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Corporations Can Kill Too: After Film Recovery, Are Individuals Accountable for Corporate Crimes

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CORPORATIONS CAN KILL TOO: AFTER *FILM RECOVERY*, ARE INDIVIDUALS ACCOUNTABLE FOR CORPORATE CRIMES?

*Practical convenience rather than theoretical considerations have, from the days of the Year Books onward, determined what activities are possible, and what are impossible to a corporation.**

I. INTRODUCTION

On February 10, 1983, Stefan Golab, an employee of Film Recovery Systems, Inc. (FRS), died from cyanide poisoning at the company's silver reclamation plant in Elk Grove Village, Illinois.[1] In a revolutionary series of events,[2] the Cook County prosecutor sought and received the in-

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* 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 52 (1926).

1. Report of Proceedings at 5, People v. Film Recovery Syst., Inc., No. 83-11091 (Cook County Cir. Ct. of Ill. June 14, 1985) consolidated with People v. O'Neil, No. 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985). For the facts and verdict, see *infra* notes 87-116 and accompanying text.

2. People v. Film Recovery Syst., Inc., Nos. 83-11091, 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985), is the first case in which officers and high managerial personnel have been indicted and tried for homicide, although there have been previous attempts to do so. *See, e.g.*, People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981). In *Warner-Lambert*, New York's highest court dismissed an indictment against a corporation and its officers and high managerial personnel for the death of six employees in an explosion in the company's chewing gum manufacturing plant. The court dismissed the indictment because the triggering cause of the explosion was "neither foreseen nor foreseeable." *Id.* at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160. For a discussion of the facts and holding of *Warner-Lambert*, see *infra* notes 63-72 & 132-35 and accompanying text.

In the recently decided case of State v. Autumn Hills Convalescent Nursing Home, No. 85-CR-2526 (Bexar Cty. Ct. of Tex. Apr. 2, 1986) (dismissed because of hung jury), both the business entity, a nursing home, individuals, and five current and former employees, were charged with the murder by neglect of an elderly patient. *See also* L.A. Daily J., Oct. 1, 1985, at 5, col. 3. Individual defendants included the corporation's president, vice-president and other high level personnel. N.Y. Times, Dec. 22, 1985, at 11, col. 1. In People v. Landis, No. 391583 (Los Angeles Mun. Ct. of Cal. filed Dec. 20, 1983), a highly publicized Los Angeles case, a film director and several production crew members were charged with manslaughter as a result of the deaths of three actors on a movie set. *See also* Spiegel, *The Liability of Corporate Officers*, 71 A.B.A. J., Nov. 1985, at 48, 50.

Cases which attempt to fix criminal liability on corporate officers are not limited to state courts. In Orlando, Florida, the owner of four companies which engaged in hazardous waste disposal was indicted in federal court under the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§ 6901-6987 (West 1983 & Supp. 1986), for "knowingly placing employees in danger of death or serious bodily injury," by causing the illegal disposal of chemical wastes and the mislabeling of waste containers with intent to defraud other businesses and state and

dictment of three corporations[3] for manslaughter,[4] and five corporate officers or high managerial personnel for murder.[5] The trial court judge rendered a guilty verdict.[6] A notice of appeal has been filed.[7]

Historically, attempts to indict a corporation for homicide were futile.[8] In the nineteenth century, however, several jurisdictions indicted corporations for their crimes,[9] even violent crimes such as homicide.[10]

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federal agencies. United States v. Greer, No. 85-105-CR-ORL-18 (M.D. Fla. filed Dec. 17, 1985). *See also* N.Y. Times, Dec. 19, 1985, at 14, col. 5.

The guilty verdict in *Film Recovery* has prompted other prosecutors to take action against corporations and individuals for employee deaths. Middleton, *Prosecutors Get Tough On Safety*, Nat'l L.J., Apr. 21, 1986, at 1, col. 1. In Austin, Texas, two companies and their officers are awaiting trial on charges of criminally negligent homicide. The charges resulted from the deaths of three employees in trench cave-ins. State v. Peabody Southwest Inc., No. 259,254 (Travis County Ct. of Tex. filed Nov. 22, 1985); State v. Sabine Consol. Inc., No. 259,257 (Travis County Ct. of Tex. filed Nov. 22, 1985). In Los Angeles, District Attorney Ira K. Reiner instituted a procedure in which an attorney and an investigator are being sent to the scene of every industrial-workplace death. Middleton, *supra*. The first case under the new policy has been filed: In People v. Maggio, No. A780779 (Los Angeles Mun. Ct. Mar. 26, 1986), a corporation and its president are charged with involuntary felony-manslaughter following the suffocation of an employee while drilling a 33-foot deep elevator shaft, with evidence showing that he had no safety harness. Middleton, *supra*, at 8, col. 1 (quoting John Lynch, Los Angeles Deputy District Attorney).

3. The corporations were Film Recovery Systems, Inc., Stefan Golab's employer; Metallic Marketing Systems, Inc., a sister corporation; and B.R. MacKay & Sons, Inc., a private silver refinery and a shareholder in the two other defendant corporations. Siegel, *Murder Case a Corporate Landmark*, L.A. Times, Sept. 15, 1985, pt. I, at 9, col. 2, at 8, col. 2.

4. For the Illinois statute defining voluntary manslaughter, see *infra* note 118. For the Illinois statute defining involuntary manslaughter, see *infra* note 119.

5. For the Illinois statute defining murder, see *infra* note 117. All the defendants were also indicted for 14 counts of reckless conduct. For the Illinois statute defining reckless conduct, see *infra* note 124. For a list of the individual defendants and their relationship with the corporate defendants, see *infra* notes 110-14 and accompanying text.

6. Report of Proceedings at 5, *Film Recovery*.

7. *See infra* note 157.

8. At common law, courts refused to indict corporations for any crimes. Case 935, Anonymous, 88 Eng. Rep. 1518 (1701). No facts are related in the opinion of this early case, but its author stated the common law rule plainly and succinctly: "Corporation not indictable." *Id.* Another early English case held that a corporation could not be indicted for manslaughter. *See* Rex v. Cory Bros. Ltd., 136 L.T.R. 735 (1927) (illogical to hold corporation responsible for personal violence). *See generally Recent Case Notes—Corporations—Criminal Responsibility—Homicide*, 37 YALE L.J. 118, 118-19 (1927).

9. *See, e.g.*, United States v. Union Supply Co., 215 U.S. 50 (1909) (willful breach of duties imposed on oleomargarine dealers); New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909) (violation of Elkins Act); United States v. American Socialist Soc'y, 260 F. 885 (S.D.N.Y. 1919) (violation of Espionage Act), *aff'd*, 266 F. 212 (2d Cir.), *cert. denied*, 254 U.S. 637 (1920); Joplin Mercantile Co. v. United States, 213 F. 926 (8th Cir. 1914) (conspiracy to transport liquor into Indian territory), *aff'd*, 236 U.S. 531 (1915); United States v. Young & Holland Co., 170 F. 110 (C.C.R.I. 1909) (conspiracy to conceal bankrupt's assets); United States v. New York Herald Co., 159 F. 296 (C.C.S.D.N.Y. 1907) (knowingly mailing obscene materials); Chicago, Wilmington & Vermilion Coal Co. v. People, 214 Ill. 421, 73 N.E. 770 (1905) (conspiracy to violate antitrust laws); Telegram Newspaper Co. v. Com-

Generally, these jurisdictions have relied on three theories to attach liability to a corporation for the acts and conduct of its agents. The first holds a corporation, as principal, responsible for the conduct of its agents.[11] The second holds a corporation responsible for the conduct of its policy-making officials, but not for the acts of its lower-level employees.[12] The final theory maintains that a corporation is liable for the acts of its agents and employees only when the corporation's procedures and practices unreasonably fail to prevent corporate criminal violations.[13]

Illinois common law traditionally held that an accomplice could not be punished more severely than his corporate principal.[14] In response to these common law decisions, which gave corporate entities and officers

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monwealth, 172 Mass. 294, 52 N.E. 445 (1899) (contempt of court); State v. White, 96 Mo. App. 34, 69 S.W. 684 (1902) (willfully and knowingly obstructing a road); State v. Lehigh Valley R.R., 90 N.J.L. 372, 103 A. 685 (1917) (manslaughter). At common law, however, a corporation could not be indicted for felonies or misdemeanors. *See, e.g.*, People v. Strong, 363 Ill. 602, 2 N.E.2d 942 (1936) (corporate officers cannot be prosecuted as either principals or accessories because corporation not indictable for embezzlement). *See also infra* notes 40-79 and accompanying text.

10. *See, e.g.*, State v. Lehigh Valley R.R., 90 N.J.L. 372, 103 A. 685 (1917) (corporation can commit manslaughter); People v. Ebasco Servs., Inc., 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974) (court recognized that corporation may commit homicide); *but see* State v. Pacific Powder Co., 226 Or. 502, 360 P.2d 530 (1961) (corporation may not commit involuntary manslaughter as that crime is defined by statute). *See also* Annot., 83 A.L.R.2d 1117 (1962), *superceded by* 45 A.L.R.4th 1021 (1986) (available on LEXIS) and cases cited therein dealing with isolated acts by the corporation. However, Russell Mokhiber, a staff attorney with the Corporate Accountability Research Group, wrote:

> The executives responsible for the recent corporate catastrophes popularly known as Agent Orange, asbestos, and the Dalkon Shield are not in jail and will not go to jail. With the exception of informed victims, few of us describe these cases in the language of crime, even though in each case there is a wealth of evidence that victims were put at unacceptably high levels of risk of severe injury and death and that corporate executives knew of the risks, yet failed to take appropriate preventive action.

Mokhiber, *Greedy Corporations: Criminals by Any Other Name*, L.A. Daily J., Feb. 28, 1986, at 4, col. 3. For a discussion of corporate criminal liability for the asbestos catastrophe, see Comment, *Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions*, 8 PEPPERDINE L. REV. 367, 374-79 (1981).

11. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 840-44 (1927). Edgerton argued that regardless of whether a corporation is a distinct legal entity apart from its shareholders, the corporation acts vicariously through its agents. *Id.*

12. 1 U.S. NAT'L COMM'N ON REFORM OF FED'L CRIM. LAWS, WORKING PAPERS 185 n.67 (1970); Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 42, 48 (1957). Mueller argued that criminal liability should be imposed on corporations only for the acts of individuals who are primary representatives of the entity, having power over the group. *Id.*

13. *See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1243 (1979) (failure by entity to prevent criminal conduct creates corporate blameworthiness) [hereinafter cited as *Developments in the Law*].

14. *See, e.g.*, People v. Duncan, 363 Ill. 495, 2 N.E.2d 705 (1936) (accessory cannot be more severely punished than corporate principal when corporation cannot be indicted); People

immunity from criminal liability, the Illinois legislature enacted section 5-5 of the Illinois Criminal Law and Procedure Code. Section 5-5 makes a corporate agent liable for the corporation's conduct as though the agent were acting as an individual, and also subjects the agent to a potentially harsher penalty than the corporate principal.[15] The revolutionary aspect of *People v. Film Recovery Systems, Inc.*,[16] is that for the first time corporate officers,[17] high managerial personnel and the corporation itself were

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v. Strong, 363 Ill. 602, 2 N.E.2d 942 (1936) (corporate officers cannot be prosecuted as either principals or accessories when corporation not indictable for embezzlement).

15. Section 5-5 reads:

> Accountability for Conduct of Corporation
>
> (a) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf.
>
> (b) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation.

ILL. ANN. STAT. ch. 38, § 5-5 (Smith-Hurd 1972).

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

One of the traditional attractions of incorporation is limited civil liability for shareholders and absolute immunity from criminal liability. *See supra* note 8. Provided that a corporation "jumps through the hoops" of the applicable corporate code, an investor does not risk more than the purchase price of the corporation's stock. As in other areas of law, though, legislative action and the movement of the common law have caused the pendulum to swing back to the center, toward personal civil liability. Society has already dealt with the problem of limited personal civil liability of shareholders using theories of fraud and inadequate capitalization. In cases of fraud, the courts consider the real parties to be responsible. *See* Sell v. United States, 336 F.2d 467 (10th Cir. 1964) (corporate entity disregarded when recognition would bring about fraud); *see also* 1 W. FLETCHER, CYCLOPEDIA OF CORPORATIONS § 44, at 517-19 (perm. ed. 1983). Cases involving fraud are most likely to involve contract creditors because of the requirement of prior dealings inherent to fraud. Inadequately capitalized or "thin" corporate entities may be disregarded. Inadequate capitalization would weigh most heavily in a situation where the corporation is likely to have insufficient assets available to meet its debts. *Id.* § 44.1, at 528. A tort creditor is likely to prevail in an attempt to pierce the corporate veil based on inadequate capitalization because a tort creditor has not chosen its debtor, but is a victim. Perhaps it is time to pierce the corporate veil in a criminal context as well.

