail sentences, would provide a better mechanism for deterrence. As compared to monetary fines assessed upon the corporation as a whole, even where the fine is correlated

in violation of California law but the company warned no one, nor did it cease its practices. A company memo of June 18, 1958, noted the danger to children who were playing in the area, yet local residents were not warned because "we did not feel we could do it (notify them) without incurring a substantial legal liability for current owners of the property." Moreover, company officials admitted to misleading California water board officials about the polluting activities. *Id.*

252. The ill-fated Firestone 500 steel-belted radial tire was, according to federal authorities, prone to blowouts, tread separation, and other dangerous deformities involving 41 deaths and 65 injuries. *A Radical Radial Recall*, NEWSWEEK, Oct. 30, 1978, at 68.

While Firestone had no prior knowledge of the deformities of its tire, when it did learn of the hazards, no warnings were issued nor was production curtailed. In September 1973, one year after production of the tires commenced, Firestone's director of development, Thomas A. Robertson, sent a blunt assessment of 500 radials to the company's top management. In that memo it was acknowledged, "we are making an inferior quality radial tire which will subject us to belt-edge separation at high mileage." *Forewarnings of Fatal Flaws*, Time, June 25, 1979 at 58. Despite the memo, others like it, and an "epidemic" of auto accidents apparently caused by the tire's failing, Firestone continued to sell nearly 24 million radials at $50 each over the next five years while insisting the tire had no safety defects. Only after being forced to do so by the federal government, did the company issue a recall. *Forewarnings of Fatal Flaws*, Time, June 25, 1979 at 58.

253. Provisions for indemnification by the corporation of the director's liability expenses exist within many, if not most, articles of incorporation, bylaws and modern corporate statutes. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS 431-32, 800-13 (2d ed. 1970).

254. Comment, *Is Corporate Criminal Liability Really Necessary?* 29 SW. L.J. 908, 924 (1975).

255. *Id.* at 924.

to the amount of economic wrongdoing, corporations will eventually pass the costs on to consumers,[256] thereby minimizing any deterrent impact there would have been otherwise. Additionally, concerns for the "innocent" shareholders would be removed.

Of major concern with the individual liability approach is the difficulty in identifying the guilty party.[257] At common law, this was not such a problem given the corporation's limited size and complexity, and hence, courts found no reason to subject the corporation to liability.[258] Today the corporate diversity and complexity[259] has necessitated the expansion of corporate liability to the point where a court has held a corporation guilty of manslaughter.[260] There is even scholarly support for the concept of corporate murder.[261]

Yet even when the particular wrongdoers cannot be ascertained, there remains justification for criminal corporate liability as opposed to individual liability, which stems from the effects of the organization on individual behavior. Consider the following:

> What prevents most of us from committing murder is not a calculation based upon the threat of what the law will do, but mechanisms-guilt, shame, anxiety, conscience, superego-internalized within us through the forces of family, school, church, and peer group. When individuals are placed in an organizational structure, some of the ordinary internalized restraints seem to lose their hold.[262]

The economic pressures which ferment within the corporate structure are sometimes strong enough to cause employees to risk their own liability for the sake of corporate gain.[263] "[I]f the penalty for corporate wrongdoing were punishment of the corporation the punishment would ipso facto fall upon the true logical wrongdoer.[264]

The practical and conceptual considerations involved in criminal corporate liability mandate that expansion of corporate liability must be carefully defined to protect the common goals of

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256. *Id.* at 927.
257. *Id.* at 922.
258. *Id.*
259. C. Stone, *supra* note 80, at 2.
260. *See* notes 190-237 *supra* and accompanying text.
261. Mueller, *supra* note 124, at 21.

> Why should not a corporation be guilty of murder where, for instance, a corporate resolution sends the corporation's workmen to a dangerous place of work without protection, all officers secreting from these workmen the fact that even a brief exposure to the particular work hazards will be fatal, as was the case in the notorious *Hawk's Nest* venture in West Virginia, where wholesale death was attributable to silicosis?

