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Corporate Homicide: A New Assault on Corporate Decision-making

I. Introduction

On September 13, 1978, an Elkhart County, Indiana, grand jury indicted the Ford Motor Company (Ford).¹ Although this event hardly seems monumental, it represents a rare occurrence in the American criminal process. Ford was not charged with a regulatory infraction, as might have been expected, but with three counts of reckless homicide.²

The indictment followed the grand jury's investigation of an August 10, 1978, traffic accident involving a Pinto automobile. Ford was charged with recklessly designing and manufacturing a 1973 Pinto and allowing the vehicle to remain on the public highway.³ The faulty design and manufacture of the car were alleged to have caused the Pinto to explode upon rear-end impact, resulting in the death of its three occupants.⁴ Thus, an event that would normally be resolved by civil litigation in the form of a product's liability suit was found to involve such a substantial deviation from the conduct required of an automobile manufacturer as to warrant a prosecution for reckless homicide.

The "Pinto case" may mark the beginning of a new assault on corporate decision-making. Corporations might have to reconsider company policies concerning compliance with federal safety standards, cost analysis, and corporate response to products found to be defectively designed after they have reached the consumer market if they are to avoid the consequences of a criminal conviction.⁵ The use of a state's general criminal statutes to refine corporate consciousness for consumer safety, however, raises a fundamental legal issue: can a corporation be held criminally liable for homicide?

The purpose of this note is to discuss this issue in the context of the Pinto case and to focus upon whether prosecutions of this nature are legally permissible and practicably desirable. Although the matter will ultimately be resolved in the courts, the uniqueness of the prosecution and its potential impact on the corporate environment makes pre-judicial consideration worthwhile. Indeed, the Pinto case inevitably has caused concern among industrial leaders as to the potential stigma of a criminal conviction following the marketing of a defective product.

II. Corporate Liability for Homicide—A Trend Without a Rule

A. Historical Perspective

At common law a corporation could not commit a crime.⁶ This position

1 State v. Ford Motor Co., No. 5324 (Indiana Super. Ct., filed Sept. 13, 1978). The court hearing the case sits in Elkhart County.

2 Ford was also charged with one count of criminal recklessness, but that charge was later dropped at the request of the prosecutor.

3 State v. Ford Motor Co., No. 5324 (Indictment at 1).

4 *Id.*

5 See text accompanying note 95 *infra*.

6 See generally 10 W. FLETCHER, CYCLOPEDIA OF CORPORATIONS § 4942, at 620 (1978);

was predicated on the rationale that a corporation had no mind and hence could not entertain the appropriate criminal intent required for all common law crimes.⁷ Also, the absence of a physical body precluded imprisonment, the primary punishment available at common law. Illegal acts of a corporate agent were not imputed to the corporate entity because they were considered ultra vires and therefore without the authority of the corporation.

The growth of the corporation as a dominant factor in American business, however, resulted in the demise of corporate immunity. Inroads were made by prosecuting corporations for nonfeasance and regulatory offenses.⁸ The modern view that a corporation could be held criminally liable for the acts and omissions of its agents was adopted in the landmark case of *New York Central Railroad v. United States*.⁹ In upholding a conviction under the Elkins Act¹⁰ for violating a rate provision, the Supreme Court stated: "We 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."¹¹

Although both the federal government and the states were quick to extend criminal liability to the corporate entity,¹² the extension has not encompassed liability for all crimes. The Supreme Court recognized this proposition in *New York Central Railroad* when it stated: "[i]t is true that there are some crimes, which in their nature cannot be committed by corporations."¹³ Generally, whether a corporation is subject to criminal liability under a given statute is determined by the nature of the offense and the perceived legislative intent for promulgating the law.¹⁴

B. Homicide—A Problem of Semantics

Corporate criminal liability for homicide is an enigmatic concept. The ambiguity stems from two factors: the definition of homicide and the infrequency of criminal prosecutions against corporations for the offense. Although every state has statutorily attempted to deal with the problem of corporate criminal liability,¹⁵ such statutes often do little more than state that corporations are generally subject to the criminal law.¹⁶ The applicability of particular offenses to corporations, however, is frequently less than obvious.

Perhaps the greatest obstacle to the association of the corporate entity with

HENN CORPORATIONS § 186 (1961); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 33 (1972) [hereinafter cited as LAFAVE & SCOTT].

7 LAFAVE & SCOTT, *supra* note 6, at 228.

8 *Id.* at 229. *See, e.g.,* *New York & G.L.R. Co. v. State*, 50 N.J.L. 303, 13 A. 1 (1888); *People v. Clark*, 8 Crim. Ct. N.Y. 169, 14 N.Y.S. 642 (1891).

9 212 U.S. 481 (1909).