Individuals within a corporation are capable of being held criminally liable despite the corporate structure. Corporate agents cannot escape criminal liability because they act in official or representative capacities. *See, e.g.*, People v. Cooper, 200 A.D. 413, 193 N.Y.S. 16 (1922) (agency not an adequate defense for defendant in charge of corporation charged with creating public nuisance). However, individuals within a corporation are capable of escaping criminal liability altogether. See *infra* note 193 for a discussion of why individuals within a corporation often escape liability for their conduct.

17. There have been previous or similar indictments of corporate officers. *See, e.g.*, People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981), discussed *infra* notes 63-72 & 132-35, and accompanying text; *see also generally*, Granite Constr. Co. v. Superior Court, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983) (corporation can be indicted for manslaughter); Commonwealth v. Fortner LP Gas Co., 610 S.W.2d 941 (Ky. Ct. App. 1980) (corporation may be indicted for manslaughter); State v.

indicted and found guilty of the murder of an employee who died as a result of unsafe working conditions.[18]

This Comment explores the evolution of corporate criminal liability and criminal accountability of individuals associated with corporate entities. It also proposes a standard to determine when individuals and corporations that cause injuries should be held liable and proposes a range of penalties tailored to the goal of deterrence.[19]

Because there is no uniform standard for holding corporations and individuals liable for the criminal conduct of a corporation, this Comment also will provide guidelines to aid the appellate court in *Film Recovery* when it decides the Illinois rule for accountability.

II. CORPORATIONS, CRIME AND HOMICIDE: AN HISTORICAL OVERVIEW

A. The Nature of Corporations

There are two schools of thought as to how a corporation should be defined. The first, and older, says that a corporation is essentially a collection of individuals. An early English writer on the law of corporations, Kyd, stated, "[a] corporation . . . is a collection of many individuals, united into one body, . . . under an artificial form . . . ."[20] The second theory, espoused by Chief Justice Marshall, is that incorporation creates a distinct legal entity, and that "[a] corporation is an artifi-

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Six Flags Corp., No. 65,084 (N.J. Super. Ct. 1984) (amusement corporation indicted for aggravated manslaughter for the deaths of eight people killed in fire while trapped in one of park's amusements); Vaughan & Sons, Inc. v. State, 649 S.W.2d 677 (Tex. Ct. App. 1983), *review granted*, (June 15, 1983) (corporation may not be held criminally liable for negligent homicide); Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465, 483-84 (1981) (discussing indictment of Ford Motor Co. on three counts of reckless homicide following death of three teenagers in Ford Pinto accident); Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 NOTRE DAME LAW. 911, 919-24 (1979) (also discussing Ford indictment); Comment, *Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?* 38 SW. L.J. 1275, 1285-86 (1985) (discussing indictment of amusement corporation for aggravated manslaughter for deaths of eight people killed in fire while trapped in one of park's amusements).

18. Report of Proceedings at 5, *Film Recovery Systems. See infra* notes 141-53 and accompanying text.

19. This Comment also addresses the prosecution of a corporation for life-endangering conduct. For a discussion of corporate criminal liability resulting specifically from defective design, see Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1 (1984), where the author argued that corporate criminal liability for defective products does not deter criminal conduct; Note, *supra* note 17, arguing that imposition of corporate criminal liability for defective products will influence decision-making at the highest levels of American industry.

20. 1 S. KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (1793); *accord* Congdon v. Congdon, 160 Minn. 343, 200 N.W. 76 (1924).

cial being, invisible, intangible, and existing only in the contemplation of law."[21] It is easier to attach criminal liability to individuals under the earlier definition since the latter definition implies that a corporation is, itself, incapable of committing a crime.[22]

Because the modern theory of corporations shields corporations and corporate personnel from liability for criminal conduct, the courts need to set forth criteria to allow criminal piercing of the corporate veil. Such criteria should be based on the idea that when a crime is committed, a corporation is not a separate legal entity apart from its constituents.[23] In a criminal context, the court would view the corporation as a collection of individuals engaging in the activities of the corporation, but the individuals themselves would be recognized as committing the corporation's criminal acts.

B. The Common Law View of the Criminal Liability of Corporations

At common law, there were two reasons why a corporation could not commit a crime.[24] First, because a corporation had no mind, it could not form the criminal intent required for all common law crimes.[25] Second, because it had no body, a corporation could not physically commit a criminal act or be imprisoned.[26] Additionally, because the commission of a crime was *ultra vires*[27] activity to a corporation, a criminal act by a corporate agent was considered beyond the authority of a corporation

21. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (state of New Hampshire could not alter college's corporate charter without corporation's consent).

22. *See, e.g.*, State v. First Nat'l Bank of Clark, 2 S.D. 568, 51 N.W. 587 (1892) (dictum); *criticized in* Comment, *"Corporate Entity"—Its Limitations As A Useful Legal Conception*, 36 YALE L.J. 254 (1926) (arguing that formation of corporate entity is only one aspect of incorporation process).

23. *See, e.g.*, Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944) (affirming conviction of owner of corporate nightclub for involuntary manslaughter following death of patrons from fire and improper safety conditions in nightclub). *See supra* note 20 and accompanying text.

24. The rule, stated in New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909), was that because a corporation was not capable of committing a crime it was therefore not capable of being indicted. *See also* H. HENN, LAW OF CORPORATIONS § 184, at 354 (2d ed. 1970).

25. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 33, at 228 (1972); Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393, 396 (1982).

26. A corporation, can however, be executed. Blackstone called the court-ordered dissolution of a corporation "civil death." 1 W. BLACKSTONE, COMMENTARIES *484. *See* Note, *Corporations: Quo warranto: Forfeiture of Franchise on Account of Crime*, 13 CORNELL L.Q. 92 (1927-28). *See also infra* notes 208-13 and accompanying text.

27. *Ultra vires* is defined as "[a]cts beyond the scope of the powers of a corporation, as

and therefore could not be imputed to it.[28]

As corporations gained importance in American business and society,[29] the common law barriers to corporate criminal liability eroded. Corporations have been criminally prosecuted for nonfeasance,[30] regulatory offenses[31] and for the crimes of their corporate agents.[32] Many state statutes impose a fine on a corporation convicted of a crime for which the

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defined by its charter of laws of state of incorporation." BLACK'S LAW DICTIONARY 1365 (5th ed. 1979).

More modern courts disfavor the defense of *ultra vires* when it is interposed by a corporation to avoid an obligation. However, earlier courts acknowledged the doctrine of *ultra vires* as a valid defense. In Central Trans. Co. v. Pullman's Palace Car Co., 139 U.S. 24 (1891), the Supreme Court decided whether a contract between a railroad and an out of state company was *ultra vires* to the railroad's charter of incorporation. The Court rejected the railroad's argument that " 'the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong.' " *Id.* at 55. Reflecting the modern view, the 1905 Court embraced the same argument in Wyman v. Wallace, 201 U.S. 230 (1906), where it held that a bank has the power to borrow money in order to meet its obligations despite possession of assets in excess of its obligations.

The doctrine has been abolished or limited in a number of jurisdictions. *See, e.g.*, ILL. ANN. STATS. ch. 32, ¶ 3.15 (Smith-Hurd 1985) (*ultra vires* defense limited to suits between shareholders and corporation, corporation and officers or directors, and state and corporation); CAL. CORP. CODE § 208(a) (West 1977) (*ultra vires* defense not allowed in suit between corporation and third parties).

28. *See* Music Box, Inc. v. Mills, 10 La. App. 665, 121 So. 196 (1929) (illegal acts of corporate officers could have no legal or binding effect on corporations themselves); Commonwealth v. Punxsutawney St. Passenger Ry. Co., 24 Pa. 25, 26 (1899) (manslaughter "is so far ultra vires as to contravene all accepted rules in the criminal law for making it the act of the principal").

29. The development of complex business organizations, such as corporations, has paralleled the development of modern society. W. SCOTT, ORGANIZATIONS RATIONAL, NATURAL, AND OPEN SYSTEMS 136 (1981). "Corporations have been incredibly productive, forming the backbone of the most successful economic system in history." Metzger, *supra* note 19, at 1 (footnotes omitted).

30. In State v. Morris & Essex R.R., 23 N.J.L. 360, 369-70 (1852), the New Jersey court traced the early history of corporate criminal liability and held that a corporation can be indicted for misfeasance, as well as nonfeasance.

31. *See, e.g.*, New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909). In upholding the conviction of a corporation for a violation of the Elkins Act, 49 U.S.C. §§ app. 41-43 (1982) (*repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b)-(c), 92 Stat. 1466, 1470), the Court stated: "[W]e see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." 212 U.S. at 494-95.

32. *See supra* note 31. "An agent who acts for or with his principal or other agents is liable for resulting crimes as is any other participator in a criminal enterprise." RESTATEMENT (SECOND) OF AGENCY § 359A comment (1958). The intent of a corporate agent may be imputed to the corporation. *See, e.g.*, United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730 (W.D. Va. 1974) (corporation held knowingly and willingly to have committed crime by imputing intent to collective knowledge of its employees). For an early discussion, see Edgerton, *supra* note 11, where the author argued that corporations should be held criminally responsible for their agents' acts to maximize the deterrent effect.

punishment is incarceration.[33] Despite increased corporate criminal liability, the United States Supreme Court has long maintained that "there are some crimes, which in their nature cannot be committed by corporations."[34]

Traditional definitions of homicide have been a barrier to indicting corporations for homicide because they usually refer to the persons committing the crime as human beings, not business entities. Typically, homicide statutes define homicide as the unlawful killing of one *person* by *another* person[35] or the unlawful killing of a human being caused by a human being.[36] While a "person" is often defined to include a corporation,[37] courts have often said that "another" means that the person killed must be of the "same class" as the person doing the killing.[38] Thus, homicide traditionally has been a crime "[the] nature [of which] cannot be committed by corporations."[39]

C. *The Modern Cases*

Since the 1900's, when the number of corporations began to increase, courts have struggled to decide whether a corporation could be criminally liable for homicide. One of the first recorded cases con-

33. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 1005-5-3(c)(5)(B) (Smith-Hurd Supp. 1985), which states in relevant part: "The court may sentence an offender convicted of a business offense or a petty offense or a corporation or corporated association convicted of any offense to: . . . (B) A fine . . . ."

34. *See, e.g.*, New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494 (1909) (affirming conviction of corporation for illegal shipments in interstate commerce in violation of the Elkins Act). The Court did not indicate the reasoning behind this statement, nor did it list which crimes fell into the classification of crimes a corporation could commit, and which crimes a corporation could not commit. *See supra* note 31.

Blackstone stated, "[a] corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities." 1 W. BLACKSTONE, COMMENTARIES *476-77. *See infra* note 82 and accompanying text.

35. *See, e.g.*, N.Y. PENAL LAW §§ 125.10, 125.15 (McKinney 1975).

36. W. CLARK & W. MARSHALL, CRIMES 597 (7th ed. 1967).

37. *See, e.g.*, 1 U.S.C. § 1 (1982); CAL. PENAL CODE § 7 (West 1970).

38. *See, e.g.*, Commonwealth v. Illinois Cent. R.R. Co., 152 Ky. 320, 325, 153 S.W. 459, 461-62 (1913) (corporation may not be indicted for homicide because offense derives its criminality from evil intention), *superseded* by statutes: KY. REV. STAT. §§ 446.010(26), 500.080(12), 502.050, 507.040, 534.050 (1985), Commonwealth v. Fortner LP Gas Co., 610 S.W.2d 941 (Ky. Ct. App. 1980); People v. Rochester Ry. & Light Co., 195 N.Y. 102, 107-08, 88 N.E. 22, 24 (1909) (acts and motives of corporate agents may be imputed to corporation, and it is possible for legislature to enact laws by which corporations could be charged with homicide); State v. Pacific Powder Co., 226 Or. 502, 505, 360 P.2d 530, 532 (1961) (corporation may not commit involuntary manslaughter as defined by statute). For the facts and holding of *Rochester Ry.*, see *infra* notes 45-50 and accompanying text.

39. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494 (1909). *See supra* notes 31 & 34 and accompanying text.

fronting this issue was the 1904 case of *United States v. Van Schaik*.[40] In *Van Schaik*, a corporation was indicted for manslaughter for failing to provide suitable and sufficient life preservers on one of its steamships.[41] About 900 people drowned when the boat caught fire.[42] Ruling on a demurrer to the indictments, the *Van Schaik* court acknowledged that the corporation could be guilty of manslaughter under a statute that provided that "every owner, . . . through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof . . . shall be sentenced to confinement at hard labor . . . ."[43] The court held that although the statute did not provide an appropriate penalty for a corporation, the omission was probably a congressional oversight and not an attempt to immunize corporations from liability.[44] Thus, the absence of an appropriate penalty was rejected as a bar to corporate criminal liability.

