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CORPORATE CRIMINAL LIABILITY FOR SPECIFIC INTENT CRIMES AND OFFENSES OF CRIMINAL NEGLIGENCE — THE DIRECTION OF TEXAS LAW

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I. INTRODUCTION

Texas courts have not, to date, ruled definitively on the question of whether or not Texas corporations will be held liable for specific intent crimes¹ or for offenses of criminal negligence. Although there is no viable Texas case authority for either the imposition or disallowance of corporate criminal liability for specific intent crimes or offenses of criminal negligence,² such liability has been imposed for

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1. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 452-53 (1978). Specific intent crimes include those which require a *mens rea*, such as an intentional or knowing state of mind. See *id.* at 452-53; Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465, 467 (1981).

2. Viable case authority would necessarily consist of cases which have been adjudicated

a wide variety of corporate offenses such as regulatory crimes committed by a corporation through its agents.³

Long before the 1968 publication of Robert W. Hamilton's treatise⁴ on corporate criminal liability in Texas (or the lack thereof), Texas has remained the only state that has failed to specifically delineate a corporation's ultimate criminal responsibility.⁵ Professor Hamilton's advocacy of corporate criminal liability culminated in the production of his own proposed revision of the Texas Penal Code.⁶ It was his conclusion that, theoretically speaking, corporate criminal liability should be imposed; however, at that time there was no legislative machinery whereby it could be imposed.⁷ He cited

on review through the entire appellate process up to and including the court of criminal appeals. It is conceivable that corporate criminal liability for specific intent crimes has been imposed at the trial level and simply not appealed for precedential review.

3. See Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 908 (1975) (offenses include violations of economic or regulatory statutes and strict liability offenses). In 1909, the United States Supreme Court laid the foundation for modern doctrines of corporate criminal liability. See *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481, 494-95 (1909) (violation of regulatory offense). In *New York Central & Hudson River Railroad*, the Court upheld the constitutionality of the Elkins Act, a statute prohibiting rebates which made corporations liable for the acts of their officers, agents or employees acting within the scope of their duties. See *id.* at 494 (construing Elkins Act, ch. 708, 32 Stat. 847 (1903) (codified as amended at 49 U.S.C. § 41 (1976), repealed by Pub. L. No. 95-473, § 4(b)(c), 92 Stat. 1466 (1978)). The Court specifically stated: "[W]e see no good reason why the corporation may not be held responsible for and charged with knowledge and purposes of their agents, acting within the authority conferred upon them." *Id.* at 494.

Courts have also had no difficulty holding corporations liable for strict liability offenses. See, e.g., *United States v. Park*, 421 U.S. 658, 660 (1975) (violation of federal Food and Drug Act); *United States v. Union Supply Co.*, 215 U.S. 50, 54 (1909) (violation of statute regulating oleomargarine dealers); *Riss & Co. v. United States*, 262 F.2d 245, 246 (8th Cir. 1958) (violation of Interstate Commerce Commission regulations).

4. Hamilton, *Corporate Criminal Liability in Texas*, 47 TEX. L. REV. 60 (1968).

5. See *id.* at 60.

6. See *id.* at 77-85.

7. See *id.* at 66. Hamilton admitted the lack of corporate criminal liability in Texas but recognized that Texas corporations were not immune from civil penal sanctions. See *id.* at 66 (corporations liable under Texas Antitrust Act, Clean Air Act of Texas, and Texas Business Corporation Act). The basis of Hamilton's philosophical leanings toward the need for corporate criminal liability appears to flow from the seemingly incongruous difference between civil penal sanctions and strictly criminal sanctions. His analysis is strikingly sound. Not only is it more difficult to assume jurisdiction over a corporation for purposes of civil penal sanction than to simply mandate the functionally equivalent criminal sanction, but also the element of the assignation of "criminal" status to the offending corporation provides added deterrent effect to any future commission of the crime by the same or any other corporation. See *id.* at 71-75.

directly to language from one opinion rendered by a court of civil appeals which specifically stated that this was a matter upon which the legislature must first act.⁸

In 1974 the Texas Penal Code was revised, and it included several of Professor Hamilton's proposed amendments to the Code.⁹ This additional statutory authority appears to address directly Professor Hamilton's concern that prior to 1974, "if a provision of the Texas Penal Code did not specifically refer to 'corporations,' a corporation probably could not be prosecuted thereunder."¹⁰ The statutes also address Hamilton's further concern that "if a criminal statute [did] specifically refer to 'corporations,' but provide[d] no procedure by which fines could be imposed," corporations still could not be prosecuted, for further lack of procedural mechanisms.¹¹ There now appears to be ample statutory authority for the imposition of corporate criminal liability in Texas,¹² although interpreting case law has been slow to emerge.¹³ Another observation which compels the conclu-

8. *See id.* at 65 (citing *Thompson v. Stauffer Chem. Co.*, 348 S.W.2d 274 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.)). The *Thompson* court additionally stated:

It is our view that the matters of which appellant complains are matters which the Legislature will have to afford relief for, if any relief be afforded. There is no procedure in the Code of Criminal Procedure whereby a corporation as such, can be prosecuted for misdemeanor in Texas, and we cannot give our approval to the method employed. The corporation was never arrested; nor entered an appearance; was tried and convicted 'in absentia,' and we think that such Justice of the Peace Court judgment of conviction was void.

Thompson v. Stauffer Chem. Co., 348 S.W.2d 274, 275 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.).