10 49 U.S.C. §§ 41-43 (1970).

11 212 U.S. at 494-95.

12 *See generally* Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 Ky. L.J. 73 (1976-77); 1 U.S.C. § 1 (1970) (here "person" was defined so as to include corporations throughout the United States Code).

13 212 U.S. at 494.

14 LAFAVE & SCOTT, *supra* note 6, at 229-30.

15 Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw.L.J. 908, 912 (1975-76).

16 *See, e.g.,* IND. CODE § 35-41-2-3 (Supp. 1978).

the concept of homicide is the generic nature of the term. Homicide describes the "killing of a human being caused by a human being."¹⁷ Most state statutes incorporate this definition in some form when articulating a homicide offense. The requirement that the actor be human is precisely what has precluded corporate liability in the past. When confronted with potential corporate liability for homicide, courts have focused on the requirement that the actor be human and have taken great pains to determine whether a corporation can be held liable within the definition of the offense. Their answers have not been consistent, but evince a trend toward subjecting corporations to liability under homicide statutes.

C. *Homicide in the Courts*

*United States v. Van Schaick*¹⁸ was one of the first recorded cases to confront the issue of corporate liability for homicide. The *Van Schaick* court held that a corporation which failed to provide adequate life preservers on one of its steamships could be guilty of manslaughter under a statute which provided that "every owner . . . through whose fraud, connivance, misconduct or violation of the law the life of any person is destroyed shall be deemed guilty of manslaughter and upon conviction therefor shall be sentenced to confinement at hard labor."¹⁹ Significantly, the *Van Schaick* court stated that the absence of an appropriate punishment did not bar liability,²⁰ because the omission was indicative of a congressional oversight and not an intention to immunize corporations under the statute.²¹ In this manner, the *Van Schaick* court rejected a traditional barrier to criminal prosecution under criminal statutes, namely, the absence of an appropriate penalty.

New York courts first recognized corporate liability for homicide in *People v. Rochester Railway & Light Co.*²² The *Rochester Railway* court drew a strong analogy to civil proceedings in which corporations had to answer for the conduct of their agents acting within the scope of corporate authority.²³ The *Rochester Railway* court endorsed the theory that since "a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done."²⁴ Thus, the court apparently accepted the theory that a corporation could commit manslaughter. The indictment was dismissed, however, because under the relevant statute, homicide was defined as "the killing of one human being by the act, procurement or omission of another."²⁵ The *Rochester Railway* court found that use of the word "another" in this context limited liability for the offense to human beings. Accordingly, the

17 W. CLARK & W. MARSHALL, *CRIMES* 597 (7th ed. 1967). Some commentators argue that since corporations can act only through human beings, the definition does not present a barrier to prosecuting corporations. See LAFAVE & SCOTT, *supra* note 6, at 230.

18 134 F. 592 (1904).

19 Rev. St. U.S. § 5344 (2d ed. 1873); U.S. Comp. St. 1901 at 3629 (1901).

20 134 F. at 602.

21 *Id.*

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

23 *Id.* at 104, 88 N.E. at 23.

24 *Id.*

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

prosecution's contention that "another" meant a "person" (and therefore a corporation) was rejected.²⁶

The *Rochester Railway* case demonstrates the dilemma that ensues when a state's homicide statutes are applied to corporate entities. Legislative intent is difficult to discern when common law definitions are summarily employed in formulating homicide statutes. Thus, absent an expression of some legislative intent to create criminal liability, judicial attempts to remove corporate immunity are easily frustrated.

The semantic obstacle inherent in the concept of "corporate" homicide also prevented prosecution in *Commonwealth v. Illinois Central Railroad Co.*,²⁷ in which a corporation was indicted for involuntary manslaughter following a train accident which resulted in the death of a passenger. The prosecution charged that the railroad had operated the train with "gross and willful negligence" at an unreasonable speed,²⁸ thus causing the fatal accident. In analyzing the validity of the indictment, the *Illinois Central* court noted that manslaughter was not defined by statute in Kentucky. Hence, the court applied the appropriate state common law definition: "Involuntary manslaughter is the killing by one person of another person in doing some unlawful act not amounting to a felony, nor likely to endanger life, and without an intention to kill; or where one kills another while doing a lawful act in an unlawful manner."²⁹ Acknowledging that Kentucky statutory law extended the term "person" to include corporations, the *Illinois Central* court nevertheless rejected the contention that a corporation could commit homicide.³⁰ The court relied on the fact that the standard definition of homicide required the killing of one human being by "another" human being. According to the court, "in a case of homicide, though it be involuntary manslaughter, it would, we think, be giving the word 'person' a tortured meaning to say that it includes a corporation."³¹ The court found that the use of "another" in the definition of involuntary manslaughter required the slayer and victim to be of the same class. Although a corporation was a person in law, the court held that it was still an artificial person, and therefore distinct from the victim, a human being.