Four years later, in *People v. Rochester Railway & Light Co.*,[45] the New York Court of Appeals acknowledged that a corporation could commit homicide but dismissed the homicide indictment against the corporate defendant. The defendant railroad corporation was indicted for second degree manslaughter resulting from the installation of a "certain apparatus in a residence . . . in such a . . . manner that gases escaped and caused the death of an inmate."[46] Analogizing to civil proceedings in which a corporation is liable for the conduct of its agents acting within the scope of corporate authority,[47] the court noted that " 'a corporation acts by its officers and agents, [and] their purposes, motives and intent are just as much those of the corporation as are things done.' "[48] Nevertheless, the court dismissed the indictment, explaining that "[s]ection 179 of the Penal Code define[d] homicide[ ] as 'the killing of one human being by the act, procurement or omission of another.' "[49] The court found that "another" referred only to another human being, so a corporation could not be guilty under the statute.[50]

One of the first state cases to sustain an indictment against a corpo-

40. 134 F. 592 (C.C.S.D.N.Y. 1904).
41. *Id.* at 594.
42. *Id.*
43. *Id.* (citation omitted).
44. *Id.* at 602.
45. 195 N.Y. 102, 88 N.E. 22 (1909).
46. *Id.* The type of "apparatus" installed was not stated by the court.
47. *Id.* at 105, 88 N.E. at 23.
48. *Id.* at 103-04, 88 N.E. at 23 (quoting J. BISHOP, NEW CRIMINAL LAW § 417 (1892)).
49. *Id.* at 107, 88 N.E. at 24 (citation omitted).
50. *Id.* See also Commonwealth v. Illinois Cent. R.R., 152 Ky. 320, 153 S.W. 459 (1913)

ration for criminal homicide was the 1917 case of *State v. Lehigh Valley Railroad Co.*[51] There, the corporate defendant moved to quash an indictment for manslaughter.[52] In denying the motion, the New Jersey Supreme Court recognized the growing trend of attaching criminal liability to corporations:

> We need not consider whether the modification of the common law by our decisions is to be justified by logical argument; it is confessedly a departure at least from the broad language in which the earlier definitions were stated, and a departure made necessary by changed conditions if the criminal law was not to be set at naught in many cases by contriving that the criminal act should be in the law the act of a corporation.[53]

The *Lehigh* court rejected the traditional definition of homicide relied on in *Rochester Railway* and instead adopted the broader definitions promulgated since that case. The court refused to be limited by an arbitrary concept of homicide as the killing of one human being only by another human being.[54] The court criticized *Rochester Railway* stating:

> The case [*Rochester Railway*] 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 legal system by which the way is open for a court to do justice by the proper application of legal principles.[55]

In 1974, a New York trial court received another opportunity to uphold a homicide indictment against a corporation in *People v. Ebasco Services, Inc.*[56] In *Ebasco*, the defendant corporations were indicted for negligent homicide under a statute that stated: " '[a] person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.' "[57] Ebasco Services was retained by Con-

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(corporation is artificial person distinct from victim, who was human being, and therefore corporation held incapable of committing common law manslaughter).

51. 90 N.J.L. 372, 103 A. 685 (1917).

52. *Id.*

53. *Id.* at 373, 103 A. at 685.

54. *Id.* at 374, 103 A. at 686. *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES *189. Suicide met Blackstone's definition of homicide. *Id.* The court found no valid purpose in granting corporations criminal immunity. "We think of no reason why [the corporation] should not be held for the criminal consequences of its negligence or nonfeasance." *Lehigh Valley*, 90 N.J.L. at 374, 103 A. at 686.

55. *Lehigh Valley*, 90 N.J.L. at 376, 103 A. at 686.

56. 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974).

57. *Id.* at 786, 354 N.Y.S.2d at 810 (quoting N.Y. PENAL LAW § 125.10 (McKinney 1965)). Section 125.10 of the Penal Law read as follows: "A person is guilty of criminally

solidated Edison of New York to perform management, construction and engineering functions in connection with a $200 million extension to an electrical generating station on the East River. The project required the construction of a cofferdam, a boxlike structure submerged in water so that water could be pumped out in order for workers to descend to the river bottom. Two workmen were killed when the cofferdam collapsed.[58]

The corporations moved to dismiss the indictments, arguing that "[a] person" could not include a corporate defendant because the criminal code defined " ' "[p]erson," *when referring to the victim of a homicide,* [as] a human being who has been born and is alive.' "[59] The court disagreed and held that the definition of "person" referred only to the victim of homicide, not the perpetrator, and that it was intended only to exclude abortional killings from the statute.[60] The court further held that, under the holding in *Rochester Railway*, the legislature could impose criminal liability on a corporation for homicide.[61] Nevertheless, the court dismissed the indictments for lack of specificity.[62]

Six years later, in *People v. Warner-Lambert Co.*,[63] New York's highest court recognized that corporations may be indicted for homicide, but added a requirement that the triggering cause of death be either foreseen or foreseeable.[64] Because the court did not find that the cause of death was foreseeable, it dismissed the indictment.[65]

Warner-Lambert is a manufacturing corporation that produces Freshen-Up chewing gum, a square-shaped tablet with a jelly-like center. Part of the manufacturing process entailed passing filled ropes of the gum through a bed of magnesium stearate (MS), a dry, dust-like lubricant,

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negligent homicide when, with criminal negligence, he causes the death of another person." N.Y. PENAL LAW § 125.10 (McKinney 1965). New York Penal Law § 125.05[1] reads as follows: " 'Person' when referring to the victim of a homicide, means a human being who has been born and is alive." *Id.*

58. 77 Misc. 2d at 785, 354 N.Y.S.2d at 809.

59. *Id.*, 354 N.Y.S.2d at 810 (emphasis added by court) (quoting N.Y. PENAL LAW § 125.05 (McKinney 1965)).

60. *Id.* at 786-87, 354 N.Y.S.2d at 810-11.

61. *Id.* at 787, 354 N.Y.S.2d at 811 (citing *Rochester Ry.*, 195 N.Y. at 108, 88 N.E. at 24).

62. *Id.* at 788, 354 N.Y.S.2d at 812. The court said the indictment contained "sparce factual allegations" supplemented "merely by the statutory definition of criminally negligent homicide." *Id.* "Sufficient particularity is especially necessary in this case in view of the multiplicity of defendants, the length of time over which these crimes were allegedly committed and the highly technical nature of the evidence involved." *Id.*

63. 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

64. *Id.* at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160. For additional discussion of *Warner-Lambert*, see *infra* notes 132-35 and accompanying text.

65. 51 N.Y.2d at 307, 414 N.E.2d at 666, 434 N.Y.S.2d at 165.

then into a die-cut punch (Uniplast) sprayed with liquid nitrogen (a coolant), where the gum was formed into the square tablets.[66] This process dispersed MS into the air, which accumulated both at the bases of the Uniplast machines and on the plant's overhead pipes. MS is normally an inert, organic compound that in bulk, powdered form, will only burn or smolder. When suspended in the air, MS is potentially explosive.[67]

The accident occurred after Warner-Lambert employees cleaned the MS off of the machines and the overhead pipes causing "rising dust and a 'heavy fog' or 'mist' all around."[68] Apparently, a spark caused an explosion around one of the Uniplast machines, which set off a second explosion.[69] Six workers died and more than fifty workers were injured.[70]

Warner-Lambert and the individual defendants moved to dismiss the indictments.[71] In affirming the trial court's decision to grant defendants' motion, New York's highest court held that the defendants could not be liable because they could not have foreseen the cause of the explosion:

> Although [the defendants] were aware that there was a broad, undifferentiated risk of an explosion in consequence of ambient magnesium stearate dust arising from the procedures employed in [Warner-Lambert's] manufacturing operations, the corporate and individual defendants may nonetheless not be criminally liable, on the theory of either reckless or negligent conduct, for the deaths of employees occasioned when such an explosion occurred where the triggering cause thereof was neither foreseen nor foreseeable.[72]

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66. *Id.* at 298-99, 414 N.E.2d at 661-62, 434 N.Y.S.2d at 160-61.

67. *Id.* at 299-300, 414 N.E.2d at 662, 434 N.Y.S.2d at 161.

68. *Id.* at 301, 414 N.E.2d at 662, 434 N.Y.S.2d at 162. Prior to the explosions, the Freshen-Up plant was operating 24 hours per day, six days a week and producing two million packages of gum a day. Note, *Corporate Criminal Liability for Employee-endangering Activities*, 18 COLUM. J.L. & SOC. PROBS. 39, 42 (1985) (citing Brief for Respondent at 6, *Warner-Lambert*). During this time, the employees were exposed to the potentially dangerous MS while performing their duties in the plant. There was also proof that nine months earlier Warner-Lambert's insurance carrier had advised the company that the ambient MS dust was hazardous because an explosion was possible, and recommended that Warner-Lambert install exhaust vents and modify its electrical equipment. Instead Warner-Lambert's management opted to change the manufacturing process to eliminate the dust altogether. By the time the explosion occurred, only one of the six Uniplast machines had been modified. *Warner-Lambert*, 51 N.Y.2d at 301, 414 N.E.2d at 662-63, 434 N.Y.S.2d at 161-62.

69. *Warner-Lambert*, 51 N.Y.2d at 301, 414 N.E.2d at 662, 434 N.Y.S.2d at 161.

70. *Id.* at 300, 414 N.E.2d at 662, 434 N.Y.S.2d at 161.

71. *Id.* at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

72. *Id.* The opinion has been criticized. *See* Note, *Criminal Liability of Corporate Managers for Deaths of their Employees*: People v. Warner-Lambert Co., 46 ALB. L. REV. 655, 659 (1982) (*Warner-Lambert* "may practically preclude the application of the New York homicide

Other jurisdictions differ. In California, corporations can be prosecuted for manslaughter.[73] In a 1983 case, *Granite Construction Co. v. Superior Court*,[74] the court of appeal held that corporations are proper defendants in any criminal case because section 7 of the Penal Code includes a corporation in its definition of a "person."[75] In *Granite*, seven construction workers were killed in an accident at a power plant. A grand jury indicted the construction corporation for manslaughter. The defendant corporation alleged that it was exempt from such prosecution.[76] The court denied the petition, finding support in California's broad definition of manslaughter.[77] It explained that "[u]nlike other states' definitions, [Penal Code section 192] does not limit itself to natural persons by defining the act of manslaughter as the killing 'of a human being . . . by another.' "[78] The *Granite* court also recognized that courts may impute intent and either criminal negligence or recklessness to corporations in order to establish criminal responsibility.[79]

Although in recent years corporations have been indicted for homicide,[80] attempts to include their corporate officers and high managerial

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statutes to corporate agents."). *See also* Note, *supra* note 68, at 45 ("[T]he construction of a causation barrier in *Warner-Lambert* highlights a judicial and legislative reluctance to decide whether homicide laws are broad enough to cover deaths resulting from employee-endangering corporate activities."). *See also infra* note 184 and accompanying text.

73. *See* Granite Constr. Co. v. Superior Court, 149 Cal. App. 3d 465, 466, 197 Cal. Rptr. 3, 4 (1983). For a full discussion of *Granite*, see *infra* notes 74-79 and accompanying text.

74. 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983).

75. *Id.* at 467, 197 Cal. Rptr. at 4 (citing CAL. PENAL CODE § 7 (West 1970)).

76. *Id.* at 466-67, 197 Cal. Rptr. at 4-5.

77. California defines manslaughter by statute:

> Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) Voluntary—upon a sudden quarrel or heat of passion. (b) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle. (c) Vehicular—. . . .

CAL. PENAL CODE § 192 (West 1970 & Supp. 1986). California defines words and phrases in § 7 of the Penal Code, which states in relevant part: "the word 'person' includes a corporation as well as a natural person . . . ." CAL. PENAL CODE § 7 (West 1970).

78. 149 Cal. App. 3d at 468, 197 Cal. Rptr. at 5 (quoting CAL. PENAL CODE § 192 (West 1970 & Supp. 1986)). The court also rejected the defense's argument that there are legislative or policy reasons for excluding corporations from prosecution for manslaughter. *Id.* at 469, 197 Cal. Rptr. at 6. Finally, the *Granite* court stated that CAL. PENAL CODE § 672 (West 1970 & Supp. 1986), providing that a fine of up to $5000 may be imposed for felonies in addition to the prescribed imprisonment, would apply if the corporation were convicted. *Id.*

79. 149 Cal. App. 3d at 472, 197 Cal. Rptr. at 8. The court gave a brief history of corporate criminal liability for homicide and concluded that while in some other states a corporation may not be liable for certain crimes, "California law does impute intent to corporations." *Id.*

80. *See supra* notes 40-79 and accompanying text.

personnel in the indictment have failed.[81] At common law, corporate officers were held liable for acts performed in the name of a corporation,[82] but more recently courts have not held corporate officers liable when the officer acted as an accomplice[83] or when the corporation committed a crime by omission.[84] The novel aspect of *People v. Film Recovery Systems, Inc.*[85] is that the corporate officers and high managerial personnel were not only indicted, but were also found guilty.