9. Compare TEX. PENAL CODE ANN. § 7.21 (Vernon 1974) (definitions of "agent" and "high managerial agent") and *id.* § 7.22 (criminal responsibility of corporation or association) and *id.* § 7.23 (criminal responsibility of person acting in behalf of corporation) and *id.* § 12.51 (Vernon Supp. 1982-1983) (authorized punishments for corporations) with Hamilton, *Corporate Criminal Liability in Texas*, 47 TEXAS L. REV. 60, 77 (1968) (definitions of "agent," "association," and "high managerial agent") and *id.* at 78 (liability of corporations) and *id.* at 82 (liability of persons for conduct in behalf of corporations) and *id.* at 83 (sentences imposed upon corporations).

10. Hamilton, *Corporate Criminal Liability in Texas*, 47 TEX. L. REV. 60, 67 (1968).

11. *See id.* at 67.

12. *See, e.g.*, TEX. PENAL CODE ANN. § 1.07(a)(27) (Vernon 1974) (definition of "person" includes corporation); *id.* § 7.22 (corporation criminally responsible for offense committed by its agent); *id.* § 12.51 (Vernon Supp. 1982-1983) (authorizes punishments for corporations adjudged guilty of an offense).

13. *Vaughan & Sons v. State*, 649 S.W.2d 677 (Tex. App.—Texarkana 1983, pet. granted) and *Thompson v. Stauffer Chem. Co.*, 348 S.W.2d 274 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.) are virtually the only two cases to have emerged within the last 20 years.

sion that corporate criminal liability is provided for in Texas, is the analogous case authority from other states that have based the decision to impose corporate criminal liability for specific intent crimes and offenses of criminal negligence on statutes similar to those effectuated in Texas in 1974.¹⁴

In February of this year the Texarkana Court of Appeals in *Vaughan & Sons v. State*¹⁵ reversed the conviction of a corporation for the offense of criminally negligent homicide on the ground that corporate criminal liability could not be imposed on a corporation for an offense as serious as homicide.¹⁶ The facts revealed that two employees of Vaughan & Sons negligently caused the death of two individuals in a motor vehicle collision.¹⁷ Subsequent to the Texarkana Court of Appeals' decision, the state filed a petition for discretionary review with the court of criminal appeals, and recognizing the significance of the decision, the State's attorney filed a supplemental brief. The petition was granted on June 15, 1983.¹⁸ The forthcoming opinion may set unequivocal precedent concerning the imposition of corporate criminal liability in criminal negligence cases. Such precedent would have inevitably strong impact on the imposition of corporate criminal liability for the commission of specific intent crimes.

II. INTERPRETATION OF APPLICABLE TEXAS PENAL CODE PROVISIONS

Four sections of the Texas Penal Code specifically deal with the imposition of corporate criminal liability: sections 7.21,¹⁹ 7.22,²⁰

14. See *State v. Adjustment Dep't Credit Bureau, Inc.*, 483 P.2d 687 (Idaho 1971); *Rice v. Commonwealth*, 621 S.W.2d 911 (Ky. 1981); *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941 (Ky. Ct. App. 1980); *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33 (Mass. 1971); *People v. Lee Myles Corp.*, 385 N.Y.S.2d 339 (N.Y. App. Div. 1976); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 520 P.2d 900 (Or. Ct. App. 1974); *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413 (Pa. Super. Ct. 1980); *Commonwealth v. J.P. Mascaro & Sons*, 402 A.2d 1050 (Pa. Super. Ct. 1979).

15. *Vaughan & Sons v. State*, 649 S.W.2d 677 (Tex. App.—Texarkana 1983, pet. granted).

16. See *id.* at 679.

17. See *id.* at 677.

18. See *id.* at 677.

19. TEX. PENAL CODE ANN. § 7.21 (Vernon 1974).

20. *Id.* § 7.22.

1.07(27),²¹ and 12.51.²² These sections deal with corporate felony and misdemeanor offenses.²³ Section 7.21 contains definitions of the persons for whose conduct a corporation or association may be held criminally liable.²⁴ Section 7.22 actually sets out the criminal responsibility of a corporation or association:

(a) If conduct constituting an offense is performed by an agent acting in behalf of a corporation or association and within the scope of his office or employment, the corporation or association is criminally responsible for an offense defined:

(1) in this code where corporations and associations are made subject thereto;

(2) by law other than this code in which a legislative purpose to impose criminal responsibility on corporations or associations plainly appears; or

(3) by law other than this code for which strict liability is imposed, unless a legislative purpose not to impose criminal responsibility on corporations or associations plainly appears.

(b) A corporation is criminally responsible for a felony offense only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by:

(1) a majority of the board of directors acting in behalf of the corporation or association; or

(2) a high managerial agent acting in behalf of the corporation or association and within the scope of his office or employment.²⁵

Section 12.51 specifies the appropriate punishment for a corporation adjudged guilty of an offense.²⁶ This punishment varies according

21. *Id.* § 1.07(27) ("person" includes a corporation).

22. *Id.* § 12.51 (Vernon Supp. 1982-1983).

23. Specifically, sections 7.21-7.24 are titled: SUBCHAPTER B. CORPORATIONS & ASSOCIATIONS. TEX. PENAL CODE ANN. §§ 7.21-7.24 (Vernon 1974). Such subtitle would indicate the legislature's intent to directly address the issue of corporate criminal liability and establish rules for the assignment thereof.

24. *See* TEX. PENAL CODE ANN. § 7.21 (Vernon 1974) (agent and high managerial agent).