Thus, the *Illinois Central* and *Rochester Railway* courts both denied corporate liability while manifesting a philosophical difference regarding the ultimate issue, corporate criminal liability for homicide. The *Illinois Central* court found the two concepts to be theoretically incompatible, while the *Rochester Railway* court accepted the plausibility of corporate criminal liability for homicide, but denied responsibility under the relevant statute. These two cases represent the theoretical and statutory barriers that have prohibited corporate prosecutions for criminal homicide. Notwithstanding the final holding of *Rochester Railway*, the court's willingness to accept the theoretical compatibility of criminal homicide and the modern corporate entity established important dictum for later prosecutions.

26 *Id.*

27 152 Ky. 320, 153 S.W. 459 (1913).

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

29 *Id.* at 324, 153 S.W. at 461.

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

31 *Id.* at 325, 153 S.W. at 462.

*State v. Lehigh Valley Railroad Co.*³² was one of the first cases to sustain an indictment returned against a corporate defendant for criminal homicide. In upholding the indictment, the *Lehigh Valley* court recognized the growing trend to make corporations subject to the general criminal law, even at the expense of logic. The *Lehigh Valley* court explained:

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 law the act of a corporation.³³

Ultimately, the court reasoned, a corporation should be accountable under the criminal law unless something in the nature of the offense, the penalty provided, or the essential elements would render corporate culpability impossible.³⁴

The *Lehigh Valley* court had little difficulty entertaining the view that a corporation could be criminally liable for its own negligence under a manslaughter statute. In dealing with the traditional definition of homicide as the killing of one human being by another human being, the court noted that numerous definitions of homicide had been promulgated.³⁵ Thus, the *Lehigh Valley* court rejected the traditional definition, refusing to be constrained by what it thought to be an arbitrary concept of homicide, namely, that a human being must be killed *by another human being*.

The *Lehigh Valley* court also rejected the *Rochester Railway* holding. Concluding that *Rochester Railway* was based on the precise language of a statute which adopted a "traditional" definition of homicide, the court summarily dismissed the relevance of the case.³⁶ In *Lehigh Valley*, however, it was noted that the *Rochester Railway* court went to "some pains to show that there was nothing essentially incongruous in holding a corporation aggregate criminally liable for manslaughter."³⁷ The *Lehigh Valley* court also dismissed the holding of *Illinois Central* on the ground that it was premised "on an inaccurate definition of homicide."³⁸ Thus, both the *Rochester Railway* and *Illinois Central* problems were resolved by adopting a more flexible definition of homicide.

In essence, *Lehigh Valley* was not willing to frustrate the adaptation of the criminal law to prevailing social realities. The court refused to recognize artificially created conceptual barriers founded on theoretical objections and statutory construction. This position was articulated in the *Lehigh Valley* court's critique of *Rochester Railway*:

32 90 N.J.L. 372, 103 A. 685 (1917).

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

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

35 The court cited Blackstone's definition as one example: "the killing of a human creature, of any age or sex, without justification or excuse." Blackstone included suicide within this definition, which the court found to preclude the restriction of one human being killing *another*. Hence, the *Lehigh Valley* court considered corporate homicide consistent with Blackstone's definition. *Id.* at 375, 103 A. at 686.

36 *Id.* at 375-76, 103 A. at 686.

37 *Id.* at 376, 103 A. at 686.

38 *Id.*

The case is a good illustration of the way in which the proper growth and development of the law can be prevented by the hard and fast language of a statute, and of the advantage of our own legal system by which the way is open for a court to do justice by the proper application of legal principles.³⁹

The New York courts did not reconsider the *Rochester Railway* rule until 1974. In *People v. Ebasco Services, Inc.*,⁴⁰ a corporation was charged with negligent homicide when a cofferdam collapsed killing two workmen engaged in construction work on a river bottom. The defendant corporation attacked the indictment claiming that a corporation could not be indicted for criminally negligent homicide. The court responded by ruling that *Rochester Railway* had established precedent for the concept of corporate culpability for homicide.⁴¹

In explaining the dismissal of the indictment in *Rochester Railway*, the *Ebasco* court noted that the *Rochester Railway* result hinged on a question of legislative intent. Thus, the validity of the indictment in *Ebasco* was dependent upon whether the legislature intended the negligent homicide statute to apply to corporations. Accordingly, to resolve the matter the court turned to the language of the statutes involved.