81. *See* People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981) *supra* notes 63-72 and accompanying text. It has been suggested that but for the inclusion of four individual defendants, the New York Court of Appeals might not have dismissed the indictment in *Warner-Lambert*. See Note, *supra* note 68, at 44 n.42, where the author argued that the law has failed to confront the problem of employee-endangering corporate activities. The individual defendants in *Warner-Lambert* were the company's vice president in charge of manufacturing, director of corporate safety and security, plant manager and plant engineer. People v. Warner-Lambert Co., 69 A.D.2d 265, 267, 417 N.Y.S.2d 997, 999 (1979), *rev'd*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

82. "A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may in their distinct individual capacities." 1 W. BLACKSTONE, COMMENTARIES *476-77 (citing Case 935, Anonymous, 88 Eng. Rep. 1518 (1701)). The rule is attributable to dictum by Chief Justice Holt in an anonymous case. No facts accompany that opinion, which is reported verbatim:

> Case 935. Anonymous. Corporation is not indictable.
> Note: per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are.

88 Eng. Rep. 1518 (1701).

83. *See, e.g.*, People v. Strong, 363 Ill. 602, 2 N.E.2d 942 (1936); People v. Duncan, 363 Ill. 495, 2 N.E.2d 705 (1936). In 1961, Illinois enacted § 5-5 of the Criminal Law and Procedure Code to legislatively overrule *Duncan* and *Strong*. ILL. ANN. STAT. ch. 38, § 5-5 (Smith-Hurd 1972) (Committee Comments-1961). For text of § 5-5, see *supra* note 15.

84. Standard Oil Co. of Texas v. United States, 307 F.2d 120, 127 (5th Cir. 1962) ("[T]he corporation may be criminally bound by the acts of subordinate, even menial, employees."). Corporations also have been held accountable for criminal acts of low-level employees. *See, e.g.*, Steere Truck Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963) (knowledge of employees and agents of corporation, truck drivers, attributable to corporation); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958) (trucking corporation criminally liable for terminal log clerk's failing to discover or refraining to report excess driving time violations to superiors); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir.) (willful act of salesman attributable to corporation so as to make it liable for criminal prosecution for violation of maximum price regulations), *cert. denied*, 328 U.S. 869 (1946); United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814 (D. Md. 1957) (knowledge of notice of corporation's agent, a truck driver, acting within the scope of authority is notice to corporation); The President Coolidge. Dollar S.S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939) (shipping corporation may be criminally liable for crew member emptying garbage into navigable water).

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

III. *PEOPLE V. FILM RECOVERY SYSTEMS, INC.*

A. Facts[86]

In *People v. Film Recovery Systems, Inc.*,[87] Film Recovery Systems, Inc, (FRS), one of the corporate defendants, operated a plant outside of Chicago in Elk Grove Village, Illinois. FRS reclaimed silver from used photographic film through a standard process called cyanide-leaching.[88] Steven J. O'Neil founded FRS in 1979.[89] O'Neil and B.R. MacKay & Sons Inc. of Salt Lake City were the sole shareholders, and O'Neil was president of both FRS and a sister corporation, Metallic Marketing Systems, Inc. (MMS).[90]

In 1981, O'Neil hired defendant Charles Kirschbaum as plant manager. Kirschbaum had spent the previous two years working for another silver reclamation company that had used the same cyanide-leaching process as FRS.[91] By this time, FRS had acquired a total of 120 tanks and vats,[92] and was grossing between $13 and $20 million per year.[93]

In proportion to its growing number of vats and tanks, FRS increased its work force from six to forty employees.[94] FRS mainly employed illegal aliens from Mexico or Poland who spoke little or no English, earning about four dollars per hour. In order to communicate with their employees, O'Neil and Kirschbaum relied on defendant Daniel Rodriguez, an illegal alien who spoke English and Spanish and was employed as foreman and assistant plant manager at a wage of about six

86. Because of the unavailability of court documents, the following facts are primarily derived from a *Los Angeles Times* newspaper article which was based on the trial transcript, other court documents and interviews with the prosecutors and defense lawyers. Siegel, *supra* note 3, at 8, col. 1.

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

88. Siegel, *supra* note 3, at 8, col. 3. FRS employees dipped film chips into huge vats containing a solution of sodium cyanide and water. Spiegel, *supra* note 2, at 48. The silver on the film reacted with the solution, producing silver cyanide, which was then pumped into smaller electroplating tanks. Inside those tanks, an electric current drew the silver onto metal plates. The employees would then remove the plates from the tanks and scrape the silver off of them. Finally, the company shipped the silver flakes to a refinery where they were made into silver bullion. Siegel, *supra*, at 8, col. 2.

Toward the end of the 1970's, the price of silver rose from $3.40 per troy ounce to $50 per ounce. By early 1980, FRS's plant had grown from eight tanks and vats to 80, a size that O'Neil, then in his mid-twenties, could not manage on his own. *Id.* at 8, col. 2.

89. *Id.* at 8, col. 2.

90. *Id. See also*, Spiegel, *supra* note 2, at 48.

91. Siegel, *supra* note 3, at 8, col. 3.

92. *Id.* at 8, col. 4.

93. Spiegel, *supra* note 2, at 48.

94. Siegel, *supra* note 3, at 8, col. 3.

dollars per hour.[95]

FRS used Cyanogran brand sodium cyanide to reclaim silver.[96] Every container of Cyanogran carried a warning label that read, in English: "Poison. Danger! May be fatal if inhaled, swallowed or absorbed through skin. Contact with acid or weak alkalies liberates poisonous gas. . . . Do not breathe dust or gas. Do not get in eyes, on skin, on clothing."[97] FRS dissolved the Cyanogran in water, a weak alkali.[98]

Although Kirschbaum's previous employer had installed hooded vents over each vat to remove the potentially poisonous gas from its plant, FRS did not install hooded vents, but instead used a ceiling exhaust system. In July, 1981, a visiting insurance inspector noted that the ceiling exhaust system did not remove any contaminated air, but merely moved that air around the plant.[99] Additionally, the equipment used to test the quality of air in the plant had an error factor of plus or minus twenty-five per cent.[100]

FRS employees wore improper respirators: face masks designed to prevent employees from inhaling particulates.[101] The risk of working with the sodium-cyanide solution, however, was inhaling poisonous gas, not small particles; the latter being the risk of a worker using a grinder or sander. An additional danger was posed by cyanide-contaminated water from open vats which splashed on the plant's floor.[102] During the insurance inspector's 1981 visit, he noted that FRS had outgrown its present facility. In 1982, FRS added space by leasing the building next door. However, only front-office personnel moved to the new building, while twenty more tanks and vats were added to the existing plant.[103]

In August, 1982, a representative of the first aid company that supplied and serviced FRS' first aid kits visited the plant. While there, she observed an overpowering odor that smelled like ammonia and that burned her eyes, throat and nose.[104] She had difficulty breathing and

95. *Id.*

96. *Id.* at 8, col. 4. Cyanogran is manufactured by E.I. du Pont de Nemours & Co., Inc. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 8, col. 5. This means that the actual air quality in the plant could be as much as 25% above to 25% below that registered on the testing equipment.

101. *Id.* at 9, col. 1.

102. *Id.* at 8, col. 5. FRS' carelessness in letting the potentially poisonous cyanide and water solution spill on the floor increased the potential for employees to be exposed to the poisonous substance.

103. *Id.*

104. *Id.* The representative's symptoms were consistent with those normally associated with

became nauseated. She saw that the sodium-cyanide vats were overflowing and the floor was covered with crystal-like chips. The first aid kits were also covered with similar crystal chips.[105]

In December, 1982, Stefan Golab, a Polish immigrant, began working at FRS for $4.50 an hour, pumping and stirring the sodium-cyanide solution inside the vats. Shortly thereafter, he began to come home from work with headaches and nausea. He also vomited. On February 4, 1983, after he became sick at work, Golab brought an interpreter to the FRS plant to ask Kirschbaum to transfer him away from the sodium-cyanide vats. Kirschbaum said that he would try to help, but the next work day, Golab was again assigned to stir and pump at the vats.[106]

Four work days later, on February 10, 1983, Golab was still working at the vats. His fellow workers noticed that Golab's face was pale white and he had difficulty walking. When the workers noticed foam forming at Golab's mouth, they carried him outdoors to the parking lot. Paramedics were called to the scene. When they arrived Golab was not breathing and had no pulse; his complexion was blue-gray. The paramedics unsuccessfully attempted cardiopulmonary resuscitation. Although the paramedics knew that cyanide was used in the plant, they did not administer amyl nitrite, the antidote for cyanide inhalation, because Golab's coworkers did not confirm that he had been exposed to cyanide.[107] Golab was never revived.[108]

In *People v. O'Neil*,[109] a Cook County grand jury indicted the following individuals for murder: Steven J. O'Neil,[110] Michael T. MacKay,[111] Gerald R. Pett,[112] Charles Kirschbaum[113] and Daniel

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cyanide exposure. Exposure to cyanide may cause lassitude, headaches, insomnia, vertigo, palpitations, skin eruptions and eye and ear disturbances. Contact with the skin may cause rashes and itching. 7 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 579-80 (P. Canter ed. 1962).

105. Siegel, *supra* note 3, at 8, col. 5.

106. *Id.*

107. *Id.* at 8, col. 6. While the paramedics' conduct may have been negligent because they did not administer the antidote for cyanide poisoning even though they knew cyanide was used at FRS, negligence by a health care provider does not relieve an accused from a charge of murder. *See* People v. Dixon, 78 Ill. App. 3d 73, 397 N.E.2d 45 (1979) (where person inflicts wound calculated to destroy life, there is no defense that victim's death was contributed to by, or immediately resulted from, unskilled or improper treatment for injury by attending physicians and surgeons); People v. Dilworth, 274 Cal. App. 2d 27, 78 Cal. Rptr. 817 (1969) (surgeon's negligence, which caused death, does not absolve defendant of murder if accused's act was proximate cause of operation), *cert. denied*, 397 U.S. 1001 (1970).

108. Siegel, *supra* note 3, at 8, col. 6.

109. People v. O'Neil, No. 84-5064 (Cook County Cir. Ct. of Ill. indictment filed Apr. 1984).

110. Indictment at 1, *O'Neil.*

111. *Id.* MacKay owned B.R. MacKay & Sons, Inc., which was a shareholder of the two

Rodriguez.[114] The grand jury also indicted FRS, MMS, and B.R. MacKay & Sons, Inc. for involuntary manslaughter.[115] All defendants were also indicted on fourteen counts of reckless conduct.[116]

B. The Trial

In Illinois, there are no degrees of murder: homicide is either murder,[117] voluntary manslaughter,[118] involuntary manslaughter[119] or reckless homicide.[120]

The defendant corporations in *People v. Film Recovery Systems, Inc.*[121] were charged with involuntary manslaughter.[122] In order to obtain a guilty verdict against the corporations, the prosecution had to

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other corporate defendants and also operated a private silver refinery. Siegel, *supra* note 3, at 9, col. 2, at 8, col. 2. MacKay's extradition from Utah was blocked by then governor Scott M. Matheson. *Id.* at 9, col. 2.

112. Indictment at 1, *O'Neil.* Pett, a vice president of FRS, was dismissed from the case after the presentation of the prosecution's case. Siegel, *supra* note 3, at 9, col. 2.

113. Indictment at 1, *O'Neil.*

114. *Id.*

115. Indictment at 1, *Film Recovery.* FRS operated the plant and employed the victim, MMS was a sister corporation of FRS, and B.R. MacKay & Sons was a shareholder in both corporations. Spiegel, *supra* note 2, at 48.

116. Indictment at 1, *O'Neil*; Indictment at 1, *Film Recovery.*

117. Illinois defines murder as:

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

Ill. Ann. Stat. ch. 38, § 9-1 (Smith-Hurd 1979).

118. Illinois defines voluntary manslaughter as:

> (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but then negligently or accidentally causes the death of the individual killed.

ILL. ANN. STAT. ch. 38, § 9-2 (Smith-Hurd 1979 & Supp. 1985).

119. Illinois defines involuntary manslaughter as: "A person who intentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly . . . ." ILL. ANN. STAT. ch. 38, § 9-3 (Smith-Hurd 1979).

120. Illinois defines reckless homicide as being conduct otherwise qualifying as involuntary manslaughter, *see supra* note 15, except that "the cause of death consists of the driving of a motor vehicle, in which case the person commits reckless homicide." ILL. ANN. STAT. ch. 38, § 9-3 (Smith-Hurd 1979).

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

122. Indictment at 1, *Film Recovery.* For the Illinois definition of involuntary manslaughter, see *supra* note 119.

show that the corporations[123] acted without lawful justification, on the theory that their employees' and agents' actions were imputed to the corporations themselves. The prosecution also had to show that the corporations' acts caused Golab's death, the corporations' acts were likely to cause death or great bodily harm to some individual and the corporations' acts were performed recklessly.[124]

As to the individual murder defendants,[125] the prosecution had to prove that the individuals acted without lawful justification, with criminal intent[126] and that their acts created a strong probability of death or great bodily harm to the victim or another individual.

