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CRIMINAL LIABILITY FOR LIFE- ENDANGERING CORPORATE CONDUCT

W. ALLEN SPURGEON* AND TERENCE P. FAGAN**

INTRODUCTION

Business corporations supply modern society with the necessities and comforts of life. Benefiting from the collective capital of many shareholders and laws favoring the artificial business entity, corporations are uniquely able to provide goods and services to the public. Corporations produce our transportation vehicles, process the food we eat, construct the buildings in which we live and work, and make a myriad of goods we use everyday. The manufacturing process provides employment and also profoundly affects our environment. Corporations are thus an essential element of modern life.

While corporations have dramatically improved the United States' standard of living, this progress has not been without social costs. Some corporate activity endangers life itself. Unsafe cars, drugs, and food additives endanger the health of consumers. Hazardous working conditions and toxic chemicals used in the manufacturing process pose life and health risks to industrial workers. Water and air pollution and the dumping of toxic chemicals threaten public health.

Such simultaneous beneficial and detrimental aspects of corporate conduct present lawmakers with the challenge of curtailing socially harmful activity without stifling the industrial process. Criminal law may operate as one device to restrain corporations from engaging in unreasonably harmful conduct. In the most recent attempt to codify and reform the Federal Criminal Code,¹ the Senate Judiciary Committee included an offense which would have punished conduct, manifesting

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¹ The most recent bill of this nature and the one that will be the subject of this article is S. 1722, 96th Cong., 2d Sess. (1979) [hereinafter cited as S. 1722]. See SENATE COMM. ON THE JUDICIARY, REFORM OF THE FEDERAL CRIMINAL LAWS, S. REP. NO. 96-553, 96th Cong., 2d Sess. (1979). For earlier versions of this reform effort, see *Hearings on S. 1453 Before*

an extreme indifference to or an unjustified disregard for human life, which knowingly places human life in imminent danger of death.

Because criminal law represents society's moral condemnation of certain activity, such an endangerment offense will most effectively deter corporate behavior if society casts moral blame upon life-endangering conduct. When corporate activity imperils human life to a degree substantially greater than the societal benefits it confers, that activity becomes morally blameworthy and properly subject to criminal sanctions. Even though conduct may be morally condemnable, criminal sanctions should be invoked only when the threat of punishment will deter behavior or fulfill a retributive function. Even though the corporate form reduces their impact, criminal sanctions do serve as a deterrent. Thus, an endangerment offense providing added criminal liability would provide corporations with an incentive to conform to social norms.

This article will analyze both the efficacy of utilizing criminal law to shape corporate behavior and the specific provisions of the proposed endangerment offense. Part I establishes the existence of socially harmful corporate conduct and the need for government regulation. This section will also elaborate the history and provisions of the endangerment offense. Part II considers whether corporate life-endangering conduct is morally blameworthy so as to be properly subject to criminal sanctions and whether punishing such conduct would have a different impact. This section attempts to illustrate some of the social policy problems associated with criminalizing some life-endangering activity. While Part II focuses on theoretical and policy questions, Part III discusses the implementation of criminal sanctions in a practical context. It analyzes the actual deterrent effect of inflicting criminal penalties on a corporation and its employees. Finally, Part III briefly considers whether the Senate Judiciary Committee's construction of the endangerment statute would reach most morally blameworthy and socially harmful conduct.

I. LIFE ENDANGERING ACTIVITY AND PROPOSED FEDERAL LEGISLATION

A. SOCIALLY HARMFUL CORPORATE ACTIVITY

As noted above, while corporations are responsible for the technological advancement of society, corporate activity also imposes serious social costs. In recent decades, these costs, in the form of deleterious effects on the public health, safety, and welfare, have become increas-

the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974); *Hearings on S. 1 Before the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

ingly apparent. Corporate life-endangering activity can be divided into three categories: occupational harm, dangers to consumers, and deterioration of the environment affecting the general public.² A survey of the most notable recent occurrences in each of the areas illustrates the effect of such corporate conduct.³

Millions of Americans are exposed to health and safety risks while they work. Before the advent of the Occupational Health and Safety Act⁴ as many as 100,000 people died annually from occupational diseases.⁵ After the Act's passage in 1970, federal health officials have estimated that 25 percent of the work force is exposed to regulated toxic substances and that 880,000 workers are exposed to carcinogenic chemicals.⁶ Substances such as asbestos⁷ and vinyl chloride⁸ used in many industrial processes, cause widespread illness to those workers who use them.

Some corporate activity also poses a danger to consumers. One study estimates that "approximately 20 million Americans are injured each year in the home as a result of accidents involving unsafe consumer products. These accidents result in about 30,000 deaths and 110,000 permanently disabling injuries."⁹ In some cases, a single product with a

² This trichotomy of harms is articulated in Schrager & Short, *Toward a Sociology of Organizational Crime*, 25 SOC. PROB. 407 (1978).

³ This survey of incidents is not meant to be a parade of horrors but rather aims to define the general parameters of corporate endangering activities. Many of the examples which follow will be used later in the article for analytical purposes.

⁴ 29 U.S.C. §§ 651-678 (1970).

⁵ The 1972 President's Commission on Occupational Safety and Health compiled this statistic, which was reported in M. CLINARD & P. YEAGER, *CORPORATE CRIME* 10 (1980).

⁶ Bronson, *Workers' Right to Know*, Wall St. J., July 1, 1977, at 4, col. 2-4 (quoted in *Does Business Value Human Life?*, 22 BUSINESS & SOC'Y REV. 44, 51 (1977)).

⁷ Studies by the U.S. Health Service in the 1930s demonstrated that asbestos workers had a significant incidence of asbestosis (a nonmalignant scarring of the lungs) and pneumoconiosis (a chronic reaction to the inhalation of dust). See SUBCOMM. ON CRIME, HOUSE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., *CORPORATE CRIME* 23 (Comm. Print No. 10 1980) [hereinafter cited as SUBCOMM. ON CRIME]. See also A. LANZA, W. MCCONNELL & J. FEHRENELE, *EFFECTS OF INHALATION OF ASBESTOS ON THE LUNGS OF ASBESTOS WORKERS* 1 (Public Health Service Pub., Vol. 50, No. 1, Jan. 1, 1935). Research conducted in the 1960s confirmed that asbestos constituted a health hazard. See Selikoff, *Asbestos Exposure and Neoplasia*, J.A.M.A., April 6, 1964, at 22 and note 88 *infra*. Although industry knew of these health risks, few corporations took steps to rectify the problem. OSHA now regulates the permissible number of asbestos fibers in the ambient environment of the workplace, a standard that industry opposed. See SUBCOMM. ON CRIME, *supra* at 25.

⁸ Vinyl chloride is mainly used in the manufacture of plastics, an industry that accounted for one percent of the gross national product in 1976. SENATE COMM. ON COMMERCE, TOXIC SUBSTANCES CONTROL ACT., S. REP. NO. 94-698, 94th Cong., 2d Sess. 5 (1976). This chemical substance has been associated with liver cancer in workers and birth defects. *Id.*

⁹ SENATE COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., 2D SESS., CENTER FOR POLICY ALTERNATIVES AT THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY, *BENEFITS OF ENVIRONMENTAL, HEALTH AND SAFETY REGULATION* 24; (Comm. Print 1980) (citing

design or testing defect may seriously endanger many consumers. For example, the Ford Pinto fuel system was shown to be susceptible to exploding upon near-impact at certain speeds.¹⁰ The Firestone Tire and Rubber Company marketed the radial "500" tire which often proved faulty, causing many accidents and injuries.¹¹ The Richardson-Merrell Pharmaceutical Company produced the drug MER/29, designed to reduce cholesterol, which in fact had many harmful side effects.¹²

In addition to conduct which endangers the life and health of employees and consumers, corporate activity also imperils the general populace by damaging the environment. Toxic chemicals, in particular, pose a grave health risk. In 1976, two million chemical compounds existed, with nearly a thousand new chemicals introduced into the market each year, ultimately entering the environment through use or dispo-

Dardis, Aronson & Lin, *Cost Benefit Analysis of Flammability Standards*, 60 AM. J. AGRIC. ECON. 695 (Nov. 1978)).

¹⁰ In 1971-76 model Pintos, the metal fuel tank was located behind the rear axle. Rear-impact collision studies have shown that at collisions of moderate speeds, the fuel tank is carried forward, impacting with the rear-axle housing or mounting bolts. SUBCOMM. ON CRIME, *supra* note 7, at 9. As of 1978, rear-end collisions resulting in fires had caused 26 deaths and burn injuries to 24 other persons. *Id.* at 10 (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMINISTRATION, OFFICE OF DEFECTS AND INVESTIGATION ENFORCEMENT, INVESTIGATION REPORT, PHASE I, *Alleged Fuel Tank and Filler Neck Damage in Rear-End Collisions of Sub-compact Passenger Cars, 1971-76 Ford Pinto, 1975-76 Mercury Bobcat 4* (May 1978) [hereinafter cited as INVESTIGATION REPORT]). Ford allegedly knew the fuel system was defective, but declined to make a safety improvement at cost of \$11 per car. SUBCOMM. ON CRIME, *supra* note 7, at 9 (referring to Dowie, *How Ford Put Two Million Firetraps on Wheels*, 23 BUS. & SOC'Y REV. 46 (1977)). Dowie reportedly obtained the safety cost figure from an internal Ford memorandum, *id.* at 1. In 1980, an Indiana jury acquitted Ford of reckless homicide charges stemming from the burn deaths of three young women. N.Y. Times, March 14, 1980, § 1, at 1, col. 1.

¹¹ Firestone became the first American firm to manufacture steel-belted radial tires in large quantities for the original equipment market. In 1976, four years after production began, the Center for Auto Safety, a consumer organization, noticed that a disproportionate number of complaints involved the Firestone 500. On the order of the National Highway Traffic Safety Administration in 1978, Firestone produced a list of 213 accidents associated with the tire. SUBCOMM. ON CRIME, *supra* note 7, at 3-5. A subsequent congressional investigation concluded, "Accidents attributable to the '500' number in the thousands, injuries in the hundreds, and known fatalities as of August 1978, 34 . . . *Id.* at 5 (quoting SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 2D SESS., THE SAFETY OF FIRESTONE 500 STEEL BELTED RADIAL TIRES 1 (Comm. Print 1978)). In 1978, at the behest of the National Highway Traffic & Safety Administration, Firestone agreed to recall some 7.5 million radial tires. SUBCOMM. ON CRIME, *supra* note 7, at 8.