Id. at 23.
262. C. Stone, *supra* note 80, at 35.
263. *Id.*
264. Richberg, *The Imprisonment of Criminal Corporations*, XIX THE GREEN BAG 156 (1907).

public health and safety.[265]

In cases of corporations that consciously and recklessly subject their own customers and employees to death for the purpose of monetary gain, the interests of practicality and public policy warrant the extension of corporate criminal liability. If public policy demands have been deemed great enough to warrant criminal liability being extended to corporate acts of larceny and false pretenses, they are great enough to extend liability to corporate homicide.

VI. PROPOSALS FOR CHANGE

Today, it is not a crime for high-level corporate officers or directors to consciously conceal a workplace hazard or to market an unsafe product.[266] The corporate malefactor who falsifies test results or reports to government agencies, suppresses damage information, and misrepresents the safety value of a product, at time receives little more than a slap on its metaphorical wrist.[267] Those who oppose the concept of corporate homicide argue that there is no need to make this kind of behavior criminal because corporations are capable of regulating their own conduct through internal company mechanisms;[268] but new discoveries of corpo-

265. The only serious harm which it [the corporation] can do, consists in the injury to those really innocent stockholders who having nothing to do with the crime and no real opportunity of preventing it. This injury is regrettable; but . . . the balance of advantage seems to require subordinating their interest to the general interest. However 'innocent' the owners of the corporate enterprise may be, the general interest requires that . . . corporate responsibility can deter them, from conducting the business in criminal ways.

Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 836-37 (1927).

266. Only civil remedies are available, as discussed in text accompanying notes 126-67 *supra*.

267. The testing and marketing conduct of Richardson-Merrell in its endeavors to get the Federal Drug Administration's approval to market the drug MER/29, is a prime example. While the court noted the extreme abhorrence of the behavior, its award of $500,000 can arguably be considered relatively slight, given the size and profitability of the drug company. Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *see also* R. FINE, THE GREAT DRUG DECEPTION: THE SHOCKING STORY OF MER/29 AND THE FOLKS WHO GAVE YOU THALIDOMIDE 25 (1972). On other occasions the wrist slap is more harsh, as was the case of Grimshaw v. Ford Motor Co., No. 197761 (Orange County Superior Court, filed Nov. 22, 1972).

268. This line of reasoning holds to the idea that conduct of individual employees are closely monitored by company supervisors. Since "careless" employees are of greater cost to the company than benefit, it is cost efficient for corporations to regulate their own internal processes. The underlying premise is that corpora-

rate disregard for human life continue to be found, rendering the argument's merit questionable.[269] Recent developments indicate that such conduct is not an isolated nor temporary phenomenon; such developments have evoked congressional concern.[270]

Corrective measures have sprouted as a result, including the Criminal Code Reform Act of 1979[271] which contains some unique transformations, that, if adopted,[272] could have a profound impact upon the business community. Before addressing some of the more unique aspects of the legislation, of initial interest is the bill's treatment of homicide. Unfortunately, the Act does little to illuminate the semantic confusion surrounding the definition of homicide. Section 1603,[273] dealing with negligent homicide defines the offense as follows: "A person is guilty of an offense if he engages in conduct by which he negligently causes the death of another person."[274] While the definition of "person" under the bill's general definition appears to include corporations[275] at least by

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tions will replace the careless employee with another who is not so careless leaving each worker with the choice of exercising an optimum degree of care or lose his job. Liebowitz, *Does the Corporation Discourage Individual Responsibility?*, THE ATTACK ON CORPORATE AMERICA 11 (M. Bruce Johnson ed. 1978).

269. Current controversy centers around A.H. Robins Co. for having marketed a poorly designed intrauterine birth-control device under the trade name of Dalcon Shield. WASHINGTON POST, June 17, 1980 *reprinted in* 126 CONG. REC. E3123 (daily ed. June 20, 1980) (remarks of Rep. Miller). A Colorado court awarded $6.8 million in the case after it found that "evidence showed that once the company was made specifically aware of the numerous dangerous side effects of the device . . . it suppressed the information, made additional false claims, and then resorted to an effort to coverup the facts." *Id.* at E3124.