The prosecution relied on section 5-4 of the Illinois Criminal Code to overcome the traditional common law barriers that immunized a corporation from prosecution for homicide. The statute allows a corporation to be indicted for crimes so long as there is a legislative purpose to impose liability on a corporation.[127] The statute also imputes the con-

123. The actions of an employee or agent may be imputed to a corporation to hold the corporation criminally liable; *see supra* note 84 and accompanying text.

124. Section 4-6 of the Illinois Criminal Law and Procedure Code defines reckless conduct as follows:

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

ILL. ANN. STAT. ch. 38, § 4-6 (Smith-Hurd 1984). *See* People v. Guthrie, 123 Ill. App. 2d 407, 258 N.E.2d 802 (1970) (tying up and leaving victim in cornfield on deserted road late at night, resulting in victim's death, in order to perpetrate insurance fraud, may be reckless conduct); People v. Cunningham, 123 Ill. App. 2d 190, 260 N.E.2d 10 (1970) (hitting victim across back with pool cue may be reckless conduct).

125. *See supra* note 117 and accompanying text.

126. Murder and involuntary manslaughter are distinguished only by their requisite mental state. In People v. Cowen, 68 Ill. App. 3d 437, 386 N.E.2d 435 (1979), the defendant was found guilty of murder for killing a 17 year old who was attempting to break into the defendant's car. *Id.* at 441, 386 N.E.2d at 438. Defendant appealed seeking to reduce the conviction to a lesser crime than murder. In reaching its decision, the court stated: "[m]urder requires the intent to kill or do great bodily harm or knowledge that the acts create a strong probability of such result, while involuntary manslaughter requires only reckless conduct which causes death." *Id.* (citations omitted). The court affirmed the murder conviction. *Id.*

In People v. Bembroy, 4 Ill. App. 3d 522, 281 N.E.2d 389 (1972), the court found the elements of the offense of involuntary manslaughter

> may be distinguished from those of the offense of murder only in terms of the mental state required. While a conviction for murder requires an intent to kill or do great bodily harm, or knowledge that his acts will create a strong probability of such a result, a conviction for involuntary manslaughter requires only reckless conduct which causes death.

Id. at 525, 281 N.E.2d at 392 (citation omitted).

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

> (a) A corporation may be prosecuted for the commission of an offense if, but only if:

duct of a corporation's agent to the corporation;[128] another statute defines voluntary actions as both acts of commission and omission.[129]

More importantly, the Illinois law provides that conduct of an individual on behalf of a corporation subjects that *person* to criminal liability as though the conduct was performed on the individual's own behalf. Additionally, the individual may be incarcerated or punished more severely than the corporation.[130] The prosecution was thus able to rely on Illinois statutes to prosecute the officers and employees of the defendant corporations.

Following the prosecution's case, the defendants moved to dismiss, claiming that as a matter of law no case had been made against them.[131] The defendants based their claim on the rule of causation enunciated in *People v. Warner-Lambert Co.*,[132] that knowledge of the triggering cause of death be "neither foreseen nor foreseeable."[133] In *Warner-Lambert*, a chewing gum manufacturer and several of its officers and employees were indicted for second-degree manslaughter and criminally negligent homicide.[134] The indictments were subsequently dismissed.[135] Similarly, the defendants in *Film Recovery* claimed that the cause of Stefan Golab's

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(1) The offense is . . . defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation; and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, . . .; or
(2) The commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation.

. . . .

(c) For the purpose of this Section:
(1) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.
(2) "High managerial agent" means any officer of the corporation, or any other agent who had a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.

Id.

128. *Id.* § 5-4(a); *see supra* note 127 for text.

129. The Illinois statute defined a voluntary act as follows: "a voluntary act . . . includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing." ILL. ANN. STAT. ch. 38, § 4-1 (Smith-Hurd 1972).

130. *See supra* note 15.

131. Siegel, *Trial Makes History, Stirs Controversy*, L.A. Times, Sept. 16, 1985, pt. I, at 8, col. 1. The defendants opted for a court trial before Judge Ronald J.P. Banks instead of a jury trial. *Id.*

132. 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981); *see supra* notes 63-72 and accompanying text.

133. Siegel, *supra* note 131, at 8, col. 1 (citing *Warner-Lambert*, 51 N.Y.2d at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160).

134. *Warner-Lambert*, 51 N.Y.2d at 299, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

135. *Id.* at 307, 414 N.E.2d at 666, 434 N.Y.S.2d at 165.

death was also not "foreseen nor foreseeable." After hearing arguments on the defendants' motion to dismiss, Judge Banks deliberated for ten minutes, then dismissed defendant Pett and ordered the trial to continue.[136]

The remaining defendants then presented their case. Each individual defendant pointed his finger at his superiors until finally it appeared that FRS was an entity operating without human control. Defendant Rodriguez, the plant foreman, claimed that he had no knowledge that breathing cyanide was dangerous, and that he was not a foreman, but only gave orders because the plant manager, Kirschbaum, told him to. Kirschbaum claimed that he did not change the method used to reclaim silver; that everything was done as it was before he worked at FRS. He also claimed that he did not know water was a weak alkali and to his knowledge the purpose of testing the pH in the tanks was to protect the tanks, not to prevent the creation of poisonous gas. Even FRS president O'Neil denied any responsibility, claiming he was merely an employee of the corporation.[137] The defense attacked the credibility of the prosecution's witnesses,[138] presented conflicting medical testimony,[139] and either tried to avoid responsibility for running the corporation or tried to shift the responsibility to another individual.[140]

C. *The Decision*

In *People v. Film Recovery Systems, Inc.*,[141] Judge Banks delivered a guilty verdict from the bench.[142] He made the following relevant findings of fact:[143]

136. Siegel, *supra* note 131, at 8, col. 1.

137. *Id.* at 8, col. 2. O'Neil said that B.R. MacKay & Sons had taken over the assets and rights of the plant in payment for $800,000 of debt owed by MMS to B.R. MacKay & Sons. *Id.* at 8, col. 4.

138. *Id.* at 8, col. 2. The defense pointed out that many of the prosecution's witnesses had pending civil suits against the defendants and therefore would benefit from a conviction. The defense also put on contradictory evidence regarding safety equipment in the plant. *Id.* Additionally, the defense argued that FRS' plant was similar to dozens of other silver recovery plants and that workers regularly sent relatives to FRS for jobs. *Id.* at 8, col. 3.

139. *Id.* The defense medical experts and toxicologists suggested that Golab died of a heart attack, not cyanide poisoning. *Id.*

140. *Id.* at 8, col. 3; *see supra* text accompanying note 137. At one point in the trial, the prosecution asked an FRS bookkeeper, "Was anyone running the company on February 10, 1983?" The bookkeeper replied, "I don't know who was actually running the company, no." The prosecution suggested, "The company was just running itself?," to which the witness replied, "Yes." *Id.* at 8, col. 5.

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

142. Report of Proceedings at 11, *Film Recovery*.

143. Presumably, Judge Banks intended to protect his decision by preparing a substantial record for appeal.

1) Stefan Golab died of acute cyanide toxicity.[144]

2) The "conditions under which the workers in the plant performed their duties [were] totally unsafe."[145]

3) The "defendants were totally knowledgeable in the dangers which are associated with the use of cyanide."[146]

4) Steven J. O'Neil, was "in control and exercised control over both Film Recovery Systems and Metallic Marketing Systems before and after the death of Stefan Golab, which was on February 10, 1983."[147]

5) Conditions at the plant which caused sickness and injury to workers constituted reckless conduct.[148]

6) Golab was murdered.[149]

7) Defendants created the conditions in the plant by omission and commission.[150]

8) Defendants were "either officers or high managerial personnel" of both FRS and MMS.[151]

9) The statement, "a corporation cannot be convicted of a crime because [the corporation] has no mind and it cannot therefore have a mental state in order to infer knowledge on a corporation" is totally erroneous.[152]

Despite the defendants' arguments and evasions, Judge Banks found all three remaining individual defendants guilty of both murder and fourteen counts of reckless conduct, and found both FRS and MMS guilty of

144. Report of Proceedings at 5, *Film Recovery*. Judge Banks based this finding on the testimony of workers, insurance inspectors, Occupational Safety and Health Administration inspectors, Environmental Protection Agency inspectors and police officers about air conditions in the plant. Judge Banks also relied on the Medical Examiner's testimony. According to the toxicologist's report, Golab had a blood cyanide level of 3.45 micrograms per milliliter—a lethal amount. *Id.* at 6.

145. *Id.* at 6. Judge Banks found that the facility lacked sufficient safety equipment, that no safety instructions were issued to workers, that the workers were not properly warned of the hazards of working with cyanide, and that not all of the workers were capable of reading the warning signs written in English and Spanish. *Id.* at 6-7.

146. *Id.* at 7-8. Judge Banks based this finding on the workers' testimony that the defendants knew the workers were getting nauseated and were vomiting. O'Neil testified that he knew the hazardous nature of cyanide. Kirschbaum saw the workers vomiting; he also wore different safety equipment than the workers and had read the warning label on the sodium cyanide containers. Rodriguez testified that he knew workers got sick at the plant, and that he, too, had read the warning label. *Id.* at 8.

147. *Id.* at 8-9.

148. *Id.* at 9. *See supra* note 124 and accompanying text.

149. Report of Proceedings at 9, *Film Recovery*.

150. *Id.*

151. *Id.*

152. *Id.*

involuntary manslaughter and fourteen counts of reckless conduct.[153] Specifically, Judge Banks stated that

> the mind and mental state of a corporation is the mind and mental state of the directors, officers and high managerial personnel because they act on behalf of the corporation for both the benefit of the corporation and for themselves; and if the corporation's officers, directors and high managerial personnel act within the scope of their corporate responsibilities and employment for their benefit and for the benefit of the profits of the corporation, the corporation must be held liable for what occurred in the work place.[154]

Judge Banks' decision included only factual findings; no legal theory or citation to precedent was included. On July 1, 1985, Judge Banks sentenced each of the individual defendants to concurrent terms of twenty-five years on the murder count and one year on each reckless conduct count.[155] He also fined FRS and MMS a combined total of $48,000.[156]

The *Film Recovery* defendants have filed a notice of appeal.[157]

IV. ANALYSIS

People v. Film Recovery Systems, Inc.[158] is a breakthrough with respect to increased corporate accountability. But, the trend toward increased accountability should not go forward unquestioned; policy considerations as well as a legal foundation for accountability must be considered if the results are to be fair and efficient. Courts and legislatures must also recognize that different types of criminal conduct may require different civil or criminal penalties. Finally courts must decide whether and to what degree criminal liability should attach to officers, directors and high managerial personnel.

A. Public Policy Favors Increased Corporate and Individual Criminal Accountability

1. Corporate criminal conduct injures society

Society is injured by all types of corporate criminal conduct: The

153. *Id.* at 10.

154. *Id.* at 9-10.

155. Spiegel, *supra* note 2, at 48-50. Each individual was also fined $10,000. *Id.*

156. *Id.* at 50. The Occupational Safety and Health Administration has yet to collect a fine of $2,425 levied against FRS. *Id.*

157. Telephone interview with Thomas Tucker, Assistant Prosecutor in *Film Recovery* (Feb. 4, 1986). No briefs have been filed as of this date. *Id.*

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

health and safety of the public continues to be compromised by the suppression of information linking asbestos with disease;[159] human life has been lost, and will continue to be lost because Ford wanted its Pinto to cost less money;[160] the environment is damaged because corporations decide to violate regulations regarding toxic waste;[161] and the financial system is weakened by securities fraud.[162] These are but a few examples of how individuals can be hurt by corporate conduct; the question is what should be done?

2. Criminal liability deters corporate criminal conduct

There is little doubt that corporate criminal conduct is deterred by criminal liability.[163] Criminal convictions are not quickly forgotten and personal criminal sanctions should cause corporate management to take notice and institute preventative action.[164] The effect of criminal prosecutions on third parties does not even require successful guilty verdicts; the mere publicity of prosecutions accompanied by the certainty of jail terms would cause corporate individuals to take notice.[165] If the president of a corporation believes he will go to jail if his corporation is found guilty of dumping toxic waste into the watershed, it is likely he will take action to

159. For a discussion of the asbestos tragedy see Comment, *supra* note 10. To find out how a dozen businessmen answered the question, "Does business value human life?," see *Does Business Value Human Life?*, 22 BUS. & SOC'Y REV. 44 (1977).

160. For a discussion of "behind the scenes" corporate conduct in the Ford Pinto cases, see *infra* notes 172-73 and accompanying text.

161. For a discussion of the effects of environmental crime, see Adler & Broiles, *The Pollution Exclusion: Implementing the Social Policy of Preventing Pollution Through the Insurance Policy*, 19 LOY. L.A.L. REV. 1251, 1266-68 (1986) (oil spilled in a river and cloud of gas escaped from a factory); McMurry & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A.L. REV. 1113, 1138-41 (1986) (hazardous waste prompted criminal sanctions); Price & Danzig, *Environmental Auditing: Developing a "Preventive Medicine" Approach to Compliance*, 19 LOY. L.A.L. REV. 1189, 1191-95 (1986) (environmental auditing on the rise because of increased governmental regulation).