25. *Id.* § 7.22 (Vernon 1974 & Supp. 1982-1983). The Practice Commentary of section 7.22 contains an interpretation of the corporate criminal liability statutes by Seth S. Searcy III and James R. Patterson of the Austin Bar. *See* Patterson and Searcy III, *Practice Commentary*, TEX. PENAL CODE ANN. § 7.22 (Vernon 1974). The authors conclude that all evidence of legislative intent points to the imposition of corporate criminal liability for all grades of crimes including felonious conduct. *See id.*

26. TEX. PENAL CODE ANN. § 12.51 (Vernon Supp. 1982-1983).

to the severity of the crime.²⁷

A review of *Vaughan & Sons v. State*,²⁸ is an invaluable cumulative education to the long line of arguments against the imposition of corporate criminal liability. The Texarkana court ruled that even though the statutes so state, the legislature could not have intended to include corporations within the class of culpable parties because corporations are unable to formulate "intent" in their "artificial and soulless" form.²⁹ This reasoning is patently unpersuasive.³⁰ The legislature enacted section 7.22³¹ which specifically applies to corporations. Subsection (b) of section 7.22 imposes criminal responsibility for felony offenses which were "authorized, requested, commanded, performed, or recklessly tolerated," all of which require a form of specific intent.³² It would thus appear that by the promulgation of this subsection the legislature intended to extend

27. *See id.* (maximum \$20,000 fine for felony, \$10,000 for Class A or B misdemeanor, \$2,000 for Class C misdemeanor).

28. 649 S.W.2d 677 (Tex. App.—Texarkana 1983, pet. granted).

29. *See id.* at 678; *see also* Commonwealth v. Punxsutawney St. Passenger Co., 24 Pa. C. 25 (1900), reprinted in 48 PIRTSB. LEG. J. 42 (corporation cannot be indicted for offenses involving "element of malice or criminal intent"). *But see* People v. Rochester Ry. & Light, Co., 195 N.Y. 102, 104, 88 N.E. 22, 23 (1909) (corporation can be convicted of certain crimes requiring specific intent). The *Rochester* Court placed certain limits on a corporation's liability. For example, liability did not attach to crimes that required "personal, malicious intent and acts so manifestly ultra vires that a corporation could not commit them." *See* People v. Rochester Ry. & Light, Co., 195 N.Y. 102, 104, 88 N.E. 22, 23 (1909).

30. The Texarkana court's holding that a prima facie interpretation of the negligent homicide statute and the Penal Code is insufficient to determine legislative intent, appears poorly reasoned. It seems axiomatic that statutory law should be given its prima facie interpretation unless the legislature has openly contravened its own writing. *See State ex rel. Vance v. Hatten*, 600 S.W.2d 828, 830 (Tex. Crim. App. 1980).

In *Hatten*, the court rejected the respondent's argument that "[t]he legislature did not intend for the statute in question to be given its literal meaning." *Id.* at 831. A statute, the court explained, must be interpreted as it is written by the legislature. *See id.* at 830. The court of criminal appeals favorably cited the maxim stated in *Brazos River Authority v. City of Graham*, 354 S.W.2d 99, 109 (Tex. 1961), that: "If Parliament does not mean what it says, it must say so." The court concluded that: "[i]f this Court were to reach the conclusion by speculation that the legislature did not intend what it clearly and unambiguously stated, we would still be without authority to change the specific terms of the statute, where such language is plain and unequivocal." *State ex rel. Vance v. Hatten*, 600 S.W.2d 828, 831 (Tex. Crim. App. 1980).

31. TEX. PENAL CODE ANN. § 7.22 (Vernon 1974).

32. *See id.* To obtain a conviction for the offense of murder one must find that the actor specifically intended to cause or knowingly caused the occurrence of the homicide. *See id.* The same would be true in the case of burglary and other felonies. *See id.* § 31.03 (Vernon Supp. 1982-1983) ("intent to deprive" owner of property element of theft); *see also id.* § 20.03 (Vernon 1974) ("intent to abduct" element of kidnapping).

specific intent criminal liability to corporations.³³

Section 7.22(b) does not deal with the misdemeanor offense of criminally negligent homicide.³⁴ A misdemeanor offense falls under section 7.22(a), and the person representing the corporation only need be an "agent" of the corporation.³⁵ Subsection (a) mandates that in order to fall under its provisions, the applicable statute must in some way make a *corporation* specifically subject to its imposition.³⁶ Therefore, in determining whether a corporation can be indicted for criminally negligent homicide, section 19.07 of the penal code must be examined. Section 19.07 provides:

- (a) A *person* commits an offense if he causes the death of an individual by criminal negligence.
- (b) An offense under this section is a Class A misdemeanor.³⁷

Thus, to fall under section 7.22(a) the corporation would have to be made subject to section 19.07 somewhere in the Penal Code.³⁸ This has been done under section 1.07(a)(27) which contains the definitions of terms used in the Penal Code:

33. See Patterson and Searcy III, *Practice Commentary*, TEX. PENAL CODE ANN. § 7.22 (Vernon 1974).

Under accepted principles of complicity and conspiracy law, entities may be held criminally responsible for virtually *every type of offense in this code*, including such personal crimes as murder and rape. . . . Subsection (b) is designed to ensure that felonious conduct really does represent the entity's conscious policy [before criminal liability is allowed to attach].

Id. (emphasis added).

34. See TEX. PENAL CODE ANN. § 7.22(b) (Vernon Supp. 1982-1983).

35. See *id.* § 7.22(a) (Vernon 1974) (refers to offense generally, thereby implying misdemeanor offenses).

36. See *id.*

(a) If conduct constituting an offense is performed by an agent acting in behalf of a corporation or association and within the scope of his office or employment, the corporation or association is criminally responsible for an offense defined:

- (1) in this code where corporations and associations are made subject thereto;
- (2) by law other than this code in which a legislative purpose to impose criminal responsibility on corporations or associations plainly appears; or
- (3) by law other than this code for which strict liability is imposed, unless a legislative purpose not to impose criminal responsibility on corporations or associations plainly appears.

Id.

37. *Id.* § 19.07 (emphasis added).

38. See *id.* § 7.22(a).

(a) In this code:

.....