The relevant statute stated: "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."⁴² The homicide article of the New York Penal Code defined person as follows: "'Person,' when referring to the victim of a homicide, means a human being who has been born and is alive."⁴³ The defendant asserted that the limitation of the word "person" to human beings applied to all uses of the term within the homicide definition, including the party liable for the death. Noting that this conclusion contradicted the definition on its face, the *Ebasco* court stated that the limitation applied only when "person" referred to the victim. The *Ebasco* opinion, moreover, indicated that the only purpose of this limitation was to exclude abortifacient killings from the definition of homicide.⁴⁴

Finding a definition of "person" absent in the homicide article, the court employed the broader meaning supplied in the general definitional article of the penal code: "'Person' means a human being, and where appropriate, a public or private corporation. . . ."⁴⁵ The *Ebasco* court concluded that since *Rochester Railway* authorized the legislature to subject corporate entities to criminal liability for homicide, there was no manifest impropriety in applying the broader definition of "person."⁴⁶

Lehigh Valley and *Ebasco* demonstrate an increasing judicial willingness to

39 *Id.*

40 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974).

41 *Id.*, 354 N.Y.S.2d at 810. See text accompanying notes 22-24 *supra* for the *Rochester* proposition.

42 *Id.* at 786, 354 N.Y.S.2d at 810.

43 *Id.* (emphasis by the court).

44 *Id.* at 787, 354 N.Y.S.2d at 810-11.

45 *Id.*, 354 N.Y.S.2d 811.

46 *Id.* This approach actually begs the question. Since "person" includes corporations only "where appropriate," the question is whether the legislature intended the homicide statute to apply to corporations. *Rochester Railway's* dicta extending liability for homicide to corporations does not mean that such liability was in fact created by the statute. See text accompanying notes 51-54 *infra*.

impose criminal liability on corporations for homicide. Although the common law treatment of corporations under the criminal law and the intangible nature of the corporate entity have presented theoretical and conceptual problems for some courts, their influence is waning. Given the ubiquitous nature of corporations in our society, economic and social considerations have preempted the importance of anachronistic theories and conceptual consistency. This does not, however, resolve the issue completely since a definitive rule has yet to be produced. The absence of both judicial consideration and legislative guidance in many states suggests that uniform treatment regarding the compatibility of criminal homicide and the corporate entity must await future development. Although jurisprudential assaults upon the concept of criminal liability continue,⁴⁷ statutory obstacles remain the primary concern. Thus, consideration of normal statutory frameworks is appropriate. The Model Penal Code provides a good vehicle for such an examination.

III. The Model Penal Code and Corporate Criminal Liability for Homicide

The American Law Institute has given lengthy consideration to the topic of corporate criminal liability in its Model Penal Code. Generally, the Code would subject a corporation to criminal liability if: (1) a particular statute expresses the legislature's desire to include corporations, (2) the illegal act is performed by a corporate agent acting within the scope of his employment, and (3) the criminal act is performed for the benefit of the corporation.⁴⁸ Criminal responsibility would also attach when the offense was premised upon the failure to perform a duty imposed on corporations by law, or when the offense involved the acquiescence of the board of directors or a high-level manager acting in behalf of the corporation and within the scope of his employment.⁴⁹

When corporate criminal liability for homicide is analyzed under the Model Penal Code, the typical problems of statutory construction become apparent. According to the Code: "a person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of *another human being*."⁵⁰ The problems present in *Rochester Railway* have not been eliminated. Thus, clarification of key statutory words is necessary.

The critical terms in the Model Penal Code provision are "person" "human being" and "another." The criminal homicide article defines "human being" as "a person who has been born and is alive."⁵¹ Accordingly, the term "human being" excludes corporations. Significantly, the homicide article does not provide a definition for the word "person," and therefore the Code's general definitions must be consulted. According to § 1.13(8): "'person,' . . . include(s) any natural person and, where relevant, a corporation, or an unincorporated association."⁵² Again ambiguity surfaces. The definition of "person" limits the in-

47 See generally Coleman, *supra* note 15; Elkins, *supra* note 12.

48 MODEL PENAL CODE § 2.07 (1)(a) (Proposed Official Draft 1962).

49 *Id.* at § 2.07(1)(b) & (c).

50 *Id.* at § 210.1(1) (emphasis added).

51 *Id.* at § 210.0(1).

52 *Id.* at § 1.13(8).

clusion of corporations to situations "where relevant."⁵³ The Code's general provision regarding corporate criminal liability⁵⁴ can be used as a guide in determining relevancy but ultimately the matter must be resolved by legislative intent.