162. For a discussion of the E.F. Hutton fraud case, see *infra* note 193.

163. *See* MODEL PENAL CODE § 2.07 comment, at 148 (Tent. Draft No. 4, 1955) (deterring illegal acts of corporate agents is ultimate justification for imposing fines on corporation); Edgerton, *supra* note 11, at 833 (arguing that because the primary purpose of criminal law is deterrence, the proper question is not *whether* the individual corporation is guilty, but rather *whose* conviction will further deterrence); Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 ADEL. L. REV. 361, 371 (1981) (stating that the threat of conviction makes companies refrain from wrongful conduct). For a discussion of the deterrent effect of criminal sanctions against corporations and corporate individuals, see *infra* notes 196-207.

164. *See* Levin, *Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act*, 14 AM. CRIM. L. REV. 717, 742-43 (1977).

165. *Id.* An example of the deterrent effect of individual criminal liability is the availability of treatises and corporate criminal liability seminars which are now available. *See, e.g.*, K. BRICKEY, CORPORATE CRIMINAL LIABILITY (1984); Advertisement for Corporate Criminal Liability Seminar, Nat'l L.J. Mar. 24, 1986, at 27.

avoid such dumping.[166]

Increased corporate and individual criminal liability may also help remove dangerous products from the marketplace. For example, high-level corporate managers may be more inclined to remove asbestos insulation from the market if their failure to do so could expose them to criminal prosecution. Whether high-level corporate officials are motivated by the threat of a jail sentence or by the threat of injury to the corporation itself,[167] society will benefit from their preventative action. The threat of criminal liability should force corporate managers to institute more thorough safety precautions, such as posting warning signs in the workers' native language. In *People v. Film Recovery Systems, Inc.*,[168] the individual defendants ignored warnings from an insurance inspector, a first-aid kit representative and employees themselves.[169] If defendants O'Neil, Kirschbaum or Rodriguez had realized they would go to jail for their failure to act, it is likely they would have taken greater safety precautions.[170]

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166. *See, e.g.*, Dowie, *How Ford Put Two Million Firetraps on Wheels*, 23 BUS. & SOC'Y REV. 46, 55 (1977). "One wonders how long the Ford Motor Company would continue to market lethal cars were Henry Ford II and Lee Iacocca serving twenty-year terms in Leavenworth for consumer homicide." *Id.*

167. For a discussion of court ordered dissolution of a corporation, or civil death, see *supra* note 26 & *infra* notes 209-13 and accompanying text.

168. Nos. 83-11901, 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985).

169. *See supra* notes 99-100 & 104-06 and accompanying text.

170. However, there are limited instances when a corporate individual should not be criminally prosecuted. If, for example, there exists sufficient evidence to proceed against a low-level employee, but not against complicitious supervisors or high-level personnel, it would be better to proceed against the entity itself so that corporate officers and directors are put on notice of the corporate misconduct. Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 413 (1981); Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 82-83 (1976); *see generally Developments in the Law, supra* note 13, at 1261-75. *But see* Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 926 (1975) ("In cases where the guilty individual would only receive a fine, he might be deterred more by a corporate fine. The prospect of losing his job could be more crucial to the corporate employee than having to pay an individual fine.") [hereinafter cited as Comment, *Is Corporate Criminal Liability Necessary?*].

An example of the corporate bar reacting to a judicial decision regarding the conduct of corporate officers is Smith v. Van Gorkom, 488 A.2d 858 (1985). In *Van Gorkom*, a leveraged-buyout plan was accepted by the corporation's board of directors. The court rejected the defendant directors' and officers' defense that the board's action was an exercise of their business judgment. *Id.* at 863-64. *Van Gorkom* might have been used subsequently by courts to narrow the scope of the business judgment defense. Instead, the few times *Van Gorkom* has been cited have been in order to distinguish the principal case, to state a broad proposition or as support to a dissent. *See* Allison v. General Motors Corp., 604 F. Supp. 1106, 1117-18, 1120-22 (D. Del. 1985) (derivative suit dismissed as premature because demand not properly made on

3. Negative effects of corporate criminal liability

While public policy generally favors corporate criminal liability,[171] potential liability may have a negative effect on consumers. For example, if a corporation is subject to criminal liability for marketing a dangerous product, the corporation is likely to require more extensive testing on the product before it is marketed, and the increased cost will be passed on to the consumer.[172] As a result, the availability of certain products may

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board of directors); Lynch v. Patterson, 701 P.2d 1126, 1139 (Wyo. 1985) (derivative suit alleging breach of fiduciary duty by directors).

There is little doubt that corporate constituents are aware of the *Van Gorkom* court's ruling and the potential for personal liability for their actions. *See* Manning, *Reflections and Practical Tips on Life in the Boardroom After* Van Gorkom, 41 BUS. LAW. 1, 6 (1985).

Given that the purpose of criminal sanctions is deterrence and the fact that personal liability causes individuals to make changes in their standard operating procedure, courts should seek to hold individuals criminally liable. If the imposition of civil fines in *Van Gorkom* caused an immediate publication of new corporate guidelines, *see* Manning, *supra*, then incarcerating a corporate executive for twenty-five years will cause high-level individuals to demand safe work places for their employees and to require notification of all deviations from proper safety procedures. If the courts create a real threat of incarceration, then high-level corporate individuals will have no choice but to respond to dangerous job conditions in order to avoid criminal prosecution.

Another result of criminal sanctions and publicity may be to change the way workers negotiate with management. Recently, U.S. Labor Secretary William Block indicated that imposing criminal liability on corporate managers when a corporation endangers its employees will cause corporations to ensure that health and safety are primary concerns in the business system of this country. Broadcast over the ABC Television Network, Nightline, *American Labor: Givebacks & Fightbacks*, Jan. 23, 1986, transcript at 7. If this is true, then unions will no longer have to make concessions or bargain to have management provide a safe work place, because to do otherwise may cause management to go to jail.

Another effect of imposing criminal liability on corporations is that victims would be aided in their civil suits against the corporation. Tigar, *Corporations' Liability for Criminal Acts*, Nat'l L.J., March 17, 1986, at 17, col. 1. "A criminal conviction is res judicata on the liability issue, unless entered on a plea of nolo contendre." *Id.*

171. It has also been argued that corporate criminal liability is undesirable. *See, e.g.*, Francis, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305 (1924) (arguing that state prosecution to abate a nuisance is not proper foundation for expanding use of criminal law against corporations); Note, *supra* note 72, at 675 (arguing that all corporate officers are stigmatized by corporation's criminal conduct); Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 NOTRE DAME LAW. 911, 922 (1979) (stating that the adverse impact of criminal stigma falls most heavily on innocent parties and aruging that corporate criminal sanctions should be reserved for exceptional cases because of the availability of civil remedies); Comment, *Is Corporate Criminal Liability Necessary?, supra* note 170 (arguing that corporate criminal liability punishes the shareholder and that jail sentences should be levied against responsible individuals); *but see* Note, *Corporate Criminal Liability, supra* note 65, at 52-53 (arguing that innocent party's loss may be limited to capital investment and alternative is to place impact of loss on innocent employees and consumers); Comment, *Limits on Individual Accountability for Corporate Crimes*, 67 MARQ. L. REV. 604, 637 (1984) (stating that corporate criminal liability may be society's only method of deterring corporate crime because individuals are capable of evading criminal liability).

172. An example of a product that had "probably the shortest production planning period

decrease or the price of certain products may rise.[173] It could also be argued that individuals will not want to take positions of responsibility with corporations if their liberty is risked by potential criminal sanctions. Similarly, corporations may be reluctant to enter into more dangerous ventures or risky technologies even if the results may be profitable and progressive.

These concerns are beside the point. There can be no doubt that criminal liability for corporations and corporate individuals provides more benefits to society in the form of deterrence than it burdens society in the form of higher prices and unavailable products.[174] Also, society should provide employment disincentives for those prone to commit criminal conduct. The law must facilitate the prosecution of both individuals and corporations when their conduct injures members of society.

B. The Law Must Expand to Guarantee Corporate Accountability

Public policy mandates increased corporate accountability through criminal liability; now the law must catch up. Presently, there are few standards for criminal liability. The New York Court of Appeals in *People v. Warner-Lambert Co.*[175] established a foreseeability standard. It required dismissal if the triggering cause of harm was "neither foreseen nor foreseeable."[176]

If *Warner-Lambert* is the prevailing rule of culpability, the *People v. Film Recovery Systems, Inc.*[177] defendants should not escape criminal liability. In order to succeed under a *Warner-Lambert* theory, the *Film Recovery* defendants on appeal will have to show that the "triggering cause" of Stefan Golab's death, the inhalation of cyanide, was neither

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in modern automotive history" is the Ford Pinto. Dowie, *supra* note 166, at 48. The normal development time span, from conception to production, of a new car is about 43 months, but the Pinto schedule was set at under 25 months. Because of the shortened schedule, design, styling, product planning, quality assurance and tooling of machines were conducted concurrently. *Id.* "So when crash tests revealed a serious defect in the gas tank, it was too late. The tooling was well under way." *Id.* Ultimately, the design flaw in the Pinto cost society by taking human lives. *Id.*

173. Although it took seven years, Ford eventually was forced to provide a safe gas tank in its Pinto. Dowie, *supra* note 166, at 46.

174. *See, e.g.*, Comment, *supra* note 10, at 408-09 (corporate criminal liability should protect the common goals of health and safety).

175. 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

176. *Warner-Lambert*, 51 N.Y.2d at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160. For a discussion of *Warner-Lambert*, see *supra* notes 63-72 and accompanying text.

177. Nos. 83-11091, 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985). For a discussion of *Film Recovery* see *supra* notes 86-157 and accompanying text.

"foreseen nor foreseeable."[178] Although the *Film Recovery* defendants might claim that the failure of the exhaust system to remove the cyanide gas from the air was the triggering cause of Golab's poisoning, the evidence that an insurance inspector told FRS that the air quality in the plant was potentially hazardous evidences that FRS had notice of the system's failure.[179] The defendants may also argue that Stefan Golab triggered his own death by failing to follow safety procedures. This argument should fail because the lower court found that FRS did not give its employees safety instructions.[180] Although FRS did post warning signs, they were in English and Spanish only, which Polish workers like Stefan Golab were unable to read.

Regardless of whether *Film Recovery would* be affirmed under a *Warner-Lambert* rule, this standard of liability *should not* be followed. First, *Warner-Lambert* is inconsistent with the prior rule of causation. Before *Warner-Lambert*, the causation requirement for homicide was that "the ultimate harm [be] something which should have been foreseen as being reasonably related to the acts of the accused."[181] In *Warner-*

178. *Warner-Lambert*, 51 N.Y.2d at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

179. Siegel, *supra* note 3, at 8, col. 4. The *Warner-Lambert* rule has limited the scope of homicide by forcing courts to examine intent subjectively. In People v. Beckles, 113 Misc. 2d 185, 448 N.Y.S.2d 398 (1982), the defendant struck the deceased with the back of his hand, fracturing the victim's jaw. The deceased struck his head on an angular object causing contusions and brain hemorrhages. The medical examiner determined that the cause of death was hitting the angular object, not the defendant's slap. *Id.* at 185-86, 448 N.Y.S.2d at 399. In dismissing the indictment, the court said

> the defendant's intent to cause some injury is not a sufficient predicate of culpability for criminally negligent homicide, in the absence of evidence that the circumstances would have made it obvious to a person of ordinary sensibilities that the blow or injury would create a substantial risk of death.

Id. at 187, 448 N.Y.S.2d at 399. The court, citing *Warner-Lambert*, found that proof of facts which showed that the risk that ultimately resulted from defendant's conduct was not sufficient to show intent at the time of defendant's conduct. *Id.* at 187, 448 N.Y.S.2d at 399-400 (citing *Warner-Lambert*, 51 N.Y.2d at 304, 414 N.E.2d at 664-65, 434 N.Y.S.2d at 163-64).

180. Report of Proceedings at 6-7, *Film Recovery*; *see supra* notes 97-101 and accompanying text.

181. People v. Kibbe, 35 N.Y.2d 407, 412, 321 N.E.2d 773, 776, 362 N.Y.S.2d 848, 851-52 (1974), *aff'd sub nom.* Henderson v. Kibbe, 431 U.S. 145 (1977). In People v. Kibbe, the defendants found a helplessly intoxicated man in a bar and agreed to drive him to a nearby town, but instead robbed him and abandoned him without shoes, coat or glasses on an unlit rural road in subfreezing weather. *Id.* at 410-12, 321 N.E.2d at 774-76, 362 N.Y.S.2d at 849-52. Twenty or thirty minutes later, an illegally speeding truck struck and killed the man. The truck driver neither braked nor swerved after seeing the man with his hands in the air. Henderson v. Kibbe, 431 U.S. 145, 147 (1977). Despite the fact that the actual cause of death was impact by the truck and not freezing, the New York Court of Appeals held the defendants criminally liable for murder under a standard requiring that "the ultimate harm [be] something which should have been foreseen as being reasonably related to the acts of the accused." *Kibbe*, 35 N.Y.2d at 412, 321 N.E.2d at 776, 362 N.Y.S.2d at 851-52.