The other recent discovery again involves the Ford Motor Company, for a design flaw in the automatic transmissions of several cars produced in the early 1970's. The allegations claimed that the cars suddenly, without warning, would slip from neutral to reverse resulting in 98 deaths, 1,710 injuries and as many as 23,000 consumer complaints. As early as June 30, 1971, a Ford memo from Ford's principal engineer for chassis safety systems, D.R. Dixon, is said to have warned company officials of the problem and recommended a new design. Yet the cars continued to be marketed in their unaltered condition up to October 1979, well after Dixon's alleged warnings to Ford officials. *Id.* at E3123-24.

270. *See* notes 271-72, 293 *infra* and accompanying text.

271. For information on the new Federal Criminal Code, *see* Senate bill. S. 1722, 96th Cong., 1st Sess. § 101, 125 CONG. REC. 11090 (1979) and Hearings on S. 1722 and S. 1723 Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 1979 (hereinafter cited as Judiciary Hearings); K. Feinberg, *Proposed Code: Order, Consistency Replace Loopholes, Archaic Laws*, Nat'l L.J., Aug. 4, 1980 at 48, col. 1; N. Feinberg, *Biggest Proposed Changes Affect Sentencing & White-Collar Crime*, Nat'l L.J., Aug. 11, 1980, at 22, col. 1.

272. J. Mann, *Crime Code Reform Mired in Complexity*, L.A. TIMES, Aug. 1, 1980, Part I, at 1, col. 1.

273. Senate bill S 1722, 96th Cong., 1st Sess. § 1603(a), 125 CONG. REC. 11179 (1979) has been passed by the Senate Judiciary Committee and is presently awaiting Senate floor action.

274. S. 1722, 96th Cong., 1st Sess. § 1603(a), 125 CONG. REC. 11179 (1979).

275. *Id.* at § 111: " 'person' means (a) an individual; or (b) except when used to refer to the victim of an offense involving death or bodily injury, an organization."

inference, the crime itself is unlikely to encompass the reckless corporate disregard envisioned by this article. As defined, the crime entails "negligently" induced deaths, which is a culpability standard below the knowing awareness of Ford Motor Company and the asbestos manufacturers.

Of greater intrigue is section 1617 of the Act, which sets forth a new crime of criminal endangerment,[276] in an attempt to reach knowing life-endangering conduct at issue here.

> (a) OFFENSE—A person is guilty of an offense if he engages in conduct that he knows places another person in imminent danger of death or serious bodily injury, and—
>
> (1) his conduct in the circumstances manifests an extreme indifference to human life; or
>
> (2) his conduct in the circumstances manifests an unjustified disregard of human life.[277]

While precisely addressing the conduct under discussion here, its applicability to corporations is questionable. If "persons" is defined as including organizations "except when used to refer to the *victim* of an offense involving death or bodily injury," corporate structures would necessarily be included. Here, the offense must be expressly designated by statute,[278] and imminent danger must arise out of conduct under carefully delineated federal statutes.[279]

As for criminal sanctions, the new Federal Criminal Code provides several, including criminal fines. Section 2201 of the Act increases fines for felonies to one million dollars for organizations

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276. S. 1722, 96th Cong., 1st Sess. § 1617, 125 CONG. REC. 11182 (1979).

277. *Id.* This amended version includes the phrase "imminent danger of death." This expands the scope of the earlier version that was limited to acts which placed another in danger of "imminent death." Under the former version, the "imminent death" standard would have precluded liability for conduct which caused delayed injuries or death due to long latency periods, such as with the asbestos workers.

278. S. 1722, 96th Cong., 1st Sess. § 1617 (c)(1) (1979). The Pinto fiasco was not prohibited by statute, meaning similar future conduct would be outside the jurisdictional parameters of the criminal endangerment offense.

279. *Id.* at § 1617(c)(3).