The best indication of the intent of the Code's drafters can be found in the comments to the Tentative Drafts.⁵⁵ The Code's authors acknowledge in these comments that corporate criminal liability is a modern development which "has proceeded largely without reference to any intelligible body of principle."⁵⁶ Recognizing this fact, the drafters attempted to provide general guidance on the subject. The basic principle advocated by the Code is the doctrine of respondeat superior, qualified by the requirement that the agent's conduct be performed "in behalf of the corporation."⁵⁷ Thus, under certain conditions a corporation can be held criminally responsible for a homicide committed by a corporate agent. The drafters, however, after considering that shareholders ultimately bear the burden of corporate criminal liability,⁵⁸ suggested that corporate criminal sanctions be withheld from "serious crimes."⁵⁹ What little guidance is offered by this comment is additionally compromised by the statement: "There are considerations, however, which indicate the prudence of retaining responsibility on a more restricted basis for [serious] crimes."⁶⁰ The drafters also failed to distinguish which crimes are "serious crimes."

The Model Penal Code, like most criminal codes, fails, by its language alone, to resolve the ambiguity surrounding corporate criminal liability for homicide. The absence of substantial case law adds further confusion. Although some commentators endorse the compatibility of homicide and corporate criminal liability,⁶¹ the courts are bound to resolve the inherent statutory ambiguities in terms of legislative intent. Paradoxically, the ambiguity found in penal codes subjects the issue to judicial resolution without legislative guidance.⁶²

Although the comments to the Model Penal Code do not expressly address the issue of corporate criminal responsibility for homicide, some indication exists that the drafters favor liability. The drafters note that corporate criminal liability for common law offenses has been a rare occurrence in the American criminal process.⁶³ They enumerate several offenses, however, which have resulted in criminal responsibility, including involuntary manslaughter.⁶⁴ The recognition of such prosecutions might be an implicit acceptance of the procedure. A contradictory argument, however, is suggested by the Tentative Draft's observation

53 The problem is similar to the dilemma that confronted the *Ebasco* court. See text accompanying notes 42-46 *supra*.

54 MODEL PENAL CODE § 2.07 (1) (a)-(c) (Proposed Official Draft 1962).

55 MODEL PENAL CODE § 2.07, Comment (Tent. Draft No. 4, 1955).

56 *Id.* at 146.

57 *Id.* at 147. The Tentative Draft of § 2.07 was adopted in the Proposed Official Draft with minor modifications.

58 See text accompanying note 83 *infra* for a discussion of the ultimate responsibility for corporate criminal infractions.

59 MODEL PENAL CODE, *supra* note 55, at 150.

60 *Id.*

61 See LAFAYE & SCOTT, *supra* note 6, at 230.

62 Given the current judicial trend to erode corporate immunity in general, liability is probable.

63 MODEL PENAL CODE, *supra* note 55, at 150.

64 *Id.*

that tort liability is often more prophylactic than criminal liability⁶⁵ since the monetary burden is substantially greater. Thus, no reliable legislative intent can be discerned.

The Indiana courts will confront similar statutory ambiguities in resolving the Pinto case. Thus, the validity of the Ford prosecution will require a critical analysis of the Indiana Penal Code and the precise language employed in the homicide statute.

IV. The Pinto Case—What Did the Legislature Really Intend?

A. *The Statutory Setting*

The validity of the Ford indictment under Indiana law turns on the statutory definition of reckless homicide, “[a] person who recklessly kills *another* human being commits reckless homicide. . . .”⁶⁶ The problems faced in *Rochester Railway, Illinois Central, and Ebasco* are present under such a statutory provision. The use of the word “another” appears to limit “person” to human beings. Hence, the statute could be read so as to preclude corporate liability.

A contrary result is suggested, however, when the statute is read within the context of the entire Indiana Penal Code. The term “person” is defined as “an individual who has been born and is alive.”⁶⁷ “Person,” conversely, is used in reference to “a human being, corporation, partnership, unincorporated association, or governmental entity.”⁶⁸ Thus, it appears by the use of the broad term “person” that the legislature intended to extend criminal responsibility to corporations under the reckless homicide statute.

In its memorandum in support of a motion to dismiss the indictment,⁶⁹ Ford argued that the restrictive interpretation is the correct view.⁷⁰ Ford averred that if the legislature did not intend to limit the scope of the term “person,” it would have simply replaced “another” with “a.”⁷¹ This argument gains support from the decision in *Kelley v. State*,⁷² in which the Indiana Supreme Court stated:

It is a fundamental rule in the construction of statutes that penal statutes must be construed strictly, or, as is otherwise stated, strictly construed against the state. The rule of strict construction means that statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used, and will not be held to include offenses and persons other than those which are clearly described and provided for although the court may think the legislature should have made them more comprehensive.⁷³

65 *Id.*

66 IND. CODE § 35-42-1-5 (Supp. 1978) (emphasis added).

67 IND. CODE § 35-41-1-2 (Supp. 1978).

68 *Id.*

69 Reply Memorandum in Support of Motion to Dismiss Indictment (filed Dec. 14, 1978).

70 *Id.* at 46.

71 *Id.*

72 233 Ind. 294, 119 N.E.2d 322 (1954).