Lambert, the New York Court of Appeals conceded that the defendants were aware of a "broad, undifferentiated risk of explosion" from the ambient MS dust.[182] Such a "broad, undifferentiated risk of explosion" would apparently place the *Warner-Lambert* explosion within the zone of harm "which should have been foreseen."[183] Yet, the New York Court of Appeals chose to ignore precedent and created a new standard of culpability.

Second, the *Warner-Lambert* rule represents "a major setback for the trend toward increased personal accountability in the corporate sector."[184] The *Warner-Lambert* standard is hard to meet. It will only allow liability if every link in the chain of causation was or should have been foreseen by the defendant. In the corporate context, prosecutors will have difficulty proving foreseeability by an individual defendant for each component of a complicated business activity. Because the *Warner-Lambert* standard is narrow, the risk of liability will be low; in all but the rarest instance, corporations and individuals will be cloaked in a shield of immunity.

The *Warner-Lambert* rule does not deter corporations and individuals from criminal conduct. When economic gains are weighed against the risks of apprehension, prosecution and conviction, the profit maximizing corporations would choose to ignore rules and regulations regarding health, safety and other criminal laws. If *Warner-Lambert* results in a corporation perceiving little chance of conviction, it is likely to dump its waste as cheaply as possible, usually through illegal means.[185] In fact,

182. *Warner-Lambert*, 51 N.Y.2d at 304, 414 N.E.2d at 664, 434 N.Y.S.2d at 163.

183. *Kibbe*, 35 N.Y.2d at 412-13, 321 N.E.2d at 776, 362 N.Y.S.2d at 851-52. Note, *supra* note 68, at 44. *But cf.* Note, *supra* note 72, at 672 (arguing that "*Kibbe* . . . left unclear whether 'ultimate harm' meant simply the occurrence of death or the particular way that death occurred. The *Warner-Lambert* court held that 'ultimate harm' means the particular way that death occurs.").

184. Note, *supra* note 72, at 659. For a discussion of policy rationales favoring criminal liability for corporations and corporate individuals, see *supra* notes 159-71 and accompanying text. *See generally* Note, *supra* note 68.

185. Another shortcoming of focusing criminal liability on individuals within a corporation is that individuals will weigh the advantage of committing a crime against the disadvantage of being caught. Inherent in the individual's analysis will be the likelihood of advancement and recognition by the corporation following the commission of a crime as compared to the likelihood of prosecution for the same act. Ultimately, in order to achieve a deterrent effect, strong penalties for conviction will have to be coupled with rigorous enforcement. Coffee, *supra* note 170, at 410. Professor Coffee assumed that the corporation may penalize an individual who does not perform adequately, possibly with dismissal. *Id.*

As an example, Professor Coffee stated: "suppose the manager views conviction as three times as severe a penalty as dismissal, but there is no more than a 25% chance of conviction. Conversely, there may be a 75% likelihood that he will lose his position" if the crime is not committed. *Id.* It is entirely possible that the individual will prefer to violate the law to avoid

in *Film Recovery*, FRS had been storing its waste in rented warehouses rather than spending the money for proper disposal. Corporate management responsible for disposing of the corporation's waste may even be rewarded by superiors who do not realize why the waste disposal cost has decreased or has not increased.

Regardless of whether *Warner-Lambert* is explicitly adopted or not, the appellate court will have to adopt some standard of liability for allegedly corporate criminal acts. The broader task for the court is to shape a standard that effectively and fairly imposes criminal liability on corporations and corporate individuals. An appellate court following *Warner-Lambert*'s extremely restrictive standard of liability would necessarily ignore the policy arguments in favor of applying individual liability to the *Film Recovery* defendants—namely deterrence.[186]

Any reversal—under the *Warner-Lambert* theory or otherwise—would be an unwelcome retreat.[187] Finally, a reversal of the conviction of corporate officers and high managerial personnel would contradict the emerging trend towards holding corporations responsible for their acts; society is demanding that this type of activity be addressed in the criminal courts.[188] A better rule for criminal liability is mandated.

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the more certain penalty of termination, and risk a more severe, but less likely penalty of imprisonment.

See also, e.g., Granite Constr. Co. v. Superior Court, 149 Cal. App. 3d 465, 469, 197 Cal. Rptr. 1, 6 (1983) (fine of up to $5,000 may be imposed on convicted corporation (citing CAL. PENAL CODE § 672 (West 1982))). *See supra* notes 73-79.

In the area of environmental protection, however, the federal government has taken an active role in imposing criminal liability on individuals because federal statutes, as a general rule, impose criminal liability without requiring bad intent. Wheeler, *Potential for Criminal Liability of Personnel Under Federal Acts*, Nat'l L.J., Mar. 24, 1986, at 22, col. 1. For example, in 1984, 20 individuals were prosecuted for criminally violating environmental laws. *Id.* The penalties ranged from jail terms, to community service, to probation, to monetary fines and combinations of all four penalties. *Id.* at 24, col. 2.

186. *See supra* notes 164-70.

187. For a discussion of the policy behind criminal liability for corporations, see *supra* notes 159-71.

188. For example, Texas sought retribution from a corporation and its high level employees. State v. Autumn Hills Convalescent Nursing Home, No. 85-CR-2526 (Bexar Cty. Ct. of Tex. Apr. 2, 1986) (dismissed because of hung jury). Autumn Hills Convalescent Centers, Inc. and five former and current employees were charged with murder in the death of a patient. The prosecution claimed that the patient died because the nursing home tried to save money by giving the patient improper care, while the defense maintained that the woman died of cancer. L.A. Daily J., Oct. 1, 1985, at 5, col. 3.

V. PROPOSAL

A. A Proposal for Criminal Culpability

Society needs a rule of culpability that will apply not only in an egregious case like *People v. Film Recovery Systems, Inc.*,[189] but also in other situations where corporate criminal conduct needs to be deterred. Any plan for imposing individual criminal liability must allow the corporate individual to respond to notice of potential criminal conduct by seeking to prevent the conduct. An individual should be able to exonerate himself from criminal liability if he can show that he attempted to prevent or stop the conduct.

The following proposal suggests a standard for corporate and individual liability. Its premise is that criminal liability should be deterred and that the corporate fiction should not work to shield responsible individuals.[190] Individuals with knowledge of criminal conduct should be culpable if they are in a position to deter the conduct but fail to act. The prosecutor would have to prove the following:

(1) actual knowledge of potential criminal conduct;[191]
(2) notice that such criminal conduct is occurring; and
(3) sufficient control or power by the individual over the corporation to stop or prevent the criminal conduct.

The existence of these elements would create an affirmative duty on the individual to take action, and *failure to act* would establish culpability against the individual.[192] However, even if the individual could not be held criminally liable, the corporation would be subject to criminal liability and criminal penalties.[193]

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189. Nos. 83-11901, 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985).

190. Paul Brodeur, author of three books on the subject of asbestos-related disease and litigation between victims and manufacturing corporations, has stated that the best way to prevent an environmental catastrophe, like the current asbestos problem in schools, homes and office buildings, is to hold corporations and their executives criminally accountable for the hazardous materials they produce. *Controversy: For Victims of the Hidden Killer Asbestos, a Manufacturer's Settlement May Prove to be Too Little, Too Soon*, PEOPLE WEEKLY, Mar. 10, 1986, at 124 (interviewer J. Jerome). Brodeur also stated that the criminal law is "the greatest preventive weapon in making the workplace—and the air and water we use—safe for all of us." *Id.*

191. Criminal conduct will take various forms. In *Film Recovery*, the criminal conduct was the omission to provide a safe work place for FRS' employees. However, in a fraud case, *see infra* note 193, the criminal conduct may be illegal transactions or misrepresentations. The injury to society will also take different forms. Society may be physically injured, as in *Film Recovery*, or monetarily injured.

192. *See supra* note 190.

193. The corporation may be found guilty for the conduct of its agents even though the agents are acquitted. This was illustrated in United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941). There, four corporations were convicted of

This standard of corporate criminal liability would provide useful guidelines for prosecutors, judges and most importantly, corporate of-

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conspiracy to restrain trade, but all of the individual defendants were acquitted. On appeal, the Seventh Circuit stated that it was logically impossible to reconcile the acquittals of the individuals with the convictions of the corporations. The corporations were found guilty of a crime requiring intent, despite the fact that a corporation acts only through its agents, and every officer or agent who could have acted on behalf of the corporations was acquitted. Nevertheless, the court reasoned that the issue on appeal was not whether a logically consistent verdict was handed down, but whether the conviction of the corporate defendants was consistent with the evidence adduced at trial, and affirmed. *Id.* at 411. *See also* Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 430-35 (1963).

For a number of reasons, prosecutors are often reluctant to bring criminal charges against individuals within a corporation. First, it is difficult to pinpoint which upper-level official is responsible. The corporation may not be helpful in fingering one of its own officials, resulting in *de facto* immunity for responsible corporate individuals. Fisse, *supra* note 159, at 371-72. The collective nature of the corporation will make an offense attributable to various levels of the corporate hierarchy. *Id.* at 372-73; Elkins, *supra* note 170, at 83.

Second, it is often difficult to prove that upper-level executives possess knowledge of corporate offenses; this may be the result of complex organizational structures, lower-level employee shielding, hiding of information, or simply lack of time. *See* M. CLINARD & P. YEAGER, CORPORATE CRIME 279 (1980); Metzger, *supra* note 19, at 55-58. For example, in a recent criminal case against E.F. Hutton, the assistant United States attorney did not seek indictments against the E.F. Hutton employees involved, and instead, allowed the corporation to plead guilty to 2000 criminal counts of fraud and pay $2 million in fines and $750,000 in costs. United States v. E.F. Hutton & Co., No. CR 85-000-83 (M.D. Pa. May 2, 1985). The prosecutor defended his decision before a hearing conducted by the House Judiciary subcommittee on Crime, stating that to do otherwise would require the prosecution of practically all of Hutton's employees because, in perpetrating the fraud, they followed an industry standard. Houston, *Prosecutor in Hutton Case Defends Actions*, L.A. Times, Dec. 7, 1985, pt. IV, at 1, col. 5. Similarly, the FRS defendants attempted to justify their actions by claiming that they too followed an industry standard in setting up their silver reclamation system. Siegel, *supra* note 3, at 8, col. 3.

Large corporations are usually more successful than small ones at insulating themselves and individuals from criminal liability. This immunity stems from three factors: (1) society's notion that large corporations provide a good service to society and are therefore not morally blameworthy; (2) the fact that large corporations themselves do not pay for their crimes, but the penalty is borne either by blameless shareholders in the form of decreased dividends and/or by equally blameless consumers in the form of higher prices; and (3) the ability of corporate officers and high managerial personnel to distance themselves from the adverse effects of criminal conduct. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 359 (1968); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 202-03 (1947) (arguing that "in penal law . . . the immorality of the actor's conduct is essential—whereas pecuniary damage is entirely irrelevant"). *See generally* Mueller, *supra* note 12, at 38-41. *See* Coffee, *supra* note 170, at 401 ("when the corporation catches a cold, someone else sneezes"). *See also*, Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 514-15 (1980). "[I]n an overwhelming majority of cases, the subsequent corporate careers of [convicted, though not incarcerated] executives were not hindered by their felony convictions. This suggests that certain corporate crime 'pays' even if one is convicted." *Id.* at 514. Professor Orland suggested that corporate shareholders reward the convicted official because the crime was committed in order to benefit the corporation. *Id.* at 515.

If prosecutors were armed with a framework for fixing criminal liability on corporate

ficers and management. It would also be flexible enough to apply to the spectrum of corporate criminal conduct.

B. A Proposed Sliding Scale of Penalties

Penalties for corporate criminal conduct should be geared towards deterring the specific acts of culpable parties. Possible penalties for individuals include monetary fines, community service and jail sentences. Possible penalties for corporate entities include community service or probation, monetary fines in the form of cash or equity securities,[194] and civil death.[195] More severe penalties should be handed down for crimes consisting of more egregious conduct.[196] The court should consider such factors as deliberateness of the conduct; motivation for the conduct; blameworthiness of the individual responsible for the conduct; and benefits received by the actor committing the conduct. This section analyzes the effectiveness of various penalties as applied to the *People v. Film Recovery Systems, Inc.*[197] facts, and other suspect corporate activity.

1. Fines

Fines should be reserved for the least culpable defendants as determined by the fact finder. But by no means should this penalty be taken lightly: the single most important value to a corporation is money—the bottom line. In a marketable corporation, the value of its shares of stock increase if the corporation shows a profit; moreover, credit ratings for

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individuals, because prosecutions would more likely be successful, perhaps they would be less reluctant to indict individuals because the prosecutions would more likely be successful.