¹² In the development of this drug, a lab technician noted that test animals were developing eye problems and losing weight. When the technician reported these results to her supervisors, she was told to falsify this data. C. STONE, *WHERE THE LAW ENDS* 167 (1975). Thus, the company marketed the drug in the early 1960s when at least some of its employees knew that it could cause such harmful side-effects as "interruption of normal sexual functioning, loss of hair, and the development of eye cataracts." M. CLINARD & P. YEAGER, *supra* note 5, at 265 (citations omitted).

sal.¹³ In Niagara Falls, New York, chemical contamination caused the evacuation of many homes.¹⁴ In Hopewell, Virginia, production of the chemical Kepone by the Allied Chemical Company deteriorated employees' health and damaged the aquatic environment of the James River.¹⁵ While toxic chemicals may harm significant numbers of people, corporate activity may also endanger a confined and concentrated community. For example, at Buffalo Creek, West Virginia, a solid waste dam built by a mining company collapsed, flooding the valley below and causing destruction of life and property.¹⁶

These examples of occupational, consumer and environmental harm illustrate the need to prevent socially harmful conduct. Where a private right of action exists, the threat of a compensatory damage judgment may deter corporations, who aim to maximize profit, from engaging in certain harmful conduct. However, sporadic civil damage suits may not effectively alter behavior. In addition, market pressures may prevent corporations seeking growth and profit from taking voluntary,

¹³ S. REP. NO. 94-698 at 3. Dr. David Rall, director of the National Institute of Environmental Health Sciences of the National Institute of Health, noted that "[m]any of these compounds are toxic to man in relatively low concentrations. Man is assaulted by these compounds alone and in combination from multiple sources. *This problem constitutes possibly the major health hazard of this decade.*" *Id.* at 4 (emphasis in original).

¹⁴ The Hooker Chemical Company began using the uncompleted Love Canal site as a burial place for chemical wastes in 1947, the year the site was purchased. By 1952, the company had dumped 22,000 tons of chemicals there. SUBCOMM. ON CRIME, *supra* note 7, at 14, 15. In 1953, Hooker deeded the property to the Niagara Falls Board of Education, which built an elementary school adjacent to the canal site. In the deed, Hooker disclaimed liability for any injury or death resulting from its disposal. *Id.* In 1976, chemicals began to seep into some basements of the 200 homes which had been built in the vicinity of the canal. In 1978, the New York Department of Health investigated residents' complaints of "abnormal numbers of miscarriages, birth defects, cases of cancer, and a variety of illnesses." *Id.* at 16. The department found that 82 chemical compounds had entered the air, water, and soil, 11 of which were actual or suspected carcinogens. By July 1979, President Carter had declared the canal site a disaster area, and 263 families had left their homes. *Id.*

¹⁵ Workers producing the pesticide contracted such health problems as severe tremors, diminished ability to walk or stand, "weight loss, liver tenderness and enlargement, brain damage, chest pains, personality changes [and] eye flutters." Stone, *A Slap on the Wrist for the Kepone Mob*, 22 BUS. & SOC'Y REV. 4, 6 (1977). Chemical dust arising from the manufacturing process was found to have travelled from the plant "at least sixteen miles in the air and sixty-four miles in the water." *Id.* Since Kepone had found its way into the James River via the Hopewell sewage system, shellfish and fish became contaminated, causing the governor of Virginia to close 100 miles of the river to fishing. *Id.*

¹⁶ The Buffalo Mining Company dumped slag from its coal mining operations to form a barrier behind which the company could store water needed to prepare the coal for shipment. SUBCOMM. ON CRIME, *supra* note 7, at 2. In February 1972, the reservoir behind the solid waste dam rose to within inches of the crest. The company cut a spillway as a precautionary measure, but issued no public warnings. Early the next morning the dam collapsed, sending a 20-30 foot tidal wave of waste and solids downstream. The flood killed 125 people and destroyed 1,000 homes. *Id.* at 2-3. See also M. CLINARD & P. YEAGER, *supra* note 5, at 234. In June 1974, 600 of the Buffalo Creek residents, who had brought suit against the mining company's parent corporations, were awarded 13.5 million dollars in an out-of-court settlement.

but costly, safety steps if other members of their industry do not also follow the same course of action.¹⁷

Given the free enterprise ethic in America, government would avoid interference with corporate activity by means of regulatory laws if corporations were able to avoid significant social harm. However, the perceived inability of business to regulate its own activity led to government regulation in the nineteenth century. Due to the scope of interstate commerce and the need for uniformity, the federal government became active in monitoring business activity. Modern comprehensive federal public welfare offenses¹⁸ first appeared in 1938 with the passage of the Food, Drug and Cosmetic Act.¹⁹ In the last two decades, Congress has enacted laws to protect employees,²⁰ consumers,²¹ and the environment.²² Such legislation typically provides for administrative,²³ civil,²⁴ and criminal²⁵ remedies and sanctions.

Despite this existing regime of regulation, some corporate acts continue to result in societal harm. Senators in the Ninety-Sixth Congress responded to the problem by introducing legislation criminalizing knowing life-endangering conduct by corporations.

B. PROVISIONS AND HISTORY OF THE ENDANGERMENT OFFENSE

Section 1617 of the 1979 Senate Federal Criminal Code Reform Act would have penalized a person when "he engages in conduct that he knows places another person in imminent danger of death or bodily injury, and (1) his conduct in the circumstances manifests an extreme indifference to human life, or (2) his conduct in the circumstances

¹⁷ This proposition can be proved by demonstrating that its obverse is true. If one company deviates from ethical or legal practices, thereby reaping a benefit, other companies in the same industry will also engage in the same behavior. Clinard and Yeager point out that illegal pricefixing tends to be industry wide. M. CLINARD & P. YEAGER, *supra* note 5, at 62. These authors also cite a 1953 study by Lane showing that in a given industry, the percentage of firms violating the law varies greatly according to community. *Id.* at 63 (citing Lane, *Why Businessmen Violate the Law*, 44 J. CRIM. L.C. & P.S. 151 (1953)).

¹⁸ Professor Sayre first coined this phrase in a 1933 article. See Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

¹⁹ 21 U.S.C. §§ 301-392 (1938). Initial federal regulatory laws actually began with the Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768. However, the provisions of the 1938 Act were much more comprehensive.

²⁰ See, e.g., Occupational Health & Safety Act, 29 U.S.C. §§ 651-678 (1970).

²¹ See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (1972); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1966).

²² See, e.g., Clean Air Act, 42 U.S.C. § 7401 (1977). Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1977); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976).

²³ For example, the Occupational Health and Safety Act provides administrators of the Act to issue citations, 29 U.S.C. § 658, and to enforce administrative penalties, *id.* § 659.

²⁴ See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2069; Federal Water Pollution Control Act, 33 U.S.C. § 1319(d).

²⁵ See, e.g., Toxic Substances Control Act, 15 U.S.C. 2615(b); Occupational Health and Safety Act, 29 U.S.C. 666, and statutes collected in note 42 *infra*.

manifests an unjustified disregard for human life."²⁶

The concept of an endangerment offense is not new. In formulating the Model Penal Code, the American Law Institute established an offense for reckless conduct.²⁷ The National Commission on Reform of the Federal Criminal Laws suggested a similar offense,²⁸ and New York has enacted two statutes punishing reckless, endangering conduct.²⁹ These offenses impose criminal liability in two contexts. First, as many criminal codes specifically penalize certain life-endangering conduct, the endangerment offense constitutes an additional penalty.³⁰ Second, when a person's conduct did not violate a specific statute yet still placed lives in danger, the offense created general liability where none had previously existed.³¹ In each of these previous models of endangerment, recklessness constituted the culpable state of mind.

In the early draft of the 1979 Senate bills, S. 1722 and S. 1723, the Judiciary Committee relied on these early endangerment examples. The initial version of section 1617 proscribed reckless conduct that placed the life of another in imminent danger of death or serious bodily injury when such conduct concurrently violated any statute designed to protect public health and safety.³² However, after business representa-

²⁶ S. REP. NO. 96-553 at 561-62.

²⁷ Section 201.11 of the Model Penal Code provides: "A person is guilty of reckless conduct if he: (a) recklessly engaged in conduct which places or may place another person in danger of death or serious bodily injury" ALI MODEL PENAL CODE § 201.11 (Tent. Draft No. 9 1959).

²⁸ Reckless Endangerment.

(1) Offense. A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a Class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a Class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (l) of section 201 or when the offense is committed in the course of committing or in immediate flight from the commission of any other offense over which federal jurisdiction exists.

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 1613 178 (1971) [hereinafter cited as FINAL REPORT].

²⁹ N.Y. PENAL LAWS § 120.20 (McKinney 1967) provides: "A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."

N.Y. PENAL LAWS § 120.25 provides: "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."

³⁰ For example, the National Commission noted that federal law penalizes violation of federal safety regulations. When endangerment occurs in the course of such a violation, the endangerment provision serves as an additional means of prosecution. *See* FINAL REPORT, *supra* note 28, at 178.

³¹ A person could be liable for death or injury resulting from the operation of dams, nuclear facilities, or transportation facilities. *Id.* at 178.

³² *See Reform of the Federal Criminal Laws, Hearings on S. 1722 and S. 1723 Before the Senate Judiciary Comm.*, 96th Cong., 2d Sess. 11182-83 (1979) [hereinafter cited as *Hearings*].

tives and public interest groups presented their views of the legislation, the Judiciary Committee made several changes limiting the scope of section 1617.

The committee first changed the standard of culpability from recklessness to knowledge. Business interests argued that a reckless standard would unnecessarily impose liability upon corporations for a broad range of problems. Irving R. Shapiro, chairman of E.I. du Pont de Nemours & Company, contended that juries would associate recklessness with no guilty state of mind and would therefore render decisions actually based on a strict liability standard.³³ Public interest groups, however, pointed out that recklessness is a state of mind, for the standard encompassed conduct in "gross deviation from the standard of concern that a reasonable person would have exercised in the situation."³⁴ Apparently persuaded by the business arguments, the Judiciary Committee adopted the standard of knowledge, requiring that a defendant "must be aware or believe that his conduct is substantially certain to place another in imminent danger of death or serious bodily injury" to violate the endangerment provision.³⁵

Second, the Judiciary Committee limited the scope of the endangerment by adding the requirement that the knowing conduct must evidence extreme indifference to or an unjustified disregard for human life. These qualifying requirements serve to limit the offense to "especially aggravated situations."³⁶ A defendant acts with "extreme indifference" when his conduct is so outrageous that any absence of actual harm is merely a "quirk of fate."³⁷ A person's conduct may evidence an "unjustified disregard" for human life when the "substantial likelihood of causing death or serious bodily injury is wholly disproportionate to the benefit of the conduct."³⁸

Finally, the Judiciary Committee also narrowed the scope of the endangerment offense by limiting its applicability to concurrent violations of specific regulatory offenses. As originally framed, conduct would be subject to liability under the endangerment offense if that con-

³³ *Id.* at 10087-88 (statement of Irving Shapiro). Shapiro testified on behalf of the Business Roundtable, an association of 192 large corporations. *Id.* at 10072.