(27) "Person" means an individual, *corporation*, or association.³⁹

Placing emphasis on two points, the Texarkana Court of Appeals in *Vaughan & Sons* held that a corporation cannot be liable for homicide because the legislature intended that whoever is capable of committing criminal homicide must also be capable of intent, knowledge and recklessness.⁴⁰ First, the *Vaughan* court noted that section 19 of the Texas Penal Code groups all the degrees of homicide together, including criminally negligent homicide, and second, that each degree of homicide proscribes the killing of an individual by a "person."⁴¹ On close scrutiny, however, it appears that section 7.22 and other corporate liability statutes cannot be construed to exclude criminal negligence and specific intent offense liability. A concurrent reading of sections 7.22, 19.07, and 1.07(a)(27)⁴² of the Penal Code reveals a clear authorization for the return of indictments against corporations or associations involved in specific intent offenses.⁴³ Legislative intent to include corporations and associa-

39. *Id.* § 1.07(a)(27) (emphasis added).

The term *person* plays a variety of roles throughout the code. As in prior law, Penal Code art. 22, it describes whose bodily, property, and other interests are protected. Beyond that, it serves as a general descriptor for operation of the code, identifying, for example, the actor, the beneficiary of a defense, and the subject of an exception. 'Corporation' was defined in the 1970 proposed code, to include nonprofit corporations . . . , but the definition was deleted from the enacted code.

Patterson and Searcy III, *Practice Commentary*, TEX. PENAL CODE ANN. § 1.07 (Vernon 1974).

40. *See Vaughan & Sons v. State*, 649 S.W.2d 677, 678-79 (Tex. App.—Texarkana 1983, pet. granted). The Texarkana Court of Appeals begins its opinion by raising the defendant's argument that the Penal Code provisions for the prosecution of private corporations do not extend to criminal homicide. *See id.* at 678. Initially, the court correctly cites the general rule that a corporation may be held criminally liable for criminal acts performed by its agents acting on its own behalf and notes that section 7.22 provides the procedural device for imposition of criminal responsibility on corporations. *See id.* at 678.

The Texarkana court states that those jurisdictions which have addressed the issue of corporate criminal liability "[a]re divided as to criminal responsibility for personal crimes such as homicide and rape, though the majority still agree a corporation *cannot* commit a crime requiring specific intent." *Id.* at 678 (emphasis added). For this proposition the court cites no authority, and indeed no support can be shown, because the overwhelming majority of case authority is to the contrary. *See id.* at 678.

41. *See id.* at 678-79.

42. TEX. PENAL CODE ANN. §§ 1.07(a)(27), 7.22, 19.07 (Vernon 1974).

43. *Cf. State v. Adjustment Dep't Credit Bureau, Inc.*, 483 P.2d 687, 690-91 (Idaho 1971) (corporation capable of committing crime involving specific intent); *Rice v. Common-*

tions within the Penal Code definition of "person" is specifically evidenced by the addition of these two institutions under the definition of "person" in the 1974 amendment of the Penal Code.⁴⁴

Further evidence of legislative intent to impose specific intent criminal liability on corporations is seen in the legislature's 1975 amendment of section 1.07(a)(9.1).⁴⁵ As has already been noted, the 1974 amendment to the Penal Code added "corporations and associations" to the definition of "person" under section 1.07(27).⁴⁶ The 1975 amendment went another step further by adding a definition of "corporation," i.e., "nonprofit organizations, professional associations created pursuant to statute, and joint stock companies."⁴⁷ The addition of a definition of "corporation" is significant because corporations were only defined in the code in the context of a "person."⁴⁸

Another indication of the legislature's intent to impose corporate criminal liability for specific intent crimes is found in section 12.51 of the Penal Code,⁴⁹ entitled: Authorized Punishments for Corporations and Associations. In this section the Texas Legislature provided a separate and specific punishment statute for criminal offenses committed by corporations and associations.⁵⁰ The statute

wealth, 621 S.W.2d 911, 914 (Ky. 1981) (jury instruction of intent to defraud necessary on corporate criminal charge); *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941, 941-42 (Ky. Ct. App. 1980) (corporation responsible for crimes involving specific intent); *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33, 78 (Mass. 1971) (knowledge and intent of agent attributable to corporation's criminal liability); *People v. Lee Myles Corp.*, 385 N.Y.S.2d 339, 340 (N.Y. App. Div. 1976) (corporation capable of conviction for criminal possession of stolen property); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 520 P.2d 900, 904 (Or. Ct. App. 1974) (corporation convicted of promoting gambling and possession of gambling devices); *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413, 418-20 (Pa. Super. Ct. 1980) (corporate criminal liability includes crimes involving specific intent); *Commonwealth v. J.P. Mascaro & Sons*, 402 A.2d 1050, 1052 (Pa. Super. Ct. 1979) (corporation liable for crimes committed by its agents when acting in proper scope).

44. *See* TEX. PENAL CODE ANN. § 1.07 (a)(27) (Vernon 1974).

45. *See id.* § 1.07 (a)(9.1) (Vernon Supp. 1982-1983).

46. *See id.* § 1.07 (a)(27) (Vernon 1974). Under the old Penal Code article 22, the definition of "person" did not include corporations—at least when "person" was used in the accusatory portion of the statute.

47. *Id.* § 1.07(a)(9.1) (Vernon Supp. 1982-1983).

48. *See id.* § 1.07(a)(27) (Vernon 1974).

49. *Id.* § 12.51 (Vernon Supp. 1982-1983).