73 *Id.* at 298, 119 N.E.2d at 324.

The prosecution countered this argument with the assertion that the phrase "another human being" was designed to exclude suicide⁷⁴ and abortion⁷⁵ from the definition of homicide. Ford characterized this view as highly dubious, noting that "reckless suicide" would be an absurdity while the proposition concerning abortion loses its validity when it is recognized that the use of either "person" or "human being" could not include abortifacient killings.⁷⁶ The prosecution retaliated by averring that the use of the broader term "person" rather than "human being" when describing the actor, suggests that the legislature intended to extend liability. This position is consistent with Ford's earlier argument that it must be presumed that the legislature intelligently chose each word of the statute.⁷⁷ Unfortunately, the legislature could not have "intelligently" employed both terms.

Although these statutory provisions do little to clarify the legislature's intent, one additional provision does supply convincing insight. The basis of liability chapter of the penal code states that: "A corporation . . . may be *prosecuted* for any offense; it may be *convicted* of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority."⁷⁸ Thus, the legislature's intent appears to endorse corporate criminal prosecution under the reckless homicide statute, the use of the traditional homicide language notwithstanding.

B. Judicial Resolution

The trial judge in the Pinto case found the statutory language that "[a] corporation . . . may be prosecuted for any offense" combined with the reasoning in *Ebasco* to be compelling. In denying the motion to dismiss, the court concurred with the position espoused in *Ebasco* that there is "no manifest impropriety in applying the broader definition of a person to a corporation with regard to the commission of a homicide."⁷⁹ This proposition, and the statutory provision subjecting corporations to prosecution for any offense,⁸⁰ were held to be sufficient to withstand Ford's challenge to the propriety of prosecuting corporations under the reckless homicide statute.

By ruling that corporations can be indicted under the reckless homicide statute, the trial court has established a significant precedent which, if affirmed, could have nationwide significance.⁸¹ The case provides a basis for interpreting a

74 State's Memorandum at 12 (filed Dec. 1, 1978). This document was filed to oppose the Motion to Dismiss Indictment.

75 *Id.* at 11.

76 See Reply Memorandum, *supra* note 69, at 48. Since "person" definitionally includes human beings and certain artificial beings, the use of "another human being" does little to modify the scope of the statute. Abortifacient killings would not be included if "person" replaced "human beings" since no component of the term "person" includes a fetus.

77 See Reply Memorandum, *supra* note 69, at 46.

78 IND. CODE § 35-41-2-3 (Supp. 1978) (emphasis added).

79 Opinion on Motion to Dismiss at 8 (rendered Feb. 1, 1979). This opinion was rendered by Judge Donald Jones of the Indiana Superior Court, Elkhart County.

80 IND. CODE § 35-41-2-3 (Supp. 1978).

81 On February 23, 1979, an Associated Press news release announced that Norfolk & Western Railway Co. was indicted in Delaware County, Indiana, under the reckless homicide statute following a fatal automobile accident.

statutory provision, which generally subjects corporations to criminal prosecutions, as authorizing homicide prosecutions, notwithstanding the use of restrictive language. Other jurisdictions are likely to employ general criminal provisions to attack corporate misfeasance and nonfeasance. Although state legislatures could easily resolve existing ambiguities, the courts are likely to rely heavily on case law until such ambiguities are eliminated. Hence, corporations may become increasingly vulnerable not only to substantial civil liability, but also to the stigma of a criminal conviction for the death of human beings.⁸² Thus, the final issue to be addressed is the role of corporate criminal liability in modern jurisprudence.

V. Is Corporate Criminal Liability for Homicide Necessary or Desirable?

A. *The Pros and Cons of Corporate Criminal Liability for Homicide*

The extension of criminal liability to corporations has stimulated substantial criticism. The imposition of criminal sanctions on the corporate entity establishes a form of vicarious liability which has been described as "twice removed"⁸³ because the ultimate burden of the sanction falls on the shareholders. Ordinary rules of vicarious liability require the principal's authorization and consent or knowledge of the agent's act before the former may be held accountable.⁸⁴ Shareholders, however, lack adequate means of control, particularly in large, publicly held corporations. Accordingly, the propriety of imposing criminal sanctions on corporations by way of fines is subject to question because those who bear the burden of the sanction are without power to remedy corporate recklessness. Thus, the opponents of corporate criminal liability maintain that the practice operates to punish innocent people.⁸⁵ Corporate shareholders often have little control over management or corporate policy. If the goal of the criminal law is deterrence, then punishing those without the power to alter the allegedly anti-social conduct does little to attain this end.⁸⁶

Conversely, the proponents of criminal liability for corporations aver that deterrence will result from the convicted corporation bearing the "opprobrium and incidental disabilities which normally follow a personal conviction."⁸⁷ Also, a shareholder's loss cannot exceed his equity in the corporation. This protects the individual shareholder against confiscatory losses. Criminal sanctions in the form of fines also reduce or eliminate any financial gain accruing to the corporation from the illegal conduct.