³⁴ *Id.* at 9945 (testimony of Assistant Attorney General Philip Heymann).

³⁵ See S. REP. NO. 96-553 at 562.

³⁶ *Id.* at 563.

³⁷ *Id.*

³⁸ *Id.* Business concerns influenced the definition of "unjustified disregard." The Business Roundtable criticized the initial endangerment provision as an attempt "simplistically to deal with a whole variety of complicated 'endangerment' problems inherent in a technical society." *Id.* at 10075. By introducing a balancing test of dangers and benefits, the committee's adoption of the unjustified disregard requirement recognized the difficulty of penalizing endangering conduct. For an application and analysis of this standard in the context of corporate activity, see notes 74-96 & accompanying text *infra*.

duct concurrently violated any statute "designed to protect public health or safety."³⁹ During the hearings, various groups criticized such a broad endangerment provision as leading to unwarranted prosecutorial discretion⁴⁰ and to a proliferation of litigation over which statutes were designed to protect public "health and safety."⁴¹ In response to these criticisms, the Judiciary Committee specifically enumerated the regulatory statutes which would confer liability under section 1617.⁴² The committee concluded that these offenses were the "most appropriate and important from a practical standpoint for application of the endangerment concept."⁴³

The Judiciary Committee classified a violation of the endangerment offense as a felony. Conduct evidencing an extreme indifference to human life was punishable by up to five years in prison with all other conduct violating the statute subject to up to two years of incarceration.⁴⁴

The 1979 Act proposed other changes in sanctions that might have affected corporations convicted of the endangerment offense. When the convicted defendant was an organization, the proposed Act authorized fines of up to one million dollars for a felony.⁴⁵ In addition to a fine, the Act invested the trial judge with the power to authorize restitution to a victim, when the defendant had been found guilty of an offense causing bodily injury.⁴⁶

³⁹ See *Hearings*, *supra* note 32, at 11183.

⁴⁰ *Id.* at 9985 (testimony of Professor William Greenhalgh on behalf of the American Bar Association Criminal Justice Section).

⁴¹ *Id.* at 10087 (testimony of Irving Shapiro for the Business Roundtable).

⁴² Section 1617 now imposes liability only when conduct also violates any of the following criminal offenses:

- (I) The Environmental Pollution offenses of
 - (1) The Federal Water Pollution Control Act, 33 U.S.C. § 1319(c)(1);
 - (2) The Clean Air Act, 42 U.S.C. § 7413(c)(1);
 - (3) The Toxic Substances Control Act 15 U.S.C. § 2615(b);
 - (4) The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1316(b)(1);
 - (5) The Solid Waste Disposal Act, 42 U.S.C. § 6928(d)(1) or (d)(2);
 - (6) The Outer Continental Shelf Lands Act, 43 U.S.C. § 1350(c)(1);
 - (7) Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(b);
 - (8) The Noise Control Act, 42 U.S.C. § 4910(a)(1); and
 - (9) The Rivers and Harbors Act, 33 U.S.C. § 407;
- (II) The Federal Mine Safety & Health Act, 30 U.S.C. § 820(c);
- (III) The Occupational Safety and Health Act, 29 U.S.C. § 666(e);
- (IV) The Federal Hazardous Substances Act, 15 U.S.C. § 1264(a);
- (V) The Public Health Service Act, 42 U.S.C. §§ 262(f) and 263a(h), or
- (VI) The Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 333.

⁴³ S. REP. NO. 96-553 at 564.

⁴⁴ *Id.*

⁴⁵ S. 1722, *supra* note 1, § 2201(b)(2).

⁴⁶ S. 1722, *supra* note 1, § 2006(a)(1). This section allowed the court to order restitution for the payment of medical services, provided that such payment "not exceed such portion of

The endangerment provision as it related to corporate conduct represented another attempt by Congress to prevent corporate activity which imperiled human life. In order to analyze the efficacy and impact of such a criminal statute, the purposes of criminal law and the general application of criminal sanctions to corporations must be considered.

II. MORAL BLAMEWORTHINESS AND THE PUNISHMENT OF LIFE-ENDANGERING CORPORATE ACTIVITY

The goal of law is to define the permissible parameters of conduct in society. Premised on current social needs and notions of morality, law structures, prescribes, and limits our business, social, and familial activity. While law aims to establish acceptable norms of conduct, the administrative, civil, and criminal branches of law provide a means of insuring that individuals act in accordance with social norms.

When a corporation violates a regulatory statute, an administrative agency may issue a citation or negotiate a consent decree. Thus, an administrative agency may order conformity with the behavior mandated by regulatory laws or implementing regulations. When a corporation tortiously injures an individual, that person may seek compensation by bringing a private civil action. Assuming that corporations act rationally to maximize profits, the monetary compensation it must pay for a tortious wrong serves to deter the corporation from acting in a similar manner in the future. Activity which becomes costly will be avoided. When corporate conduct not only inflicts injury, but also violates a criminal statute, the state may punish the corporation or the responsible agents. The possibility of punishment acts as a deterrent of aberrant behavior.

This general description of the remedies and sanctions of administrative, civil, and criminal law illustrates that all three branches of law aim to conform behavior. All three branches could be used to reach life-endangering corporate conduct. The Senate Judiciary Committee's attempt to criminalize endangering activity represents a judgment that criminal sanctions would serve a particular role, unfulfilled by either administrative or civil law. Thus, the first inquiry in assessing the endangerment offense is whether the criminalization of life-endangering corporate activity is theoretically consistent with the goals and purposes of criminal law. If the activity does not fall within the criminal law, punishing such activity would be unjust to the corporation and reduce

the victim's medical expenses . . . as the court determines can be ascertained without unduly complicating or prolonging the sentencing process." *Id.* See also S. REP. NO. 96-553 at 952.

the general force of criminal sanctions. To answer this inquiry, we must first outline the purposes of criminal law.

A. PURPOSES AND GOALS OF CRIMINAL LAW

While civil and criminal law are much alike, two factors particularly distinguish criminal law. First, criminality attaches to conduct that is particularly morally blameworthy.⁴⁷ Society has long criminalized such immoral and deviant behavior as murder, rape, and theft. However, because tort law also provides a remedy for these wrongs,⁴⁸ immorality of the conduct must not itself confer criminality. Criminal law embodies a greater sense of moral outrage by society. Thus, a crime may be defined as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."⁴⁹ A formal judgment of guilt manifests this condemnation; social stigma, therefore, attaches to the convicted.⁵⁰ Generally, society does not place as much moral blame on an individual against whom a civil judgment is entered.

A second distinguishing feature of criminal law is that criminal sanctions constitute punishment. While punitive damages at civil law may punish a wrongdoer in the sense of imposing harm or deprivation,⁵¹ criminal sanctions represent punishment imposed by the collective force of society through the state. Because of society's moral condemnation of the wrongdoer's conduct, criminal sanctions always represent punishment.⁵² Thus, the state's power to convict and punish an individual gains legitimacy from the moral blameworthiness attached to the indi-

⁴⁷ Although reasonable persons may differ as to whether particular conduct is moral, reference to morality in this article shall mean behavior in accordance with the accepted standard of right and normative conduct in society. See Oleck, *Remedies for Abuses of Corporate Status*, 9 WAKE FOREST L. REV. 463, 474-75 (1973).

⁴⁸ See generally W. PROSSER, *TORTS* (4th ed. 1971).

⁴⁹ Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 405 (1958).

⁵⁰ Herbert Packer stated that society views conviction itself as punishment because of the stigma attached to the guilty. Packer observes that after a conviction, if the criminal is a "respectable member of the community who wants the good opinion of his fellows and of society, he has in a relevant sense already suffered some punishment." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 36 (1968).

Ball and Friedman also noted, "Labelling conduct as 'criminal' may change the public attitude toward the man who breaks the law" Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 211 (1965).

⁵¹ Hart noted that with the "exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings." Hart, *supra* note 49, at 403-04. Civil defendants are subject to body execution and punitive monetary damages. *Id.* at 404.

⁵² Punishment by the state coupled with the moral stigma of a condemnation thus differentiates criminal from civil law. As Packer points out, "Not all punishment is criminal punishment but all criminal punishment is punishment. Punitive damages imposed in a civil suit

vidual's conduct.⁵³

This moral basis also forms a constituent element of the purposes of criminal law, which are generally recognized to be deterrence and retribution. The threat of incarceration or a penalty by fine deters the potential or actual wrongdoer from violating established norms of behavior.⁵⁴ In addition to actual punishment, the social opprobrium associated with conviction serves as a deterrent.⁵⁵ Society has formalized this social stigma by placing disabilities on criminals that extend beyond the term of actual punishment.

Both actual and social sanctions potentially shape behavior. Ball and Friedman have noted that social scientists agree that sanctions "can effectuate policy considerations by influencing what a person thinks he ought to do or what he wants to do in a particular situation."⁵⁶ Sanctions act as an external restraint on behavior when an actor avoids a course of conduct simply because a statute prohibits that conduct. In this sense, moral blame may not attach to the conduct itself. However, punishment is legitimate because society associates some moral blame with the violation of statutes and regulations.⁵⁷

constitute punishment but not criminal punishment Punishment is a concept; criminal punishment is a legal fact." H. PACKER, *supra* note 50, at 35.

⁵³ Some theorists place less emphasis on the moral basis of criminal law while highlighting the rational end which the criminal law attempts to attain. Accordingly, "[t]he legislature simply wants certain things done and certain other things not done because it believes that the doing or the not doing of them will secure some ultimate social advantage, and not at all because it thinks the immediate conduct involved is either rightful or wrongful in itself." Hart, *supra* note 49, at 417. Under this view, criminal law is an instrument by which government manipulates behavior for social ends. See Ball & Friedman, *supra* note 50, at 210-11. Thus, the power of the state is used to regulate individuals and entities in their daily functions.

The differences between the moral and rational theories are few but important. Legislatures presumably only prohibit socially harmful conduct. If morality consists of the standard of right and proper conduct, actions which promote and benefit the social welfare would be moral. Conversely, actions detracting from the social good would be immoral and discouraged. When criminal law prohibits certain socially harmful behavior, moral and rational goals converge.

The major difference between the two theories is that morally based sanctions may have a greater impact on individuals' conduct, an impact discussed at note 71 & accompanying text *infra*.

⁵⁴ See Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 37 (1957).

⁵⁵ Packer notes that in addition to the fear of pain and loss of liberty, "[f]eelings of shame resulting from the social disgrace of being punished as a criminal are feared also." H. PACKER, *supra* note 50, at 42.