50. *See id.* Section 12.51 provides:

(a) If a corporation or association is adjudged guilty of an offense that provides a penalty consisting of a fine only, a court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed the fine provided by the offense.

substitutes fines for imprisonment penalties when the corporation has committed an offense such as homicide where a conviction normally requires prison time.⁵¹

In 1977, the legislature amended the statute specifically to address the issue of a corporation's or association's liability for personal injury.⁵² Section 12.51(c) was amended to include criminal punishment where the corporation or association caused *personal injury*, or other loss, through the commission of a felony or a Class A or Class B misdemeanor.⁵³ It is also important to note that section 12.51(b)(1) provides a fine for felony offenses *of any category*, which would necessarily include personal injury, violent-crime offenses.⁵⁴ By specifically including personal injury within this section, it is evident that the legislature intended to hold corporations and associations liable for assaultive type offenses, which are specific intent crimes.⁵⁵

III. COMPARISON WITH OTHER JURISDICTIONS

Case authority from other jurisdictions indicates that in states which have corporate criminal liability statutes similar to Texas statutes, it is consistently held that a corporation is liable for specific

(b) If a corporation or association is adjudged guilty of an offense that provides a penalty including imprisonment, or that provides no specific penalty, a court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed:

- (1) \$20,000 if the offense is a felony *of any category*;
- (2) \$10,000 if the offense is a Class A or Class B misdemeanor; or
- (3) \$2,000 if the offense is a Class C misdemeanor.

(c) In lieu of the fines authorized by Subsections (a) and (b)(1) and (b)(2) of this section, if a court finds that the corporation or association gained money or property or caused *personal injury*, property damage, or other loss through the commission of a felony or Class A or Class B misdemeanor, the court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed double the amount gained or caused by the corporation to be lost, whichever is greater.

(d) In addition to any sentence that may be imposed by this section, a corporation that has been adjudged guilty of an offense may be ordered by the court to give notice of the conviction to any person the court deems appropriate. *Id.* (emphasis added).

Id.

51. *See id.* § 12.51(a), (b) (Vernon Supp. 1982-1983).

52. *See id.* § 12.51(c).

53. *See id.* § 12.51(c).

54. *See id.* § 12.51(c).

55. *See id.* § 12.51(c). It is interesting to note that in 1977 the legislature increased the amount of fine which could be imposed upon corporations or associations, arguably as an increased deterrent to criminal activity on the part of these organizations. *See id.* § 12.51(c).

intent crimes and offenses of criminal negligence.⁵⁶ In *State v. Adjustment Department Credit Bureau, Inc.*,⁵⁷ the appellant corporation contended that “a corporation is not a person as employed in the criminal statutes and thus cannot be found guilty of a crime unless specifically provided therein.”⁵⁸ The Supreme Court of Idaho noted that another Idaho statute⁵⁹ defined certain terms used in the statutes, including the term “person,” and that “person” was defined to include a corporation as well as a natural person.⁶⁰ The court found this concurrent definitional statute to be controlling and held that corporate criminal liability for the specific intent crime of extortion could be imposed.⁶¹ The corporation, however, was not liable in this instance because the jury charge was incorrect.⁶² The same potential statutory construction exists in Texas.⁶³

In *Commonwealth v. Fortner LP Gas Co.*,⁶⁴ the Kentucky Court of Appeals reversed the circuit court’s holding that the statutes did not authorize the return of an indictment against a corporation for manslaughter.⁶⁵ The indictment for manslaughter returned against the corporation was reinstated.⁶⁶ In its analysis, the court looked at three specific areas within its statutory code: first, a statute which imposed criminal liability upon a corporation or association;⁶⁷ second, a general definition of “person” which included corporations

56. See *State v. Adjustment Dep’t Credit Bureau, Inc.*, 483 P.2d 687, 691 (Idaho 1971); *Rice v. Commonwealth*, 621 S.W.2d 911, 912 (Ky. 1981); *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941, 941-43 (Ky. Ct. App. 1980); *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33, 86, 93-94 (Mass. 1971); *People v. Lee Myles Corp.*, 385 N.Y.S.2d 339, 340 (N.Y. App. Div. 1976); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 520 P.2d 900, 903 (Or. Ct. App. 1974); *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413, 419-23 (Pa. Super. Ct. 1980); *Commonwealth v. J.P. Mascaro & Sons*, 402 A.2d 1050, 1051-52 (Pa. Super. Ct. 1979).

57. 483 P.2d 687 (Idaho 1971).

58. *Id.* at 691.

59. IDAHO CODE § 73-114 (1973).

60. *State v. Adjustment Dep’t Credit Bureau, Inc.*, 483 P.2d 687, 691 (Idaho 1971).

61. See *id.* at 691.

62. See *id.* at 691.

63. Compare TEX. PENAL CODE ANN. § 1.07(a)(27) (Vernon 1974) (“person” defined as “corporation”) with IDAHO CODE § 73-114 (1973) (“person” includes corporation).

64. 610 S.W.2d 941 (Ky. Ct. App. 1980).

65. See *id.* at 942-43.

66. See *id.* at 943.

67. See *id.* at 942; see also KY. REV. STAT. § 502.050 (1975). Corporate liability in Kentucky provides:

or associations;⁶⁸ and third, a punishment statute which imposed criminal liability upon a corporation or association.⁶⁹ In light of the existence of these three statutes, the court held that a corporation

(1) A corporation is guilty of an offense when:

(a) The conduct constituting the offense consists of a failure to discharge a specific duty imposed upon corporations by law; or

(b) The conduct constituting the offense is engaged in, authorized, commanded or wantonly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment in behalf of the corporation; or

(c) The conduct constituting the offense is engaged in by an agent of the corporation acting within the scope of his employment and in behalf of the corporation and:

1. The offense is a misdemeanor or violation; or

2. The offense is one defined by a statute which clearly indicates a legislative intent to impose such liability on a corporation.