An alternative to relying on prosecutorial discretion is the use of private attorney general statutes. Coffee, *supra* note 170, at 434-40. Coffee urged a plan in which an attorney's financial compensation is dependent upon whether the government investigated the violation. If so, the attorney would receive less than if he unearthed the violation. However, the use of private attorney general statutes presents a host of problems. First, monetary penalties could be circumvented by savvy corporate executives who would insist upon indemnity contracts before accepting employment with a corporation. This would nullify the effect of any penalty and would provide the corporation with an incentive to shield its employees. Second, while corporate crimes may be detectable by private attorneys, there is nothing to suggest that a private attorney will be more capable than a prosecutor in penetrating the web of corporate protection that often insulates a corporate individual from criminal prosecution by the state. In short, while private attorney general statutes and policies favoring their use should be encouraged in order to aid in the punishment of corporate offenders, these laws may prove as ineffective as prosecutorial discretion. *Cf.* Coffee, *supra* note 170, at 436-37.

194. Professor Coffee suggests that the equity securities used should be a special class of common stock issued by the guilty corporation. Coffee, *supra* note 170, at 413.

195. For a discussion of civil death, or court ordered dissolution, see *infra* text accompanying notes 209-13.

196. *See supra* note 159.

197. Nos. 83-11901, 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985).

corporate borrowing improve, and officers and directors get salary raises and retain their positions if the corporation shows a profit.

Fines should be levied in order to deter criminal conduct provided the adverse effect of economic sanctions does not fall on innocent employees, shareholders or consumers.[198]

Criminal fines are often toothless because corporations include fines and sanctions in the cost of doing business and pass them on to the consumer.[199] Consider the cost of fines to any corporation: when the fine is small enough to be passed on to the consumer without affecting market position, it is passed on; but when the sanction crosses this threshold, the dangerous activity must cease.[200] Corporations are deterred from violating the law so long as the sanction cannot be passed on to the consumer or the risk of enforcement is high.

The primary argument against imposing criminal liability on corporations is that monetary sanctions will ultimately fall on innocent shareholders in the form of reduced dividends, or on consumers in the form of higher prices.[201] To prevent such occurrences, Professor Coffee offered a monetary sanction solution that cannot be passed on to shareholders or consumers. Coffee suggested that severe penalties should be imposed on

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198. *See infra* notes 201-06 and accompanying text.

199. Russell Mokhiber, a staff attorney with the Corporate Accountability Group, illustrated the relative weight of criminal sanctions against corporations as compared to individuals:

> On August 21, 1985, the Eli Lilly drug company pleaded guilty to misdemeanor counts of failing to notify the U.S. government of numerous deaths and injuries among overseas users of Oraflex, an arthritis drug. Without knowledge of these overseas deaths, the U.S. Food and Drug Administration had approved Oraflex for use in the United States. . . . Lilly was fined $25,000; William H. Shedden, a former Lilly executive who pleaded no contest to the charges, was fined $15,000.
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> . . . While Eli Lilly was fined $25,000 after being convicted in the Oraflex case, Wallace Richard Stewart of Kentucky was sentenced in July 1983 to 10 years in prison for stealing a pizza.

Mokhiber, *supra* note 10, at 4, col. 4.

200. The following example demonstrates how fines can be included in the cost of doing business. A small corporation was engaged in the textile business. Unfortunately for the sole shareholder, his textile plant was located directly across the street from an office of the Environmental Protection Agency (EPA). Every time the company performed a necessary procedure requiring the application of heat to black fabric, black smoke was emitted from the plant in violation of air quality standards and an EPA representative would issue a fifty dollar citation to the corporation. Following repeated fifty dollar citations, which the corporation could easily include in its cost of doing business, EPA threatened a larger monetary penalty, criminal prosecution, or both. The small corporation immediately stopped processing the black fabric—at least during daylight hours. Interview with Alan Brandt, Executive with Burlington Industries, in Los Angeles (Mar. 2, 1986).

201. For a discussion of the shortcomings of corporate criminal liability, see *supra* note 171.

corporations in the form of equity securities.[202] "The convicted corporation should be required to authorize and issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity."[203] Professor Coffee also suggested that a convicted corporation which is penalized by the loss of a large block of shares will likely gain superior managers because the pressure to realize short-term gains will be negated.[204] By making a corporation surrender equity securities, society benefits from the deterrent value of a fine without the usual disadvantage of paying the fine's hidden cost.

Equity securities should not be used where less egregious conduct is involved. It is quite possible that little or none of the money derived in the form of securities would reach the victim's compensation trust fund because of administrative expenses. But if equity securities were used on a regular basis, much of the administrative structure and cost of supervising a trust fund would already be established; this suggests that equity securities should be used even in the smallest of monetary fines against a corporate entity. The deterrent effect on other corporations should be great due to the attendant publicity of the sanction. Thus, equity securities would ease the burden on innocent employees, shareholders and consumers.

In cases like *Film Recovery*, a fine of any sort is improper. As Ford's Pinto demonstrated, corporations may be tempted to sacrifice human life in exchange for monetary gains.[205] Monetary sanctions should be reserved for the least egregious conduct so as to maximize deterrence.

Fines against an individual are also inadvisable because they are not likely to deter criminal conduct. An individual may pass the cost on to his employer,[206] who in turn shifts the cost to other innocent sharehold-

202. Coffee, *supra* note 170, at 413.

203. *Id.* Professor Coffee used the phrase "cash fine necessary to deter" to imply that a substantial sum would be necessary. Also, it should be noted that Professor Coffee's plan to impose an equity penalty would be inefficient if used against a small close corporation because no trading market exists for such shares of stock.

204. *Id.* at 418.

205. For a discussion of the Ford Pinto tragedy, see *infra* note 208 & *supra* notes 172-73.

206. Provided that an indemnity agreement exists between the employee and the employer, then the ultimate penalty will again fall on employees, shareholders and consumers because the corporation will bear the burden of the fine. It may be suggested that an indemnity clause should be considered as against public policy and held void. While this suggestion would appear to remove the problem and allow for monetary sanctions against an individual, in reality courts would have difficulty in policing the relationship between individuals and corporations. Further, large monetary sanctions would likely result in bankruptcy for the individual.

ers or consumers. Monetary fines fit more closely to the definition of a retributive punishment rather than a deterrence, and should be limited accordingly.

2. Community service or probation

Community service is also a viable tool for punishment but may be less of a deterrent. Service hours can be imposed on an individual in the form of his area of expertise or in general service to the community.[207] There is no inherent barrier to imposing community service hours on a corporation, and a corporation sentenced to community service will pay its employees to work for the benefit of the community.

In *Film Recovery*, community service would hardly be a proper penalty. While community service should be used for less egregious conduct, it does not deter criminal conduct much more than fines. Both result in financial losses that can be passed on by the corporation. Within the boundaries set by the court, community service may be performed when convenient. The actual performance of the penalty does not connote criminality.[208] Community service may require an individ-

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Therefore, a monetary sanction against an individual would require the court to police the relationship between the corporation and the employee and would need to be affordable by the individual.

207. For a list of individuals who have been sentenced to complete community service hours for environmental violations, see Wheeler, *supra* note 185, at 24.

208. The criminal sanction is "the law's ultimate threat." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 250 (1968). Despite the fact that a monetary fine is no greater pecuniary loss than a civil award, by labeling conduct criminal, society is stating that certain conduct is important to prevent, requires retribution from offenders, or both. *Id.* at 31. Therefore, it is arguable that criminal stigma is a penalty that could deter corporate criminal conduct. Some commentators urge that labeling corporate conduct as criminal is an effective deterrent. *See* Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U.L. REV. 107 (1971).

Other commentators urge that publicizing corporate conduct is a waste of a government's resources. Coffee, *supra* note 170, at 424-29. Professor Coffee suggested that society cannot pin a scarlet letter on criminal corporations. *Id.* at 424.

See also Dowie, *supra* note 166, at 55. Dowie, in discussing design flaws in the Ford Pinto, disclosed a Ford intra-office memorandum detailing Ford's own cost-benefit analysis of an $11 safety improvement which would have made the Pinto less likely to burn upon rear impact. The memo calculated the potential savings to Ford, as a result of installing the device, at $49.5 million in civil settlements and legal judgments. The memo also calculated the cost to Ford of installing the device at $137 million. Therefore, the argument goes, Ford would save $87.5 million by not installing the safety units. *Id.* at 51. The memo calculated the dollar value of human lives lost due to Pinto explosions, the value of serious burn injuries and the value of the burned automobiles. The memo also estimated the number of Pinto explosions and casualties and injuries, but the seemingly complete memo does not assign a dollar value for Ford's loss of business due to negative publicity. *Id.* The proper conclusion to be drawn is that Ford did not believe that negative publicity would account for a significant dollar amount, thus negative publicity was not figured into its cost-benefit analysis. Because criminal stigma

ual to spend time with youth groups or the aged, which is hardly equivalent to spending time in jail. Community service would be an appropriate penalty for less culpable actors and for corporations that are not as blameworthy as other actors.

3. Jail, civil death and equity securities

Jail terms, court ordered dissolutions of corporations and impounding large amounts of equity securities are each cut from the same cloth—optimal deterrence. The threat of a jail sentence is probably the most effective deterrent for corporate individuals because liberty is a prized possession. Civil death through court ordered dissolution is the most effective deterrent for corporations but pragmatically can only be applied to a small, close corporation without injuring innocent shareholders. Condemnation of a sizable portion of a company's ownership will be the most effective form of deterrence for a large, public corporation. In *Film Recovery*, there was no indication that the risk of a jail sentence was perceived by defendants Rodriguez, Kirschbaum or O'Neil. However, the risk of a twenty-five year jail term would surely have influenced their corporate decisions regarding worker safety.

Another form of punishment available in cases of serious corporate misconduct is court ordered dissolution or civil death.[209] A state has the power to punish a corporation by dissolution and by seizing the corporation's assets.[210] However, the practice has not been favored in recent times.[211] Blackstone said a corporation may be dissolved and particular members may be disenfranchised when the entity acts contrary to the laws of society.[212] Blackstone further suggested that lands belonging to the corporation should revert to the grantors or their heirs under the fiction of a failed grant.[213] Analogizing feudal lands to modern day assets leads to the conclusion that in appropriate cases, a corporation's machinery and materials should be auctioned for the benefit of the state.

But the court should consider the secondary effects of corporate dis-

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would not cause serious negative publicity, it will not cause a significant income loss. *See generally* Comment, *Is Corporate Criminal Liability Necessary?*, *supra* note 170. Thus the deterrent value of criminal stigma is uncertain. Due to the tenuousness of criminal stigma as a deterrent, it should not be relied upon. "[T]he effectiveness of public censure after conviction as a deterrent force is very debatable in the case of corporations." *Id.* at 925.

209. *See supra* note 26.

210. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 38-1 (Smith-Hurd 1977), CAL. PENAL CODE § 1804 (West 1977).

211. Note, *supra* note 26, at 98.

212. 1 W. BLACKSTONE, COMMENTARIES *484.

213. *Id.*

solution on society. For the small, close corporation, these would be minimal. Their product markets tend to be specialized and any void left by their dissolution would be quickly filled by an enterprising entrepreneur. Even if this were not true, the impact on the labor market and general product market would be de minimus.

Dissolution of a large, public corporation is likely to affect a greater number of non-culpable segments of society because they employ more people and produce more products and services which are utilized by more people. If the state shuts down a large plant, innocent workers would lose their jobs, suppliers would lose customers, and consumers would lose a product source. In short, the damage done in penalizing the corporation would not mirror the culpability of those affected.

Considering the advantages and disadvantages of court ordered dissolution, civil death could serve a limited purpose in deterring criminal conduct. Courts imposing civil death should take care to ensure that society does not become the punished victim through job losses or product and service unavailability.

As a practical matter, small corporations are dissolved as soon as their key officials are sentenced to jail. Small corporations may be the ideal candidates for court ordered dissolution because no more severe penalty could be handed out; yet, other corporations will be deterred from violating the law.

As applied to *Film Recovery*, civil death would have worked to deter the corporate executives because the individuals would have wanted to preserve the source of their livelihood. Regardless of any threat to liberty, the threat of civil death will deter corporate criminal conduct.

The best deterrent and punishment for public corporations that commit wrongful acts is the taking of equity securities.[214] First, the trustee[215] of the securities will be heard in the management of the corporation. Second, corporate executives will eventually have to replace management that exposes the corporation to humiliation through criminal conduct. Finally, a criminal verdict may aid, or at least stimulate, shareholder derivative suits against the corporation and the culpable individuals.

214. For a discussion of the use of equity securities as a punishment, see *supra* notes 202-04 and accompanying text.

215. A trustee would oversee the condemned securities on behalf of the state. *See supra* notes 203-04 and accompanying text.

V. CONCLUSION

Death at the workplace is not uncommon. Nor is criminal conduct by corporations. Yet the individuals behind the scenes often go unpunished. *People v. Film Recovery Systems, Inc.*[216] can lead jurisprudence into the modern era by making those who are most culpable criminally liable for their conduct. What the law needs is a flexible framework to help judges, prosecutors and corporate managers determine when and how corporate individuals should be held liable for their criminal conduct.

Jeffrey P. Grogin

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