> (A) section 1853 (Environmental Pollution);
> (B) section 110(d) of the Federal Mine Safety & Health Act of 1977 (30 U.S.C. 820(d));
> (C) section 17(e) of the Occupational Safety & Health Act of 1970 (29 U.S.C. 666(e));
> (D) section 5(a) of the Federal Hazardous Substances Act (15 U.S.C. 1264(a));
> (E) section 351(f) and 353(h) of the Public Health Service Act (42 U.S.C. 262(f) and 263a(h)); or
> (F) section 303 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 333).

and $250,000 for individuals.[280] While increased fine levels would appear to enhance deterrence of corporate irresponsibility, so long as fine levels are not correlated to the amount of wrongful gain, the deterrent value would probably be modest.[281] For penalties to be effective, the cost of engaging in the harmful activity must exceed the benefits which stem from it.[282]

Assume for a moment that Ford Motor Company had not yet marketed the Pinto but was contemplating doing so. Ford had estimated there would be a cost of $137 million to redesign the Pinto to make it as safe as other cars on the market. They also estimated that by delaying the redesign for two years, there would result a fifty million dollar cost in terms of personal injury litigation and damage claims.[283] It takes but a simple calculation to see that Ford could realize a net economic benefit of eighty-seven million dollars if the company does not redesign the Pinto. Faced with a penalty of one million dollars in criminal fines, should they get caught, the costs of engaging in such conduct pales in comparison to the economic benefits that can be acquired by marketing the unsafe product.[284] When good conduct is no longer economically advantageous, even fines as high as one million dollars can result in minimum impact.[285] So long as fine levels are not correlated to the defendant's monetary gain, reckless disregard for human life will continue to be economically appealing.[286]

A second criminal sanction provided by Senate bill 1722 is that

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280. *Id.* at § 2201(b)(1)(A) (individual defendants) and § 2201 (b)(2)(A) (organizational defendants). Section 2202(e) precludes corporate defendants from idemnifying their losses by providing that "the fine shall not be paid, directly or indirectly, out of the assets of the organization."

281. When the fine is not correlated to the amount of economic gain derived from the wrongful act, even as much as $400,000 - 500,000 in fines can have nominal impact. For example, it has been written that the effect of the $437,500 fine levied on General Electric for its part in the electrical equipment price-fixing conspircy, which affected some seven billion dollars of commerce was roughly equivalent to a $3.00 parking fine for a man with an income of $15,000 a year. M. GREEN, THE CLOSED ENTERPRISE SYSTEM 170 (1972).

282. *See* note 286 *infra* and accompanying text.

283. These figures were those included in the Grush-Saunby report discussed in text accompanying note 33 *supra*. The fifty million dollar figure is a mere "rounded off" version of the $49.5 million figure used by Ford.

284. When dealing with major American corporations, present fine levels do not reflect consideration of the enormous figures involved in various business activity. For instance, company sales for the Ford Mustang during the first 27 months alone may have netted $350 million, MOODY'S INVESTOR SERVICE, MOODY'S INDUSTRIALS 10025-26 (1974), while Ford lost an estimated $250 million on the Edsel. Smith, *How a Great Corporation Got Out of Control: The Story of General Dynamics*, FORTUNE, Jan. 1962, at 64.

285. *See* C. STONE, *supra* note 80, at 37-38.

286. One executive candidly testified: "It is cheaper to pay claims than it is to control flourides." Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir. 1963).

of imprisonment of company officials as a means of deterring illigitimate business behavior. By its nature it cannot be imposed upon a corporation, but following a corporate conviction the individual perpetrator could certainly serve the sentence as agent for the corporate wrongdoing.[287]

The deterrent value of imprisonment appears to be especially effective as applied to businessmen. It has been shown that people such as businessmen, who place a high value on their community standing are likely to be particularly sensitive to the stigma associated with a criminal conviction.[288] Where conviction is coupled with imprisonment the stigma becomes even greater. "To the businessman . . . prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail.[289] It has further been found that the "threat of a jail sentence in particular induces employees to forego even substantial corporate profits rather than risk individual criminal liability."[290]

Perhaps the greatest impact of jail sentences would be to introduce a new variable in the corporate cost-benefit analysis equation. No longer would a company be able to predict the number of lawsuits which might arise and the anticipated amount of fines incurred and plug the figure into the cost variable. Imprisonment of businessmen is not precedent setting in any way—it is only a

287. S. 1722, 96th Cong., 2d Sess. § 403, 92 CONG. REC. 11122 (1979). Section 403 provides: "a person is criminally liable for an offense based upon conduct that he engages in or causes in the name of an organization or on behalf of an organization to the same extent as if he engaged in or caused the conduct in his own name or on his own behalf."

288. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 356 (1968).

289. Liman, *The Paper Label Sentences: Critiques*, 86 YALE L.J., 630, 630-31 (1977).

290. Comment, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1245 (1979). The case of the 1961 General Electric price-fixing conspiracy lends credence to the idea of jail sentences deterring business misconduct. Of the seven businessmen who received jail sentences, four were corporate vice-presidents, two division managers, and one was a sales manager. During trial the men testified that price-fixing was "a way of life." Following their convictions and jail sentences, however, their attitudes appeared to dramatically change. Before a Senate Subcommittee, one witness testified: "They would never get me to do it again. I would starve before I would do it again." Another man was asked whether he would resume the price-fixing meetings if told to do so by his superiors replied; "I would leave the company rather than participate in the meetings again." One former vice-president stated that the "taint of a jail sentence" made people "start looking at moral values a little bit." G. Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L. BULL. 377 (1972) *citing* Hearings Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary at 16790.

sanction that is seldom invoked.[291]

The Criminal Code Reform Act of 1979, while meritorious in the sense of labeling acts of reckless endangerment as criminal, has the effect of contributing to the burgeoning federal regulatory morass that *many businessmen feel* is unnecessarily intrusive.[292] If such government intrusion is to be reduced, the goal should be to encourage industrial self-regulation.

A second legislative proposal pending within the halls of Congress appears to make just such an attempt. House bill 7043[293] sponsored by Representative George Miller (D-Cal.) would establish criminal penalties for certain corporate officials who knowingly suppress the hazards of their product from employees or the public.[294] As with the Federal Criminal Code Reform Act, the liability focus of H.R. 7040 is not with corporate criminal liability but rather individual liability, and in that sense appears outside the scope of a corporate homicide discussion. The bill, however, recognizes the severity of this particular form of business conduct and attempts to deter it, not only by attaching a criminal stigma to the act, but by encouraging industrial self-regulation.[295]

As the Pinto and the asbestos episodes suggest, the reckless disregard for human life usually entails active attempts to suppress knowledge of product hazards. This suppression of evidence within a complex organizational structure makes wrongdoing doubly difficult to detect. This bill, however, penalizes the *suppression* of the dangerous defect as opposed to penalizing consequences of the defect itself. Specifically, the legislature requires that once a corporate manager[296] discovers that a potential serious health or safety hazard exists in a product, the manager must notify all affected employees and regulatory agencies who in turn can notify the public.[297] Compliance requires nothing more than a postcard notice.[298] Thus, the corporate agent, under

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291. *See* note 103 *supra* and accompanying text.

292. Mofsky, *Are State Securities Laws (Blue Sky Regulations) Beneficial or Harmful?* THE ATTACK ON CORPORATE AMERICA 127-28 (M. Bruce Johnson ed. 1978).

293. The bill was originally introduced as H.R. 4973 on July 26, 1979 but has since been reintroduced as a clean bill currently pending in the Judiciary Subcommittee on Crime.

294. H.R. 7040, 96th Cong., 2d Sess. (1980).

295. *See* 125 CONG. REC. E5656 (daily ed. Nov. 15, 1979) (remarks of Rep. Miller).

296. "(d) As used in this section

(1) the term 'manager' means a person having -

(A) management authority in or as a business entity; and

(B) significant responsibility for the safety of a product or business practice or for the conduct of research or testing in connection with a product or business practice."

297. CONG. REC. E3123 (daily ed. June 20, 1980) (remarks of Rep. Miller).

298. *Id.*

this bill, has incentive not to suppress such information.