(2) As used in this section:

(a) 'Agent' means any officer, director, servant or employee of the corporation or any other person authorized to act in behalf of the corporation.

(b) 'High managerial agent' means an officer of a corporation or any other agent of a corporation who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation.

Id.

68. See *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941, 942 (Ky. Ct. App. 1980); see also KY. REV. STAT. § 500.080 (1975). " 'Person' means human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or governmental authority." KY. REV. STAT. § 500.080 (1975).

69. *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941, 942 (Ky. Ct. App. 1980); see also KY. REV. STAT. § 534.050 (1975).

(1) For an offense defined in this code a corporation convicted of an offense may be sentenced to pay a fine in an amount not to exceed:

(a) For a felony of any class, \$20,000; or

(b) For a Class A misdemeanor, \$10,000; or

(c) For a Class B misdemeanor, \$5,000; or

(d) For a violation, \$500; or

(e) Double the amount of the defendant's gain from commission of the offense, whichever is the greater.

(2) For an offense defined outside this code for which no special corporate fine is specified, a corporation convicted of an offense may be sentenced to pay a fine in an amount not to exceed:

(a) \$20,000, if the offense when committed by an individual has an authorized term of imprisonment in the penitentiary; or

(b) \$10,000, if the offense when committed by an individual has an authorized term of imprisonment of not less than ninety (90) days nor more than twelve (12) months; or

(c) \$5,000, if the offense when committed by an individual has an authorized term of imprisonment of less than ninety (90) days; or

(d) \$500, if the offense when committed by an individual has no authorized term of imprisonment; or

(e) Double the amount of the defendant's gain from commission of the offense, whichever is the greater.

(3) For an offense defined outside this code for which a special corporate fine is speci-

could be liable for manslaughter.⁷⁰ The Texas Penal Code contains almost identical statutes to those which were held to impose corporate criminal liability in Kentucky.⁷¹

There are a number of additional cases from other jurisdictions which discuss statutes that are substantially similar to the Texas Penal Code statutes, and which assign corporate criminal liability for specific intent crimes and offenses of criminal negligence.⁷² *Commonwealth v. McIlwain School Bus Lines, Inc.*,⁷³ a homicide by vehicle case, contains a discussion of a Pennsylvania penal statute that is substantially similar to the Texas statute which defines "person".⁷⁴ The Superior Court of Pennsylvania also discussed another Pennsylvania statute similar to the Texas corporate liability statute.⁷⁵ More importantly, the *McIlwain* court encountered a problem of statutory construction similar to the problem thought to exist by the Texarkana Court of Appeals in *Vaughan & Sons*: the Pennsylvania homicide statute did not specifically include a corporation as a possible party to the offense.⁷⁶ In resolving the problem, the *McIlwain* court specifically noted that the Pennsylvania Penal Code defined

fied, a corporation convicted of the offense may be sentenced to pay a fine in the amount specified in the law that defines the offense.

Id.

70. See *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941, 943 (Ky. Ct. App. 1980).

71. See TEX. PENAL CODE ANN. § 1.07(a)(27) (Vernon 1974); *id.* § 7.22 (Vernon 1974 & Supp. 1982-1983); *id.* § 12.51 (Vernon Supp. 1982-1983).

72. See *Rice v. Commonwealth*, 621 S.W.2d 911 (Ky. 1981); *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33 (Mass. 1971); *People v. Lee Myles Corp.*, 385 N.Y.S.2d 339 (N.Y. App. Div. 1976); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 520 P.2d 900 (Or. Ct. App. 1974); *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413 (Pa. Super. Ct. 1980); *Commonwealth v. J.P. Mascaro & Sons*, 402 A.2d 1050 (Pa. Super. Ct. 1979).

73. 423 A.2d 413 (Pa. Super. Ct. 1980).

74. See *id.* at 420. Compare TEX. PENAL CODE ANN. § 1.07(a)(27) (Vernon 1974) (person includes "corporation or association") with 75 PA. CONS. STAT. ANN. § 102 (Purdon 1977) (person includes "association or corporation").

75. See *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413, 419-20 (Pa. Super. Ct. 1980). Compare TEX. PENAL CODE ANN. § 7.22 (Vernon 1974) (criminal responsibility of corporation) with 18 PA. CONS. STAT. ANN. § 307(a), (b) (Purdon 1983) (criminal liability of corporation).

76. See *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 412, 414 (Pa. Super. Ct. 1980); *Vaughan & Sons v. State*, 649 S.W.2d 677, 679 (Tex. App.—Texarkana 1983, pet. granted). Compare TEX. PENAL CODE ANN. § 19.01(a) (Vernon 1974) (negligent homicide statute does not specifically include term "corporation") with 75 PA. CONS. STAT. ANN. § 3732 (Purdon 1977) ("corporation" not specifically included in homicide by vehicle statute).

"person" to include a corporation⁷⁷ and held that the statutes provided corporate criminal liability for the specific intent crime of homicide by vehicle.⁷⁸

In *Commonwealth v. J.P. Mascaro & Sons*,⁷⁹ the Superior Court of Pennsylvania held that a corporation may be criminally liable for theft by deception, deceptive trade practices, and unsworn falsification to authorities.⁸⁰ The court noted that "[t]he circumstances under which corporations [in Pennsylvania] may be criminally liable are set forth in 18 Pa.C.S. Section 307(a)."⁸¹ The Pennsylvania statute, subsequently set out by the Superior Court, is almost identical to section 7.22 of the Texas Penal Code:

A corporation may be convicted . . . of an offense if . . . (3) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.⁸²

The Oregon court of appeals imposed corporate criminal liability for promoting gambling and for possession of gambling devices in *State v. Oregon City Elks Lodge No. 1189, BPO Elks*.⁸³ The Oregon court did not address directly the question of whether or not corporate criminal liability could be imposed. Rather, the court merely assumed the viability of corporate criminal liability and cited as ultimate authority an Oregon statute similar to section 7.22 of the

77. See 75 PA. CONST. STAT. ANN. § 102 (Purdon 1977).

78. See *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413, 423 (Pa. Super. Ct. 1980).

79. 402 A.2d 1050 (Pa. Super. Ct. 1979).