⁵⁶ Ball & Friedman, *supra* note 50, at 75.

⁵⁷ [E]ven when the activity proscribed by law is not in itself morally wrong, the knowing violation of the law may be morally blameworthy. If a statute regulates and structures important social behavior and institutions, there is probably a moral duty to obey that law, at least in a reasonably just society.

Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 HARV. L. REV. 1227, 1237-38 (1979).

Criminal sanctions may also act as an internal restraint on behavior. In such a case, the actor conforms his behavior to a given standard, not because he fears the consequences of nonconformity, but because he believes the standard to be right.⁵⁸ When an actor knows that society will judge certain behavior as morally blameworthy, the actor internally establishes a course of action which will not subject him to blame or cause him to make conscious choices as to the propriety of his behavior. Thus, the actor does not need to follow a statute book to determine if his behavior is acceptable.

In addition to deterrence, criminal law also serves a retributive function. Retribution is entirely premised on the moral blameworthiness of the conduct: the state imposes sanctions because the actor has harmed society. It is therefore "morally fitting that a person who does wrong should suffer in proportion to his wrongdoing."⁵⁹ Thus, punishment for moral reasons serves to satisfy social passions for vengeance.⁶⁰ If the state did not fulfill this function, individuals would attempt to gain revenge themselves, thereby disrupting rule by law.⁶¹ Such disruption would also take place if the state punished behavior not morally condemnable. If a consensus of society does not view the actor's conduct as immoral, punishment becomes undeserved and unjust. Undeserved punishment leads to a lack of respect for the criminal justice system.

B. MORAL BLAMEWORTHINESS AND CORPORATE LIFE-ENDANGERING CONDUCT

The distinctive feature of criminal law is the moral blameworthiness attached to the conviction for and punishment of proscribed conduct. Criminal sanctions seek to deter actors from engaging in behavior they believe to be wrong or that society condemns. The punishment of

⁵⁸ Packer divides deterrence into conscious and unconscious components. In explaining the unconscious aspect, he states that the "existence of a 'threat' helps to create patterns of conforming behavior and thereby to reduce the number of occasions on which the choice of a criminal act presents itself." H. PACKER, *supra* note 50, at 43. Thus, he contends that we become unconsciously impelled to do the right thing and abide by the law. See also *id.* at 65.

⁵⁹ See Rawls, *Two Concepts of Rules*, PHILOSOPHICAL REV., Jan. 1955, at 3, 4-5 (quoted in Posner, *Retributions and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 71 (1980)).

⁶⁰ Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 ADEL. L. REV. 361, 406 (1978).

⁶¹ In discussing the concept of retribution in *Furman v. Georgia*, 408 U.S. 238 (1972), Mr. Justice Stewart stated,

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law. *Id.* at 308 (Stewart, J., concurring). For an analytical discussion of retribution, see Gregg v. Georgia, 428 U.S. 153, 237-41 (1976) (Marshall, J., dissenting).

less than immoral behavior weakens the force of criminal law. Each of these propositions presumes first that the actor views the conduct as immoral and second that society can reach a consensus as to the immorality of certain behavior. When applied to corporate life-endangering conduct, these presumptions become problematic.⁶²

While the artificial entity of the corporation has no soul or conscience of its own to help it evaluate morality of conduct, the human agents who operate the corporation do have the capacity to judge right from wrong. However, the organizational structure and competitive environment of the corporation may influence the moral perspective of businessmen. In his pioneering study of white collar crime, Sutherland pointed out that "criminal behavior is learned in association with those who define it favorably . . . [a] person in an appropriate situation engages in such behavior if, and only if, the weight of favorable definitions exceeds the weight of unfavorable definitions."⁶³ The corporation is an association and community that favorably defines behavior that produces economic gain for the corporation.⁶⁴ In some situations, the corporate profit motive overrides the individual's preconceived notions of morality. In 1932, the president of General Motors declined to install safety glass in new model cars, a step which would have reduced the incidence of injury in collisions, on the ground that "[W]e are not a charitable institution—we are trying to make a profit for our shareholders."⁶⁵ A 1976 survey found that respondent executives believed their colleagues "would not refuse orders to market off-standard and possibly dangerous products."⁶⁶ When corporate goals conflict with individual moral standards, the individual often faces the choice of compromising or losing employment. Thus, in the MER/29 drug incident, the employee had to choose between her job and falsifying her experimental data.⁶⁷

Despite the fact that the corporate profit motive may encourage individuals to act in ways which society judges to be immoral, to assert

⁶² The discussion of this section is concerned with a theoretical application of the concepts of moral blameworthiness and deterrence. Part III, *infra*, discusses the practical aspects of deterrence by considering whether criminal sanctions have an actual impact on corporations and corporate agents.

⁶³ E. SUTHERLAND, WHITE COLLAR CRIME 234 (1949) (quoted in Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 917 (1976)).

⁶⁴ For a discussion of how the corporation becomes the immediate community of the corporate executive, see M. CLINARD & P. YEAGER, *supra* note 5, at 274-75.

⁶⁵ Letter from Alfred P. Sloan, Jr. to Lamont du Pont, president of E.I. du Pont de Nemours & Co. (April 15, 1932) (quoted in Mintz & Cohen, *Crime in the Suites*, in THE CONSUMER AND CORPORATE ACCOUNTABILITY 79 (R. Nader ed. 1973)).

⁶⁶ M. CLINARD & P. YEAGER, *supra* note 5, at 274 (quoting Madden, *Forces which Influence Ethical Behavior*, in THE ETHICS OF CORPORATE CONDUCT 66 (C. Walton ed. 1977)).

⁶⁷ See note 12 & accompanying text *supra*.

that the drive for profit causes immoral behavior is too simplistic. Corporate goals do not exist in isolation from general social goals. Society values life and so do most corporate executives. In one informal survey, several corporate officers were of the opinion that no project should go forward "if even one life is endangered beyond prudent precaution."⁶⁸ The problem facing corporate executives is not that they must follow corporate goals with unswerving allegiance, but that social goals often conflict. Society values life, but it also values technological progress. In some situations, the pursuit of progress imposes risks on life. In the survey noted above, some officers pointed out that endangering activity such as building bridges is found in all societies, even communist countries where business does not espouse the profit motive for private gain.⁶⁹

Whether they are coopted into a corporate atmosphere emphasizing profit to the exclusion of accepted societal values, or whether they choose to maximize one of several conflicting social goals, businessmen may fail to view their conduct that eventually causes danger to lives as morally blameworthy. In terms of the goals of criminal law, this failure to envisage conduct as immoral detracts from the deterrent value of an endangerment offense. Deterrence produced solely by the threat of criminal sanction will of course have socially desirable results. An endangerment offense structured like section 1617 of the 1979 Act, where the offense is only as broad as a concurrent violation of other specified regulatory statutes,⁷⁰ will provide added incentive to avoid engaging in conduct clearly prohibited by certain statutes. However, because corporate executives do not share a consensus as to the morality of certain life-endangering behavior not specifically proscribed by statute, such an endangerment offense does not encourage corporate executives to develop general patterns of conduct which would reduce or eliminate life-endangering risk. Thus, without a moral consensus or mandate, corporate executives will be deterred from certain activity because they fear

⁶⁸ Nelson T. Bogart, vice-president of Standard Oil of California (quoted in 22 BUS. & SOC'Y REV. 44, 48 (1977)). The *Review* sent letters to several corporate executives posing a hypothetical question involving drilling for oil at sea. The ultimate question was: "How much in profits is one life worth?" Most of the executives responded that a human life is priceless and should not be jeopardized knowingly. *See, e.g.*, W.F. Rockwell, Jr., chairman of Rockwell International ("Certainly no endeavor should be pursued where a life is knowingly to be lost."). *Id.* at 47.

⁶⁹ *See, e.g.*, David P. Reynolds, chairman of the board of Reynolds Aluminum, *id.* at 45. Some executives went beyond this view and characterized risk as an inherent and essential aspect of our free enterprise system. *See, e.g.*, comments of Edgar B. Speer, chairman of U.S. Steel ("[F]reedom and individual enterprise of people to take risks is vital to the maintenance and progress of our total society." *Id.* at 46.) and Richard R. Shinn, president of Metropolitan Life ("[T]he freedom to assume risk, even risk to life, is part and parcel of our basic freedoms." *Id.* at 50).

⁷⁰ *See* note 42 *supra*.

punishment, rather than because they are acting in accordance with a previously established standard they believe is right.⁷¹

Perhaps a standard of right is difficult for corporate executives to formulate because society in general finds it difficult to establish a consistent moral code with respect to life-endangering activity. Professor Sayre observed that "all criminal law is a compromise between two fundamentally conflicting interests—that of the public which demands restraint of all who injure or menace the social well-being and that of the individual which demands maximum liberty and freedom from interference"⁷²

Individual freedom and social well-being are two basic but complex concepts. In a democratic society, freedom means the ability to pursue economic gain, to acquire property, and to seek happiness as the individual pleases. The social good generally encompasses the same ideals and yet recognizes that unrestrained individual freedom may cause social harm. Public policy places limitations on freedom. In some cases, a legislative restriction on individual freedom leads to a readily discernable social benefit. Punishing individuals who murder or assault others serves to promote the social good of security and order. Punishing employees and manufacturers for unhealthy working conditions, unsafe products, and environmental pollution also serves a social good. Yet the restraint on individual freedom attached to this punishment may be significant. A certain degree of pollution may be attendant on a given industrial process, but complete eradication of the pollution may be so economically costly that the industrial process will cease to continue.⁷³ Our technology may be capable of producing an automobile that is absolutely safe, yet the price of this car may be so great that many members of society would be unable to buy one. Thus, by punishing polluters and automakers for the general good, individuals may be deprived of the opportunity to buy desired products or services.

The point at which freedom of activity must be restrained for the well-being of the larger society will always be open to public debate.

⁷¹ Packer argues that the utilitarian approach to deterrence is insufficient. Thus, it is not enough that individuals refrain from behavior simply because they fear the consequences of acting in a certain way. Packer emphasizes the "unconscious habitual controls of the law-abiding," H. PACKER, *supra* note 50, at 65, which emanate only from a view that prohibited conduct is immoral. *Id.* In the corporate context, Stone points out the inability of the law to shape corporate behavior solely on the basis of utilitarian deterrence and other external controls. See C. STONE, *supra* note 12, at 91-110. Stone concludes that some internal control is preferable so that people "act in socially appropriate ways because they believe it the 'right thing' to do, rather than because (and thus, perhaps only to the extent that) they are ordered to do so." *Id.* at 112.

⁷² Sayre, *supra* note 18, at 68.

⁷³ For a discussion of the social costs of totally eliminating socially harmful behavior, see C. STONE, *supra* note 12, at 31.