At least within some quarters of the corporate sector, the concept, generally referred to as "whistleblowing,"[299] has evoked "sound damnation."[300] The argument is that a breach of loyalty to the company occurs when a worker "turns in" his companions and subjects his employer to civil and, perhaps, criminal penalties. In the words of former General Motors chairman, James M. Roche, "[S]ome of the enemies of business now encourage an employee to be disloyal to the enterprise. . . . However this is labeled—industrial espionage, whistle-blowing or professional responsibility—it is another tactic for spreading disunity and creating conflict."[301] If self-regulation is to be encouraged, special protections, which are few, need to be afforded the whistleblower. H.R. 7040 provides that protection in section 1822(b).

> Whoever knowingly discriminates against any person in the terms or conditions of employment or in retention in employment or in hiring because of such person's having informed a Federal agency or warned employees of a serious concealed danger associated with a product or business practice shall be fined not more than $10,000 or imprisoned not more than one year, or both.[302]

This type of supervision contains an obvious drawback difficult to circumvent. While the law might prevent whistleblowers from being fired, it cannot prevent the company from making his life uncomfortable. Section 1822(b) attempts to rectify the situation by penalizing discriminatory conduct, but in reality, there are difficult causation problems in trying to prove that subtle forms of harrassment are the result of the whistleblowing.[303]

Though neither piece of legislation, House bill 7040 nor Senate bill 1722 provides for criminal corporate liability for homicide, the attempts are nevertheless commendable in their congressional cognizance of a long neglected mode of reprehensible conduct which arguably necessitates a criminal label. Moreover, if legislative developments follow the historical path of the common law, then these attempts to expand individual criminal liability may be indicative of an emerging trend to hold the corporate body it-

299. *See* C. STONE *supra* note 80, at 213-16.
300. *Id.* at 214.
301. *The Whistle Blowers*, TIME, April 17, 1972, at 85. Concern for disloyalty of whistleblowers, however, appears misplaced since it ignores the fact that they would not be necessary, absent serious concealment of product dangers.
302. H.R. 7040, 96th Cong., 2d Sess. § 1822 (d)(1)(A)(B), 126 CONG. REC. E1774 (daily ed. April 15, 1980) (remarks of Rep. Miller).
303. *See* C. STONE *supra* note 80, at 215.

self criminally liable for acts of reckless disregard for human life in the products field.

VII. EPILOGUE

Our judicial system labels acts that are particularly offensive and repugnant to our sense of right and wrong as criminal. This labeling process has a two-pronged effect. First, it generally invokes more severe penalties as a means of deterring the offensive behavior, and secondly, a criminal charge attaches a stigma upon the convicted person or group which serves as an advertisement to all that this form of behavior will not be tolerated. Today, this stigma has not been placed on corporations who knowingly market life-endangering products, but as both primary and secondary authorities continue to carve out more and more exceptions to criminal corporate liability, it appears the courts are now at the brink of extending the analysis to acts of corporate homicide. However courts are limited to interpreting the statutory language given them by the various state legislatures. Real reform must therefore come from the legislative branches to modify statutory definitions of "person" to encompass the corporate body. The "juristic" person must be held accountable along with its homo sapien counterpart in those cases where there is: (1) a calculated and deliberate failure to correct a life-threatening product without warning those persons subjected to the danger, and (2) an active suppression or attempt to suppress such information of a product's dangerous defect.

Under present law, if an individual makes a conscious decision to act so as to subject others to a substantial certainty of death, it is considered a homicidal act *unless* that person does so while employed by and acting on behalf of a corporation. It is time to judicially and legislatively recognize that the result is the same in either case, whether the actor is a corporate agent or a common street criminal, or whether the murder weapon is a dangerously designed fuel tank or a loaded pistol. The stark realities of "artificial beings" and "legal fictions" is that their impact is far from artificial or fictional.

The spector of the crumpled, ash-blackened 1973 Pinto strewn along the side of U.S. Highway 33, brought forth the ugly side of the profit motive, a motive which at times makes human life little more than another factor in the economic analysis of business. While this will likely continue, the human element needs to be made a more substantial factor than it is presently. If this attempt is to accomplish anything more than a quixotic chasing of windmills, jurists and legislators alike must recognize this reck-

less disregard for human life for what it really is—the crime of corporate homicide.

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