80. See *id.* at 1051.

81. *Id.* at 1051.

82. Compare 18 PA. CONST. STAT. ANN. § 307(a) (Purdon 1983) with TEX. PENAL CODE ANN. § 7.22(b)(1), (2) (Vernon 1974). The pertinent provisions of the Texas statute provide:

(b) A corporation is criminally responsible for a felony offense only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by:

(1) a majority of the board of directors acting in behalf of the corporation or association; or

(2) a high managerial agent acting in behalf of the corporation or association and within the scope of his office or employment.

TEX. PENAL CODE ANN. § 7.22(b)(1), (2) (Vernon 1974).

83. 520 P.2d 900, 902-04 (Or. Ct. App. 1974).

Texas Penal Code, in a footnote.⁸⁴

In *People v. Lee Myles Corp.*,⁸⁵ the Supreme Court of New York presumed a corporation's affirmative criminal liability for criminal possession of stolen property under a penal code section similar to Texas Penal Code section 7.22.⁸⁶ Although the case was ultimately reversed on unrelated grounds, the court assumed the availability of corporate criminal liability in order to lay a foundation for subsequent analysis.⁸⁷

In *Rice v. Commonwealth*,⁸⁸ the Supreme Court of Kentucky outlined a corporation's affirmative criminal liability for theft by deception by setting out the state's corporate liability statute.⁸⁹ As in *Lee Myles Corp.*, the case was reversed on unrelated grounds;⁹⁰ however, the court made it clear that corporate criminal liability was a valid option in Kentucky.⁹¹

In *Commonwealth v. Beneficial Finance Co.*,⁹² the Supreme Court of Massachusetts held that a corporation could be criminally liable for the specific intent crimes of bribery and conspiracy.⁹³ The court never actually addressed the threshold question of whether such liability could be imposed because the law of corporate criminal liability was already well established in Massachusetts.⁹⁴ The appellant, therefore, only raised the issue upon which standard the corporation's criminal liability should be predicated.⁹⁵ The court ultimately

84. *See id.* at 903 n.4. Compare OR. REV. STAT. § 161.170 (1981) with TEX. PENAL CODE ANN. § 7.22 (Vernon 1974).

85. 385 N.Y.S.2d 339 (N.Y. App. Div. 1976).

86. *See id.* at 340. Compare N.Y. PENAL LAW § 20.20 (Consol. 1975) with TEX. PENAL CODE ANN. § 7.22 (Vernon 1974). The New York statute provides in pertinent part:

2. A corporation is guilty of an offense when:

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation. . . .

N.Y. PENAL LAW § 20.20 (Consol. 1975).

87. *People v. Lee Myles Corp.*, 385 N.Y.S.2d 339, 340 (N.Y. App. Div. 1976).

88. 621 S.W.2d 911 (Ky. 1981).

89. *See id.* at 912; *see also* KY. REV. STAT. § 502.050 (1975) (corporate liability).

90. *See Rice v. Commonwealth*, 621 S.W.2d 911, 914 (Ky. 1981) (improper jury charge basis of reversal).

91. *See id.* at 912.

92. 275 N.E.2d 33 (Mass. 1971).

93. *See id.* at 42, 81-82.

94. *See id.* at 71.

95. *See id.* at 71.

decided that criminal liability could be imposed upon a corporation based on the "acts of lower echelon corporate officials who have authority to act on behalf of the corporation."⁹⁶ In essence, corporate criminal liability was predicated upon a lesser degree of agency status in the corporation than that proposed by the defendants.⁹⁷ The defendants specifically argued that corporate criminal liability can only be imposed if "such conduct was performed, authorized, . . . or tolerated by the corporations' directors, officers or other 'high managerial agents' who are sufficiently high in the corporate hierarchy."⁹⁸ The Massachusetts Supreme Court rejected the defendant's argument.⁹⁹

The author has found no current viable authority in any jurisdiction that contradicts the foregoing authority.¹⁰⁰ Current cases hold that in general, if criminal liability is not imposed on a corporation it is due to a defect in the trial, or a failure to find that the corporation's agent was in fact an agent, or, as an agent, was acting in the scope of corporate duty.¹⁰¹

IV. *VAUGHAN & SONS* INCONSISTENT WITH OTHER JURISDICTIONS

In *Vaughan & Sons*, the Texarkana court noted cases from other jurisdictions which have imposed criminal liability upon corporations for lesser degrees of homicide.¹⁰² It is evident that the Texar-

96. *Id.* at 84.

97. *See id.* at 83-84.

98. *Id.* at 71.

99. *See id.* at 84. Under defendant's standard, it would be difficult to obtain a conviction because "top executives do not carry out the overt criminal acts." *Id.* at 84.

100. Three other less related but supportive cases from other states also utilize statutes similar to section 7.22 of the Texas Penal Code to assign corporate criminal liability for the violation of regulatory statutes. *See United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981) (violation of Sherman Act); *People v. White Bros. Equip. Co.*, 380 N.E.2d 396, 398-99 (Ill. App. Ct. 1978) (absolute liability for operating motor vehicle under fraudulent permit); *People v. Aquarian Age 2000, Inc.*, 380 N.Y.S.2d 545, 547-48 (N.Y. App. Div. 1976) (operating chain distributor scheme).