82 Criminal convictions also raise critical issues involving collateral estoppel in subsequent civil litigation. Although the offensive assertion of collateral estoppel by the plaintiff in civil litigation based upon the civil defendant's conviction in a prior criminal case is an unresolved issue in many jurisdictions, future application of such a theory remains a possibility. See generally Comment, *The Conclusiveness of Criminal Judgments in Subsequent Civil Cases: An Expanding Role for Collateral Estoppel in Oregon*, 11 WILLAMETTE L.J. 176 (1975).

83 Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 42 (1957).

84 LAFAYE & SCOTT, *supra* note 6, at 231.

85 Coleman, *supra* note 15, at 920.

86 *Id.* Although derivative suits provide a possible means of recovering fines from corporate directors, indemnification provisions in corporate bylaws often limit their effectiveness. Furthermore, the shareholders are forced to bear the burden of litigation.

87 MODEL PENAL CODE § 2.07, Comment at 148 (Tent. Draft No. 4, 1955). The comments indicate that the drafters "generally" favor corporate criminal liability, with exceptions. Whether homicide is an exception is not clear. See text accompanying notes 51-65 *supra*.

B. *The Case for Corporate Criminal Liability*

Before evaluating the concept of criminal liability of corporations, the ultimate goal of criminal sanctions in general must be assessed.⁸⁸ Criminal punishment is generally justified as achieving three desirable effects: deterrence, retribution, and reformation. The social value of retribution is tenuous, and the concept has been deemphasized in recent years.⁸⁹ Furthermore, as one commentator states, "rehabilitation is not generally thought of in connection with corporations"⁹⁰ especially since fines are the only possible penalty. Therefore, if corporations are to be held liable for homicide, deterrence becomes the criterion of analysis.

Since the imposition of corporate criminal liability threatens to expose innocent shareholders to monetary losses, the likelihood of criminal conviction to deter illegal corporate acts must justify this effect. Thus, corporate criminal liability must ultimately be evaluated by how well it deters illegal corporate activity. Realistically, this evaluation cannot be properly conducted in the abstract. Assessment must be made in light of particular crimes. Thus, corporate criminal liability for homicide should be assessed in terms of its effectiveness to deter corporate conduct likely to endanger human life. Moreover, the impact of liability must be analyzed in terms of the particular sphere of the corporate milieu producing the illegal act.

In conducting this analysis in the context of the Pinto case, it should be noted that *State v. Ford Motor Co.* presents issues which transcend those of existing precedents. Prior indictments of corporations for homicide resulted from acts of corporate agents performed within the scope of employment. The engineer recklessly operating the train or a repairman recklessly installing a gas pipe, are examples of the norm. The prosecution of Ford, however, occurs in a completely different setting. Ford's alleged illegal conduct is comprised of three acts: (1) defectively designing the vehicle, (2) defectively manufacturing the vehicle, and (3) allowing the vehicle to remain on the public highways.⁹¹ Each of these acts is the product of a complex business decision. Both the design and manufacture of automobiles are subject to extensive federal regulation.⁹² Rigorous testing precedes marketing. Defects discovered after sale to the public may involve recalls, either voluntary or compulsory.⁹³ Therefore, the Pinto which exploded on August 10, 1978, was the product of many substantial business decisions occurring at various levels of the corporate hierarchy. The deterrent effect of corporate liability for criminal homicide, therefore, must be assessed by the effect of conviction on this decision-making process.

The maximum penalty which can be imposed on a corporation convicted under the Indiana reckless homicide statute is a \$10,000 fine.⁹⁴ The effectiveness

88 See generally Coleman, *supra* note 15, at 919.

89 *Id.*

90 *Id.*

91 *State v. Ford Motor Co.*, No. 5324 (Indictment at 1).

92 See, e.g., National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1976).

93 See 15 U.S.C. §§ 1411-1420 (1976).

94 IND. CODE § 35-50-2-6 (Supp. 1978).

of this sanction as a deterrent to a large, profitable corporation is questionable. The imposition of a \$10,000 fine in itself is a nominal burden. Opponents of corporate criminal liability for homicide might contend that companies such as Ford are not likely to alter internal policies for fear of such sanctions. Thus, superficially, such indictments appear as futile attempts to impede corporate recklessness when deterrence is the standard of evaluation and "small" fines are the sanction.