Such discussion will inevitably balance costs and benefits of a given activity to determine its desirability. Section 1617 of the 1979 Act adopted such a balancing approach with respect to life-endangering activity. Section 1617 proscribed conduct manifesting an "unjustified disregard" for human life, which the Judiciary Committee defined as conduct posing risks which were "wholly disproportionate to the benefit of the conduct."⁷⁴ This standard raises the question of what conduct presents a harm so disproportionate to its benefit so as to incur the moral blame of society which will fulfill the morally based criminal goals of deterrence and retribution.

Many corporate activities involve danger. It is difficult to define precisely which activities deserve moral condemnation, because it is often difficult to ascertain the point at which the harm of a particular activity becomes disproportionate to the benefit. However, some categories of blameworthiness may be formulated. Several factors determine in which category particular conduct may become located. First, activity may be divided, as Irving Shapiro has done, into three types: unknown risks, known and avoidable risks, known and unavoidable risks.⁷⁵ Second, the continuum encompasses the economic cost of avoiding a risk. Finally, the social cost associated with avoiding a risk must be considered, where social cost means the unquantifiable burden placed on the enjoyment and utility of the item.

The threshold question in categorizing activities is whether a given risk is discoverable. Society would not morally condemn corporations and individuals for creating an unknown and unforeseeable risk. However, corporations must have a duty to take all reasonable precautions to discover risks. If a corporation rushes production of a particular item without thoroughly testing for and solving faults that may cause injury, the corporation may be subject to moral blame.⁷⁶ This blameworthiness is in part evidenced by the decision of Congress to impose, through the Toxic Substances Control Act, a requirement that manufacturers test for the harmful and toxic effects of new chemicals.⁷⁷

After the risk is discovered, the next question in establishing blame-

⁷⁴ S. REP. NO. 96-553, at 563.

⁷⁵ Shapiro, *supra* note 6, at 50.

⁷⁶ The Firestone radial 500 tire incident presents a possible example of such blame. While all American tire manufacturers experienced some development problems with producing radial tires, Firestone was the first company to market such a tire. Firestone itself experienced more difficulty with the 500 tire than with other steel-belted radials, which it took more time to develop. Firestone accepted back more 500 tires from its customers and settled more claims involving the 500 than it did for its other steel-belted radials. See SUBCOMM. ON CRIME, *supra* note 7, at 6. Thus, it may be inferred that the 500 tire's problems stemmed in part from rushing the tire into production before solving technological problems.

⁷⁷ See 15 U.S.C. §§ 2601(b), 2603 (1976).

worthiness is whether the risk can be avoided and at what cost. In answering this question, the different categories begin to take shape. In one category falls activity that is most blameworthy, which may consist of two primary kinds of conduct. First, failure to prevent cheaply avoidable risks is most condemnable. For example, construction laborers working at great heights are exposed to the possibility of injury upon falling. Scaffolding and safety lines greatly reduce this risk. As compared to the value of a life or the economic cost scaffolding adds to the construction project, such safety devices are cheap. In the language of the endangerment offense, failure to provide safety devices would represent an unjustified disregard for human life, because the harm of the conduct (death or serious injury) would be disproportionate to the benefit (economic reduction in cost of buildings constructed without the use of safety devices).⁷⁸

Even though this example may seem blameworthy without contention, failure to prevent cheaply avoidable risks may not always be criminally condemnable. Ford Motor Company allegedly could have reduced the incidence of Pinto fires occurring on rear-end impact with the installation of an eleven-dollar part.⁷⁹ While this lack of prevention seems morally blameworthy, a twelve-person jury in Indiana acquitted Ford of reckless homicide charges in the Pinto case.⁸⁰ While this verdict may have been the result of certain evidentiary rulings and defense tactics peculiar to the particular trial,⁸¹ it is disturbing when considered in a blameworthiness analysis. The benefit involved is an automobile which many people can afford to purchase. Automobile transportation is a social good providing enjoyment and personal utility. Indeed, Ford produced 2,213,700 Pintos between 1971 and 1976.⁸² The harm caused by producing fuel systems susceptible to fire is serious death or injury. Prior to May 1978, twenty-six people died, and twenty-four others were burned as a result of rear-end collision Pinto fires.⁸³ Whether Ford's behavior manifested an unjustified disregard for human life turns on what factors are to be balanced in determining disproportionality. The

⁷⁸ For a similar example, see *People v. Ebasco Services, Inc.*, 77 Misc. 2d 784, 354 N.Y.S. 2d 807 (1974), where the court held that a corporation may be indicted for homicide. In that case, several workers drowned when a coffer dam collapsed. By sustaining the indictment, the court implied that failure to take safety precautions is culpable.

⁷⁹ This allegation was made by Mark Dowie. See note 10 *supra*.

⁸⁰ N.Y. Times, March 14, 1980, § 1, at 1, col. 1.

⁸¹ The trial judge limited relevant evidence to internal Ford documents relating to the testing of the particular model Pinto involved in the accident. *Id.* § 1, at 16. In addition, Ford refused to stipulate as to the authenticity of any of its company memoranda, *id.*, a tactic posing further evidentiary complications for the prosecution.

⁸² These statistics are reported in SUBCOMM. ON CRIME, *supra* note 7, at 9.

⁸³ The National Highway Traffic Administration compiled these statistics. See INVESTIGATION REPORT, *supra* note 10, at 4 (cited in SUBCOMM. ON CRIME, *supra* note 7, at 10).

incidence of injury compared to number of people driving Pintos does not appear disproportionate. But if the operative proportion is between the cost of prevention and incidence of injury, Ford's behavior becomes unjustified. Certainly many Pinto purchasers would have bought the car if it had cost eleven dollars more. Ford allegedly did not give its purchasers this option, but instead calculated that the cost of safety was not worth the savings in lives.⁸⁴ While some economic value may be placed on a life, the cost of the safety improvement could be spread among purchasers without creating a burden. Thus, Ford's failure to prevent a cheaply avoidable risk appears morally blameworthy.

A second type of conduct falling into the most blameworthy category is that which poses a great degree of danger, yet may still cost a great deal to avoid. Failing to incur the avoidance expense casts blame on the actor causing the harm. The Buffalo Creek incident illustrates such conduct. The mining process produced slag and liquid waste for disposal. In order to allow the impurities to settle from the water and to have the water available for future use, the mining company dumped the slag to form a barrier behind which the water could be stored.⁸⁵ Eventually, the dam collapsed, sending a tidal wave of waste into the valley below, killing 125 people and destroying a thousand homes.⁸⁶

The harm of the mining company's conduct was death and destruction of property. The benefit of the activity to society at large was the production of coal. The inhabitants of the Buffalo Creek area benefited from the use of streams not directly contaminated by the company's liquid effluent. The coal company benefited from being able to dispose of its slag while retaining water for later use in the mining process. In balancing the proportionality of these benefits against the harm, the danger was disproportionate to the benefit received by the coal company. When the destruction of a community is at stake, the risk should be avoided. In 1974, the company settled a damage suit for thirteen-and-a-half million dollars. Instead of paying damages, the company could reasonably have used these monies to reinforce the dam or to find an alternate means of storing waste water. The company's failure to do so was unjustified and therefore blameworthy.

A second category of blameworthiness consists of activity in which the proportionality of benefit and harm may nearly balance. In this category, defining what conduct manifests an unjustifiable disregard for life is more difficult. The health hazards associated with asbestos and

⁸⁴ The Dowie article alleges that Ford made such calculations. See Dowie, *supra* note 10, at 51. A Ford official characterized these allegations as distorted and containing half-truths. SUBCOMM. ON CRIME, *supra* note 7, at 10.

⁸⁵ SUBCOMM. ON CRIME, *supra* note 7, at 2.

⁸⁶ *Id.* at 3.

vinyl chloride used in the manufacturing process illustrate this kind of behavior. Asbestos has more than three thousand commercial applications,⁸⁷ but is also associated with significant health risks.⁸⁸ Similarly, the vinyl chloride industry accounted for one percent of the gross national product in 1976, yet this chemical has been associated with liver cancer in workers and with birth defects.⁸⁹

The substances present the harm of death or serious illness. However, society gains the benefit of using fire-resistant products and items containing plastic. In this case, the harm may not necessarily be disproportionate to the benefit. Here we are confronted with the conflicting social goals of valuing human life and of social progress. No life should be sacrificed needlessly, but taking some risks may be a constituent part of society. If manufacturers adhere to standards which reasonably protect the health of workers, their conduct cannot be so unjustifiable as to warrant moral blame simply on the basis of a cost/health balancing test.⁹⁰

A final category of blameworthiness consists of conduct which poses a small but not negligible degree of harm that is very costly to avoid. No great amount of moral blame attaches to such activity. The problem of benzene in the workplace, as treated by the Supreme Court in *Industrial Union, AFL-CIO v. American Petroleum Inst.*,⁹¹ provides a recent example. Several studies had linked benzene with leukemia.⁹² OSHA reduced the standard for benzene in the air from ten to one part per million, a standard costing industry approximately \$470 million in investment and start-up costs and \$34 million in annual costs.⁹³ One in-

⁸⁷ *Id.* at 22.

⁸⁸ Research by Selikoff showed that by 1973, "444 of the original 632 workers (in the 1943 control group) were dead, a death rate 50 percent greater than expected for the average white male." *Id.* at 24 n.12 (citing Selikoff & Hammond, *Multiple Risk Factors in Environmental Cancer*, in *PERSONS AT HIGH RISK OF CANCER* (J. Fraument, Jr. ed)).

⁸⁹ See note 8 *supra*.

⁹⁰ Legislative or administrative bodies may determine what levels of a particular substance are necessary to protect employee health. Thus, the OSHA standard for asbestos is now two million fibers per cubic meter of air. SUBCOMM. ON CRIME, *supra* note 7, at 25. A violation of such regulations would in itself be morally blameworthy. See *Developments in the Law*, *supra* note 57, at 1237. In order to violate the § 1617 endangerment offense, an actor's conduct must not only satisfy the elements of § 1617, but must concurrently constitute a violation of specified regulatory offenses. See note 42 *supra*. If the actor's conduct does not satisfy the balancing test embodied in the "unjustified disregard" standard, the actor would not violate § 1617 even though the actor's conduct violated a regulatory statute. Thus, the moral blame attached to violating a statute would not by itself suffice to incur blame under the endangerment offense. However, to the extent that statutes represent a legislative determination of justifiable conduct, a violation of the regulatory statute may in some instances represent the kind of unjustifiable conduct the endangerment offense seeks to prohibit.

⁹¹ 100 S. Ct. 2844 (1980).

⁹² See *id.* at 2852 n.9 for a collection of these studies.