The inherent flaw in this analysis is the assumption that the \$10,000 fine is the only consequence of conviction. The negative publicity of a criminal conviction is the consequence most likely to deter reckless corporate conduct. A guilty verdict could threaten the fate of a corporation's entire product line by inspiring public mistrust and thereby jeopardizing future revenues. Short-term cost reductions due to relaxed concern for safety would have to be discounted by the potential impact on sales revenue. Therefore, the imposition of corporate criminal penalties should deter the instigation of corporate policies that produce incidents such as the Pinto explosion of August 10, 1978, by stimulating greater managerial scrutiny of the design and manufacture of products.

The Pinto case, regardless of its outcome, will also heighten corporate concern regarding recalls. A product designed and manufactured with proper care but subsequently found to be defective may be the basis of a homicide indictment. Thus, a new variable enters decisions concerning the recall of defective products. Simple cost analysis will no longer suffice because the company must account for potential public animosity in the event of criminal indictment. The net result is increased concern for product safety and consumer protection.

Arguably, a products liability suit might provide the necessary deterrence offered by criminal liability. The monetary concern is potentially much greater and the victim is compensated more directly. Also, the impact on corporate sales has the potential of being equally devastating. Although this argument has its merits, it fails to note that criminal liability is generally reserved for egregious deviations from the standard of care required of corporations. Furthermore, civil remedies might not be available in all cases,⁹⁵ thus leaving criminal prosecution as the only sanction. The social and moral condemnation associated with a homicide conviction also provides an added variable of immense proportions that is not offered by civil litigation. Media coverage of such events generates national exposure. The result should be much stronger deterrence of reckless disregard for product safety.

Absent potential criminal responsibility for marketing a defective product, the value of human life is reduced to mere cost analysis. Probability distributions estimating potential consumer deaths and resulting civil liabilities pitted against the cost of adequate safety precautions threatens to become the standard of corporate decision-making. Thus, potential criminal liability provides a prophy-

⁹⁵ This is the case in Indiana. Indiana law does not provide a civil remedy to the families of the deceased girls. State's Memorandum in Rebuttal to Motion to Dismiss (filed Dec. 20, 1978).

Civil remedies afforded by wrongful death statutes to parents of minor children killed by defective products are often limited. See generally Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197 (1971).

lactic variable likely to weigh heavily in contemporary decision-making models, thereby enhancing corporate responsibility to consumers.

VI. Conclusion

The traditional immunity from criminal prosecution offered to corporations has eroded substantially. Although legislative enactments authorize prosecutions of corporations for most crimes, the liability of corporations for specific crimes is ambiguous. Corporate criminal liability for homicide is one such offense. The ambiguity stems from two factors: the relatively few attempts to indict corporations for homicide and the adoption of traditional definitions of homicide in statutes, which lack a clear legislative intent to extend liability to corporations. The traditional definition requires the killing of one human being by another human being. The use of "another" preceding "human being" when describing the victim is said to require an actor of the same class which excludes corporations since they are not human beings. Courts have adhered to this position despite the use of broader terms such as "person" to describe the actor.

Most of the ambiguity present in statutory language can be resolved by substituting "a" for "another" in the homicide statute.⁹⁶ State legislatures should review their homicide statutes to make this correction if they so desire.⁹⁷ Since the issue turns on proper interpretation of legislative intent, the relevant statutes should be made as explicit as possible. Indeed, proper treatment by the state legislators could settle the question decisively.

Although few courts have dealt with the problem of corporate criminal liability for homicide, the prevailing trend appears to favor liability. The issue, however, is unresolved in most jurisdictions. The Pinto case demonstrates the significance of the issue at stake. The ability to prosecute corporations in this type of case will influence decision-making at the highest levels of American industry. Considering the consequences which may result, the issue mandates firm guidance from state legislatures.

It must be remembered that the imposition of criminal liability for homicide is an additional remedy which should be reserved for exceptional cases. The option to prosecute supplements the civil process and, in some states, may be the only practical recourse. Criminal liability is not designed to supplant civil remedies, but to enhance them. Corporate concern for consumer safety must not be reduced to mere cost analysis, pitting the risk of injury or fatality against the cost of producing safe products. By subjecting corporations to criminal liability for homicide, decision-making can no longer function in this manner. This new assault introduces a variable into business equations which operates to promote product safety. Thus, corporate criminal liability for homicide is justified by its deterrence of reckless disregard for consumer safety.

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⁹⁶ Since most statutes defining homicide describe the actor as a "person" and the victim as a "human being," the use of "a" preceding "human being" would limit the class of victims while extending the class of actors to include corporations. Abortional killings would be excluded. *See, e.g., MODEL PENAL CODE* § 210.1(1) (Proposed Official Draft 1962).

⁹⁷ Legislatures should also consider authorizing substantially greater fines. Since corporations are usually profit motivated, larger monetary sanctions would provide a direct incentive to fostering product safety.