⁹³ *Id.* at 2857. According to the Court, OSHA estimated the "standard will require capi-

dustry witness testified that the new standard would prevent at most one leukemia and one other cancer death every six years.⁹⁴ In view of the cost of implementation and the degree of harm avoided, the Court held that OSHA had exceeded its rulemaking authority because it could not demonstrate a reasonable relation between the health hazard and the adopted standard. The Court stated that the Occupational Health and Safety Act

was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible to do so, so long as the cost is not great enough to destroy the entire industry. Rather, both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination as far as feasible, of significant risks of harm.⁹⁵

Thus, the Court in effect held that conduct which endangers a few, but which is costly to make safe, is not morally condemnable.

This survey of the categories of corporate activity and moral blameworthiness has demonstrated that many factors must go into the balance of determining when conduct constitutes an unjustified disregard for human life. Given these complexities, it may be difficult for corporations, prosecutors, and courts to determine when behavior violates the offense. However, in some cases, the harm of conduct clearly is disproportionate to the benefit.⁹⁶ In these situations, the endangerment offense would provide an added penalty, with deterrent and retributive effects, for conduct considered morally blameworthy.

G. CULPABILITY AND CORPORATE CONDUCT

Closely associated with the moral blameworthiness characteristic of criminal law is the requirement of a guilty mind or *mens rea*. In revising the endangerment offense, the Judiciary Committee changed the standard of culpability from reckless⁹⁷ to knowledge.⁹⁸ Considering the spe-

tal investments in engineering control of approximately \$266 million, first year operating costs (for monitoring, medical testing, employee training and respirators) of \$187 million to \$205 million and recurring annual costs of \$34 million." *Id.* (citing 43 Fed. Reg. 5934 (1978)).

⁹⁴ 100 S. Ct. at 2860.

⁹⁵ *Id.* at 2864.

⁹⁶ This class of cases belongs to the "most blameworthy" category described above. See notes 78-86 & accompanying text *supra*.

⁹⁷ The Senate Judiciary Committee summarized the definition of recklessness provided in S. 1722 as follows:

[A] person is reckless if he is aware of but disregards a substantial risk that a circumstance exists or that a result will occur. A substantial risk is defined as a risk the disregard of which constitutes a gross deviation from the standard of care a reasonable person would exercise under the circumstances

S. REP. NO. 96-553 at 64. See also S. 1722, *supra* note 1, § 302(c).

⁹⁸ In summarizing the proposed code's definition of knowing, the Judiciary Committee explained that such a state of mind exist when the actor "is aware of the nature of his con-

cial emphasis our criminal system places on culpability and the social costs attributable to a lesser standard of culpability, this change appears to be warranted.

The requirement of scienter has long been an essential characteristic of criminal law. Blackstone stated that "to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."⁹⁹ Commenting on public welfare offenses not requiring scienter, Sayre stated that "*mens rea* is as vitally necessary for true crime as understanding is necessary for goodness."¹⁰⁰ In *Morissette v. United States*,¹⁰¹ the Supreme Court underscored the importance of *mens rea*, holding that intent was a necessary element for any common law crime. But the *Morissette* Court also recognized that it had condoned and enforced a category of regulatory offenses not requiring intent.¹⁰² Such statutes generally carried a minimal penalty and focused upon "achievement of some social betterment rather than the punishment of crimes as in cases of *mala in se*."¹⁰³

By imposing criminal liability on life-endangering conduct, Congress would attempt to better society at large. In this sense, endangerment has the characteristic of a *malum prohibitum* offense. Yet the scope of the endangerment offense is limited to morally blameworthy conduct, so the offense is like *malum in se*. In order to be penalized as morally blameworthy, corporate activity must be undertaken with a vicious will. Indeed, with the exception of a violation of the Food and Drug Act, criminal penalties for other regulatory offenses require knowing and willful conduct as an element.¹⁰⁴

In addition to its moral basis, knowledge is the proper standard of culpability for social policy reasons. The knowledge standard imposes on corporate leaders the duty to refrain from actions which they actually know or should know from all the facts available to them will cause unjustifiable death or injury. Corporate actors must inculcate safety, health, and ethical considerations into their rational decisionmaking process. Failure to make these considerations will be morally blameworthy and properly subject to punishment.

duct, he is aware that the requisite circumstances exist, or he is aware or believes that his conduct is substantially certain to cause the result." S. REP. NO. 96-553 at 63. See also S. 1722, *supra* note 1, § 302(b).

⁹⁹ 4 W. BLACKSTONE, COMMENTARIES *21 (quoted in Sayre, *supra* note 18, at 55).

¹⁰⁰ Sayre, *supra* note 18, at 56.

¹⁰¹ 342 U.S. 246 (1951).

¹⁰² See *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Berhman*, 258 U.S. 280 (1922); *United States v. Balint*, 258 U.S. 250 (1922).

¹⁰³ *United States v. Balint*, 258 U.S. at 252.

¹⁰⁴ See Olds, Unkovic & Lewin, *Thoughts on the Role of Penalties In the Enforcement of the Clear Air and Clean Water Acts*, 17 DUQUESNE L. REV. 1, 8 (1978).

Standards of culpability less than knowledge, such as recklessness or negligence, entail a broader scope of liability. Both recklessness and negligence depend upon a prevailing reasonable standard of care. This standard is objective, subject to judicial change over time as the standard of reasonableness changes.¹⁰⁵ Risks and hazards may be acceptable at one point in time, but unreasonable at another. Due to this changing climate, corporations may take certain actions later found to be negligent or reckless. This possibility of future liability unnecessarily chills corporate activity.

A culpability standard of strict liability would cause corporations to be even more cautious in their activity. In discussing the effect of a strict liability standard on business conduct, the Supreme Court in *United States v. United States Gypsum Co.*¹⁰⁶ pointed out that the uncertainty of whether a particular activity will be subject to punishment deters businessmen from engaging in behavior that may be close to the "borderline of impermissible conduct."¹⁰⁷ The Court noted that for some kinds of conduct, a requirement evoking excessive caution comports with the overall statutory scheme.¹⁰⁸

Certainly the goal of the endangerment offense is to deter socially harmful conduct. Yet the language of the offense manifests no concern for excessive caution. By establishing that only conduct exhibiting an unjustified disregard for human life shall be punishable, the Senate Judiciary Committee recognized that overdeterrence of corporate activity would have a socially harmful effect. The endangerment offense did not seek to punish all harmful activity, but only that which posed a risk disproportionate to the benefit of the activity.

While criminal laws should encourage industry to adhere to a standard of care, when that standard becomes unreasonably difficult to attain, society as a whole suffers.¹⁰⁹ Our system of government generally

¹⁰⁵ See, e.g., *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), where tug boats were lost in a storm. While some boats at the time carried radio equipment to receive weather reports, the sunken tugs did not. The tugowners defended liability for the lost cargo on the ground that it was not an industry custom to carry radio equipment. In finding that the owners fell below the standard of care, Judge Learned Hand stated for the court: "Indeed in many cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages." *Id.* at 740.

¹⁰⁶ 438 U.S. 422 (1978). In *United States Gypsum*, the Court rejected a strict liability standard for a violation of the antitrust laws.

¹⁰⁷ *Id.* at 441.

¹⁰⁸ *Id.* at 441-42 n.17. The Court had to make this qualification due to its holding in *United States v. Park*, 421 U.S. 658 (1975), that corporate officers were strictly liable for a violation of the Food, Drug and Cosmetic Act.

¹⁰⁹ An unreasonable standard would be one for which it is economically unfeasible for corporations to observe so that the cost of observance significantly increased the cost of or

envisages that democratic institutions will establish standards of behavior after gathering views from all sectors of society to determine the optimal standard. A culpability requirement of knowledge requires corporations to act in accordance with the due care standards established by administrative agencies and legislative bodies. Thus, for social policy reasons, knowledge is a preferable standard of culpability for an endangerment offense.

III. APPLYING THE ENDANGERMENT OFFENSE TO CORPORATIONS

In considering the effectiveness of a federal endangerment offense as it relates to corporations, a discussion of whether punishment of this activity conforms with the theoretical and moral purposes of criminal law constitutes only part of the inquiry. Morally blameworthy conduct may be the proper subject of criminality, but labelling conduct as criminal will serve no purpose unless the threat of sanction has actual meaning for the actor and society, and unless the offense is constructed so as to reach the proper range and types of conduct.

The endangerment offense presents two primary practical problems. First, even though it may be theoretically appealing to deter corporate behavior by punishment, the peculiar organizational nature of a corporate wrongdoer may dampen the actual deterrent effect of punishment. Second, while Part II discussed what conduct, in terms of moral blameworthiness, exhibited an unjustified disregard for human life, the specific scope of the endangerment offense remains to be considered.

As a preface to answering these questions, the judicial treatment of corporations and corporate officers in the criminal context should first be reviewed briefly in order to demonstrate some of the special problems arising in the corporate context.

A. CRIMINAL LIABILITY OF THE CORPORATION AND ITS EMPLOYEES

As corporate activity increased in the nineteenth century, criminal law had to develop a means for dealing with harm caused under the auspices of the corporate form. Criminally penalizing a corporation posed theoretical problems since the corporation is an artificial entity which exists only in accordance with the laws of its state of incorporation.¹¹⁰ Indeed, at common law, the artificial nature of the corporation

ended altogether the cost of the industrial enterprise. See notes 73, 87-95 & accompanying text *supra*.

¹¹⁰ See *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). See also Laugham, *The Law and the Corporate Polluter: Flexibility and Adaption in the Developing Law of the Environment*, 23 MERCER L. REV. 571, 589-90 (1972).

prevented it from incurring criminal liability.¹¹¹

In order to overcome the obstacle of artificiality, the law first equated the corporation with a natural person.¹¹² Since a corporation acts only through its human agents, courts then found corporations vicariously liable for the acts of their agents.¹¹³ In *New York Cent. & Hudson River R.R. Co. v. United States*,¹¹⁴ the Supreme Court first applied this tort principle to the criminal context. The Court held that corporations are liable for the acts of their agents, undertaken within the scope of their authority, which violate specific statutory proscriptions. Public policy mandated this result since allowing corporations to avoid liability would mean that "many offenses would go unpunished and acts be committed in violation of law, where . . . the statute requires all persons, corporate and private, to refrain from certain practices forbidden in the interest of public policy."¹¹⁵ The Court concluded that immunizing corporations from criminal liability "would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at it."¹¹⁶ Following *New York Central*, courts now regularly impute criminal liability to a corporation for the acts of employees done on behalf of the corporation and within the scope of the actor's authority.¹¹⁷

New York Central involved the violation of a regulatory offense that did not require willfulness or knowledge as an element. Theoretically, it is impossible for an artificial entity with no mind or soul to have *mens rea* so as to incur moral guilt. Apparently guided by the undesirable policy consequences of freeing corporations from liability, the Court in *United States v. Illinois Cent. R.R. Co.*,¹¹⁸ did not attempt to solve this theoretical enigma and summarily found that a corporation could be civilly liable for willfully failing to comply with statutory requirements. The Court later applied the concept of corporate willfulness to criminal law in

¹¹¹ Blackstone stated that a "corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may in their distinct individual capacities." EHRLICH'S BLACKSTONE 106 (J. Ehrlich ed. 1959).

¹¹² See, e.g., 1 U.S.C. § 1 (1976), which provides that "the words 'person' and 'whoever' include corporations . . . as well as individuals."

¹¹³ See Mueller, *supra* note 54, at 40.

¹¹⁴ 212 U.S. 481 (1904).

¹¹⁵ *Id.* at 495.

¹¹⁶ *Id.* at 495-96.

¹¹⁷ See, e.g., *United States v. Hangar One, Inc.*, 563 F.2d 1155 (5th Cir. 1977); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States v. Carter*, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *Egan v. United States*, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943).

¹¹⁸ 303 U.S. 239 (1938).

*United States v. A & P Trucking Co.*¹¹⁹ Although that case involved the liability of partnership, the Court used language applicable to all business entities:

The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law.¹²⁰

After *A & P Trucking*, federal courts upheld the convictions of corporations for offenses requiring knowledge.¹²¹ Courts have also held that corporations may be indicted for homicide for deaths resulting from the acts or omissions of employees.¹²²

Corporate officers and agents may be subject to personal criminal liability for acts they perform for their employing corporation. Since most criminal statutes proscribe conduct done by "any person," officers cannot use their employment relation to shield themselves from liability. According to principles of accomplice liability, when a corporation engages in illegal activity, corporate officers directing the conduct become criminally liable.¹²³ In addition, corporate employees may incur indirect liability for aiding and abetting¹²⁴ another employee to commit¹²⁵ an offense.¹²⁶

¹¹⁹ 358 U.S. 121 (1958).

¹²⁰ *Id.* at 126 (footnotes omitted).

¹²¹ *See, e.g.*, *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975); *Boise Dodge, Inc. v. United States*, 406 F.2d 771 (9th Cir. 1969); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963); *United States v. Gibson Products*, 426 F. Supp. 768 (S.D. Tex. 1976).

¹²² *United States v. Van Schaick*, 134 F. 592 (2d Cir. 1904); *People v. Ebasco Services, Inc.*, 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974); *Commonwealth v. Illinois Central R.R. Co.*, 152 Ky. 320, 153 S.W. 459 (1913); *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909).

¹²³ "[A]ll those who may be said to have directed or caused the actor to do the act, or to have participated in accomplishing the result, may be treated as the actors." NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, I WORKING PAPERS 183 (1970) [hereinafter cited as I WORKING PAPERS].

¹²⁴ The current federal criminal code imposes liability upon anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense, and upon anyone who "willfully causes an act to be done which if directly performed by him would be an offense." 18 U.S.C. § 2(a), (b) (1978).

¹²⁵ I WORKING PAPERS, *supra* note 123, at 183.

¹²⁶ The standards and scope of strict liability are somewhat different. In *United States v. Park*, 421 U.S. 658 (1975), the Court held that chief executive officers could be personally liable for violations by subordinate employees of a strict liability statute. The Court stated that an officer will be prima facie liable when the officer "by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *Id.* at 673-74. The Court imposed a duty of "foresight and vigilance," but did not "require that which is objectively impossible." *Id.* at 673. The lower federal courts interpreting *Park's* objective impossibility defense have construed the scope of the defense narrowly. *See United States v. Hata & Co.*,

B. DETERRENCE, RETRIBUTION AND IMPOSING CRIMINAL SANCTIONS
ON CORPORATIONS AND EMPLOYEES

In order to shape corporate conduct, the threat of criminal sanctions must actually deter corporations from acting in the proscribed manner. In implementing statutory offenses, courts have upheld the criminal convictions of corporations on the presumption that the corporate entity would respond on the threat of criminal sanctions in the same way as would an individual. Thus, in both *New York Central*¹²⁷ and *A & P Trucking*,¹²⁸ the Supreme Court indicated that punishment of the corporation would cause corporate owners and directors to alter modes of behavior so as not to violate the law. Personal punishment of these same corporate agents presumably serves the same deterrent function. Even if punishment did not effect deterrence, sanctions might serve a retributive purpose. In order for an offense punishing life-endangering conduct to be effective, the goals of deterrence and retribution must be attainable in the corporate context. However, characteristics of corporations affect the analysis of whether criminal sanctions achieve these goals.

Deterring the Corporation

In order for any sanction to serve as a deterrent, it must truly punish the offender. A corporation cannot be imprisoned, so punishment is limited to the social stigma attached to the fact of conviction and to the levy of a fine. To be effective, these penalties must force the corporation to alter its operating structure so as to avoid future criminal behavior.

As with individuals, the social opprobrium attached to a criminal conviction acts as a deterrent for corporations. A corporation's image is important to its employees, shareholders, and consumers. Since a criminal prosecution diminishes the corporation's standing with these groups, criminal sanctions become undesirable.¹²⁹ Thus, in seeking to avoid conviction for reckless homicide for the Pinto deaths of three girls, Ford Motor Company spent in litigation expenses an estimated one million dollars to escape a possible \$30,000 penalty.¹³⁰

A second motivation for corporations to conform their behavior to statutory requirements is the threat of fine. The levy of fines rests on the presumption that corporations act to maximize profits and that the

Ltd., 535 F.2d 508 (9th Cir. 1976); *United States v. Starr*, 535 F.2d 512 (9th Cir. 1976). Thus, for strict liability offenses, corporate officers are exposed to significant liability.

¹²⁷ 212 U.S. 481.

¹²⁸ 358 U.S. 121.

¹²⁹ See Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 78-79 (1976).

¹³⁰ M. CLINARD & P. YEAGER, *supra* note 5, at 261.

threat to financial well-being will cause corporations to avoid penalties. Some commentators have challenged this thesis by pointing out that corporations go through various life-cycles. Once a corporation becomes established, profit maximization becomes of secondary importance, and the corporation seeks longer range goals, such as growth, increased market share, and improved social image.¹³¹ Even if corporations do not always act as profit-maximizers, profit is the *raison d'être* of corporate existence. A large or proportionate fine will eventually affect the corporate decisionmaking calculus.

Fines are often ineffective because they are so small that corporations may write them off as a cost of doing business. For example, in 1972, Chevron Corporation paid a fine of one million dollars for violation of offshore pollution laws, but "the financial statement of Standard Oil of California, Chevron's parent, shows that the fine was about .03 percent of the company's gross income (about the same as a \$10 traffic ticket for a person making \$25,000 a year.)"¹³² Fines of even moderate size will affect corporate behavior. A corporation cannot always pass the cost of fines on to consumers because it will face a competitive disadvantage in the market by raising its prices.¹³³ Of course, a million-dollar fine for a small corporation would be an effective penalty. Thus, smaller companies face more severe punishment than a larger corporation for conduct inflicting the same amount of harm.

In order to give fines a truly penal effect, judges should have the option of adjusting the size of the fine to the ability of the corporation to pay and to the magnitude of the harm caused. The proposed 1979 Act set one million dollars as the maximum fine for a corporation.¹³⁴ While such a fine may not significantly penalize a large business, it does pose a real threat to a smaller corporation. S. 1722 gave judges the power to increase fines by ordering restitution of medical expenses to victims.¹³⁵ Where the damage of corporate conduct is widespread and quantifiable, such a sentencing power vests judges with the ability to levy compensatory monetary judgments on corporate defendants which would greatly increase the cost of illegal behavior.

Opponents of imposing liability on corporations argue that fines merely hurt innocent shareholders by removing dividends and reducing stock value.¹³⁶ However, since buying stock is always a risk, it is fair

¹³¹ For a brief summary of these theories, see *id.* at 47; C. STONE, *supra* note 12, at 37-39.

¹³² M. CLINARD & P. YEAGER, *supra* note 5, at 125 (quoting B. SHOSTAK, MODERN SOCIAL REFORMS 246 (1974)).

¹³³ Mueller, *supra* note 54, at 27.

¹³⁴ See S. 1722, *supra* note 1, § 2201(b)(2).

¹³⁵ See S. 1722, *supra* note 1, § 2006 (a)(1). See also S. REP. NO. 96-553 at 952.

¹³⁶ See, e.g., Comment, *Corporate Homicide*, 54 NOTRE DAME LAW. 911 (1979).

that shareholders should lose money due to managerial misconduct.¹³⁷ To the extent that criminal fines reduce profit, they are not different from managerial mismanagement, which may reduce profits through civil damage judgments.¹³⁸ If shareholders are injured by the levy of fines, they may be more likely to exercise their ability to elect accountable and responsible corporate officers and directors.¹³⁹

Conviction and punishment by fine will only be effective if the corporate organization can respond to the threat of punishment and alter its behavioral patterns before the illegal conduct occurs. In his work on illegal corporate activity, Stone argued that sanctions will not deter unless top executives know of improper conduct by their subordinates and are able to do something about the impropriety. Stone contended that the organizational structure of corporations, with its inherent conflicting interests between different departments and levels of authority, prevented executives from gaining knowledge and acting.¹⁴⁰

While Stone's observations may be correct, the threat of an effective sanction may motivate corporate directors to make organizational changes. By establishing clear channels of communication and responsibility and by implementing operating procedures, corporations may design an organizational structure that will encourage and force employees to act lawfully.¹⁴¹ Thus, if confused lines of authority now benefit individuals in the corporation by obscuring responsibility, placing great external pressure on the corporation by the threat of fine will cause it to modify its internal operating procedures.¹⁴² Without the mask of organization, corporate agents will be exposed and thereby motivated to act lawfully.

Detering Corporate Employees

If fines cannot deter the corporation, punitive action taken directly

¹³⁷ Geis argued that the "purchase of corporate stock is always both an investment and a gamble; the gamble is that the corporation will prosper by whatever tactics of management its chosen officers pursue." Geis, *Detering Corporate Crime*, in *THE CONSUMER AND CORPORATE ACCOUNTABILITY*, *supra* note 65, at 347. See also Elkins, *supra* note 129, at 82.

¹³⁸ See Comment, *supra* note 63, at 920-21.

¹³⁹ Mueller points out that the threat of sanction may cause shareholders "to be meticulously careful in the selection and supervision of the managerial agents." Mueller, *supra* note 54, at 39. However, he argued that this deterrent may have little practical effect because shareholders may have no real say in choosing the responsible management. *Id.*

¹⁴⁰ C. STONE, *supra* note 12, at 44.

¹⁴¹ Fisse notes that when a corporation commits a crime of noncompliance or of omission, "a breakdown in large-scale organizational arrangements is especially likely to involve corporate as opposed to individual negligence." Fisse, *supra* note 60, at 390. See also Note, *Decision-making Models and Control of Corporate Crime*, 85 YALE L.J. 1091 (1976).

¹⁴² Fisse asserts that "holding a corporation responsible for an offense creates some pressure upon it to apply and develop an internal discipline system without committing the law to any particular type of intervention or supervision." *Id.* at 386.

against the individual decisionmakers might shape behavior. Unlike the artificial entity, corporate officers can be imprisoned in addition to being fined. As Geis has observed, "[j]ail terms have a self-evident deterrent impact upon corporate officials, who belong to a social group that is exquisitely sensitive to status deprivation and censure."¹⁴³ Corporate executives jailed in the electrical pricefixing conspiracy of the early 1960s stated that incarceration had profoundly affected their lives.¹⁴⁴ In addition to incarceration, executives may also be fined, which may have a penal effect depending on the relative size of the fine.

While both imprisonment and fines serve as potentially effective deterrent sanctions, neither can actually serve that function. Indeed, it is difficult to convict responsible individuals in the first instance. The diffusion of policymaking throughout a corporate organizational structure increases the difficulty of identifying particular responsible individuals.¹⁴⁵ If the employees are identified, they may not be within the personal jurisdiction of the forum where the corporate harm materialized.¹⁴⁶ When individuals are indicted as codefendants with the corporation, the defendants often negotiate a plea with the district attorney whereby the corporation agrees to plead guilty or *nolo contendere* in exchange for dismissal of the charges against the individuals.

When convictions do occur, penalties are not severe. In a recent study, Clinard and Yeager found that "of 56 convicted executives of large corporations, 62.5 percent received probation, 21.4 percent had their sentences suspended, and 28.6 percent were incarcerated."¹⁴⁷ When judges require executives to serve some sentence, the period is usually short. Clinard and Yeager observed that

[i]n 1975 and 1976 a total of 16 executives of 582 corporations were sentenced to a total of 594 days of actual imprisonment (an average of 37.1 days each). Of the total days of imprisonment, 360 (60.6 percent) were

¹⁴³ M. CLINARD & P. YEAGER, *supra* note 5, at 292 (quoting Geis, *supra* note 137, 182-83).

¹⁴⁴ Geis reports that during Senate hearings on heavy electrical equipment pricefixing, a former General Electric executive stated, "they would never get me to do it again. . . . I would starve before I would do it again. . . ." Geis also noted that another executive was asked, "Suppose your superior tells you to resume the meetings; will they be resumed?" "No, sir," he answered with feeling. "I would leave the company rather than participate in the meetings again." Geis, *supra* note 137, at 349.

¹⁴⁵ Fisse, *supra* note 60, at 372-73, 390.

¹⁴⁶ *Id.* at 380.

¹⁴⁷ M. CLINARD & P. YEAGER, *supra* note 5, at 287. The authors compiled these figures during a "systematic analysis of federal administrative, civil and criminal actions either initiated or completed by 25 federal agencies . . . against the 477 largest publicly-owned manufacturing . . . corporations in the United States during 1975 and 1976." *Id.* The authors note that these conviction and sentencing figures exceed 100 percent because "some offenders received a partially suspended sentence and probation." *Id.* at 287 n.11.

accounted for by two officers, who received six months each in the same case.¹⁴⁸

When serving time in jail becomes a remote possibility due to suspended or short sentences, the threat of incarceration has little deterrent value.

If corporate executives do not fear incarceration, only the social stigma of conviction remains as a deterrent. However, while convicted executives may lose status in the community, they may not lose their livelihood. In contrast to many felons who lose their employment, convicted executives often retain their position with the company or draw pensions.¹⁴⁹ Those who are discharged from a company may often be hired by other corporations in the same industry.¹⁵⁰ This postconviction employment certainly reduces the impact of criminal sanctions, undermining the goal of deterrence.

Criminal Conviction and Retribution

Even if criminal sanctions do not completely fulfill a deterrence function, the imposition of penalties serves some retributive purpose. Society necessarily becomes outraged at corporate activity which unjustifiably endangers the health and safety of employees, consumers, and the public. Individual members of society have little private recourse against corporations. Some people may choose not to engage in hazardous occupations; yet in many areas a local industry may be the primary source of employment. Individuals may boycott certain consumer goods, yet some products may be unsafe on an industrywide basis so that the consumer has a choice between using an unsafe product or none at all. Individuals may be unable to escape air pollution, potential radiation, or toxic chemical hazards. The inability of the individual to affect corporate behavior motivated Congress to enact regulatory laws. Punishment of violators of these laws serves to help maintain public confidence in the efficacy of rule by law.¹⁵¹

C. THE SCOPE OF AN EFFECTIVE ENDANGERMENT OFFENSE

Unjustifiable life-endangering conduct, being morally blameworthy, is a proper subject for punishment under the criminal law. If fines are levied proportionate to the magnitude of the harm caused and to the corporation's ability to pay, criminal sanctions will deter corporations from engaging in life-endangering activity. The final inquiry in assessing the Senate Judiciary Committee's endangerment offense is whether

¹⁴⁸ *Id.* at 291.

¹⁴⁹ *Id.* at 295.

¹⁵⁰ *Id.* at 296.

¹⁵¹ See notes 59-61 & accompanying text *supra*.

the offense is constructed so as to effectively prohibit and properly punish morally blameworthy life-endangering activity.

In the final draft of S. 1722, the Senate Judiciary Committee set forth three instances in which federal jurisdiction would exist for violation of the endangerment offense. First, the offense must be committed within the jurisdictional boundaries of the United States, including federal enclaves.¹⁵² Second, the offense occurs during the commission of any other offense proscribed by the Federal Criminal Code.¹⁵³ Third, the imminent danger is created by conduct constituting a violation of specified regulatory offenses.¹⁵⁴ This list of regulatory statutes replaced a broad designation of any "statute . . . designed to protect public health or safety."¹⁵⁵ The committee made this replacement in order to reduce uncertainty as to what conduct would be culpable under the endangerment offense. In creating certainty, the committee unduly restricted the scope of the endangerment offense.

When statutes criminalize conduct, constitutional due process requires that the terms of the statute "be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."¹⁵⁶ A criminal statute must not be so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application."¹⁵⁷

These constitutional requirements generally apply to conduct that the actor may not previously know is criminal. But life-endangering activity is *malum in se*. In this sense, such activity would fall under the second jurisdictional category of the endangerment offense along with other common law crimes presently codified in title 18 of the United States Code.¹⁵⁸ If life-endangering conduct is treated as *malum in se*, the conduct causing the imminent danger need not also be limited to a specified regulatory offense. *Malum in se* offenses require only general intent.¹⁵⁹ Therefore, the result of death or injury would be sufficient to

¹⁵² S. REP. NO. 96-553 at 564.

¹⁵³ *Id.* The committee described this jurisdictional branch as reaching "every other offense in title 18 except offenses, such as the espionage or securities laws, that are described by cross-reference." *Id.*

¹⁵⁴ *Id.* See also note 42 *supra*.

¹⁵⁵ S. REP. NO. 96-553 at 564.

¹⁵⁶ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

¹⁵⁷ 306 U.S. at 453.

¹⁵⁸ The Federal Criminal Code presently punishes murder (18 U.S.C. § 1111(1976)) and manslaughter (18 U.S.C. § 1112 (1976)).

¹⁵⁹ LaFave and Scott note that general intent is sometimes used "to mean the general notion of *mens rea*." W. LAFAVE & A. SCOTT, CRIMINAL LAW 201 (1972). These authors also point out "[i]t has been said that a crime of which a criminal intent [*mens rea*] is an element is *malum in se* . . ." *Id.* at 29.

render corporations criminally liable. Exposing corporations to such a broad liability would be consistent with the value our society places on human life and with the moral blame society casts upon those who take life away.

However, not all death is punishable. Criminal law recognizes that some homicides are excusable or justifiable.¹⁶⁰ Similarly, in a modern technological society, some risk of death is unavoidable or may not be practically avoided. By enacting regulatory statutes that specify allowable behavior, Congress has in effect decided which deaths caused by the industrial process are to be excusable. Viewed from this perspective, limiting the scope of an endangerment offense to concurrent violations of regulatory statutes is the most practical public policy.

However, the Judiciary Committee's list of these regulatory statutes is incomplete. The committee omitted such statutes as the Consumer Product Safety Act,¹⁶¹ and the National Traffic and Motor Vehicle Safety Act.¹⁶² Each of these laws regulates activity with life-endangering potential. Any effective endangerment offense should encompass a knowing violation of these existing statutes.

CONCLUSION

Corporate activity that harms employees, consumers, and the environment presents society and lawmakers with a complex policy question. Some corporate conduct presents a risk of harm disproportionate to the benefit of that conduct. Such activity is morally blameworthy and within the ambit of criminal law. An endangerment offense, like section 1617 of the 1979 Act, which embodies a balancing of the risk and benefit of a particular activity, would properly punish and deter such blameworthy acts. However, considering that conduct may simultaneously benefit many sectors of society and that assigning weight to each factor in the balance may be difficult, the determination of when conduct manifests an unjustified disregard for human life presents no easy task for corporations, prosecutors, and judges.

When society can agree that a particular activity is socially harmful, criminal punishment serves to deter actors from engaging in further

¹⁶⁰ See, e.g., ILL. REV. STAT. ch. 38, § 7-5 (1979) (peace officers may justifiably use force likely to cause death or bodily harm when an officer believes that it is reasonably necessary to prevent death or harm to others).

¹⁶¹ 15 U.S.C. § 2051 *et seq.* (1972). Section 2070 of this statute prescribes criminal penalties for a willful and knowing violation of the statute's prohibited acts, listed in 15 U.S.C. § 2068.

¹⁶² 15 U.S.C. § 1381 *et seq.* (1966). While this law only provides civil penalties for non-compliance (15 U.S.C. § 1398), holding persons criminally liable for willfully violating the statute's proscription which also constitutes an unjustifiable disregard for human life would be consistent with the legislative scheme established in the endangerment defense.

similar conduct. In the corporate context, criminal sanctions will have an actual deterrent effect if judges are empowered to impose fines proportionate to the actual damage a corporation causes and to its ability to pay.

While it is not without difficulty, the endangerment offense represents a laudable attempt to deal with the problem of socially harmful conduct. Such an offense, specifying a broader range of regulatory offenses as part of its prohibitions, should be included in future efforts to reform the federal criminal law.