The Supreme Judicial Court of Massachusetts also rendered a decision containing a comprehensive discussion of the analogous agency and tort law aspects of corporate criminal liability. *See Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33, 71-94 (Mass. 1971).

101. *See State v. Adjustment Dep't Credit Bureau, Inc.*, 483 P.2d 687, 691 (Idaho 1971) (jury instruction contained incorrect statement of law); *State v. Chapman Dodge Center, Inc.*, 428 So. 2d 413, 419 (La. 1983) (insufficient evidence to support conclusion that agent committed crime while acting within scope of employment).

102. *See Vaughan & Sons v. State*, 649 S.W.2d 677, 678 (Tex. App.—Texarkana 1983,

kana court conceded a recognition of these cases which hold corporations criminally liable for offenses of criminal negligence rising to the level of homicide. The court noted that, “[m]any State Courts have, however, shown a tendency to enlarge on the criminal liability of corporations by holding them responsible for the lesser degrees of homicide.”¹⁰³ Without treating this conflicting authority, the court simply stated that the appellant’s offense was a personal crime and a crime requiring only general intent.¹⁰⁴ The court apparently rejected the analogous authority which appeared to be on-point for Vaughan’s offense, criminally negligent homicide, a misdemeanor, and which falls directly into the category of “lesser degrees of homicide.”¹⁰⁵

The Texarkana court agreed that a superficial reading of the negligent homicide statute and the Penal Code definition of “person” would allow a corporation to be found liable for criminally negligent homicide, but concluded that it could find no *plain* legislative intent to impose corporate criminal liability.¹⁰⁶ As has been discussed, there is sufficient *plain* or clear statutory law and analogous case authority upon which to base an imposition of corporate criminal liability, and it would appear that in the absence of evidence to the contrary, the legislature presumably “meant what it said.”¹⁰⁷

Another central theory upon which the Texarkana court based its denial of corporate criminal liability was the notion that “[f]or more serious offenses guilt is personal and not vicarious.”¹⁰⁸ The author-

pet. granted); *see also* State v. LeHigh Valley Ry. Co., 103 A. 685, 685-86 (N.J. 1917) (corporation criminally liable for manslaughter); Commonwealth v. McIlwain School Bus Lines, Inc., 423 A.2d 413, 423 (Pa. 1980) (corporation criminally liable for homicide by vehicle).

103. Vaughan & Sons v. State, 649 S.W.2d 677, 678 (Tex. App.—Texarkana 1983, pet. granted).

104. *See id.* at 678.

105. *See* TEX. PENAL CODE ANN. § 19.01 (Vernon 1974) (homicide includes criminally negligent homicide).

106. Vaughan & Sons v. State, 649 S.W.2d 677, 678 (Tex. App.—Texarkana 1983, pet. granted).

107. *See State ex. rel. Vance v. Hatten*, 600 S.W.2d 828, 831 (Tex. Crim. App. 1980) (unambiguous statutes must be afforded literal meaning); Brazos River Auth. v. City of Graham, 354 S.W.2d 99, 109 (Tex. 1961) (noted maxim that “[i]f Parliament does not mean what it says, it must say so.”).

108. Vaughan & Sons v. State, 649 S.W.2d 677, 678 (Tex. App.—Texarkana 1983, pet. granted). In its discussion the court reasoned that: “[I]t is fundamental to our criminal jurisprudence that for more serious offenses guilt is personal and not vicarious.” *Id.* at 678 (citing 40 Am. Jur. 2d *Homicide* § 26 (1968); Annot., 83 A.L.R.2d 1117 (1962); 19 C.J.S. Corporations § 1363 (1940)).”

ity cited for support of this proposition is unpersuasive, as well as off-point.

The court cited to *American Jurisprudence*, wherein the author stated that "[i]t is the general rule that a corporation cannot commit any grade of homicide requiring a specific criminal intent, for the reason that it cannot formulate such intent."¹⁰⁹ The cases cited as support for this general conclusion consist of: *Commonwealth v. Punxsutawoney Street Passenger Co.*¹¹⁰ and *Rex v. Cory Brothers & Co.*¹¹¹ Both cases are old, the first one having been decided in 1900. The second case is a 1927 case from England. A further reading of the cited *American Jurisprudence* section reveals that a 1904 case was used to support the author's further conclusion that "[c]ourts have indicated a willingness to hold a corporation liable for homicide resting on negligence," rather than specific intent.¹¹² The author went on to conclude, however, that liability for negligent homicide could not attach to a corporation under the line of authority holding that the statutory definition of a "person" does not include a corporation.¹¹³ The two cases used to support this conclusion were rendered in 1909 and 1913 and neither were from Texas.¹¹⁴ Furthermore, the author in *American Jurisprudence* stated: "[I]t has, however, been said that if the statute is broad enough to permit the inclusion of artificial persons, there is no objection to the conviction of a corporation of the lesser degrees of homicide for which punishment by fine is provided."¹¹⁵ Based on the foregoing examination of the *American Jurisprudence* section cited by the *Vaughan* court, it is clear that this section does not support the proposition stated in *Vaughan & Sons* that it is truly "[f]undamental to our criminal jurisprudence that for more serious offenses guilt is

109. 40 AM. JUR. 2D *Homicide* § 26 (1968).

110. 24 Pa. C. 25 (1900), reprinted in 48 PITTSB. LEG. J. 42.

111. [1927] 1 K.B. 810

112. See 40 AM. JUR. 2D *Homicide* § 26 (1968) (citing *United States v. Schaick*, 134 F. 592 (C.C. N.Y. 1904)). It is important to note that this is the type of offense for which *Vaughan & Sons* was convicted. See *Vaughan & Sons v. State*, 649 S.W.2d 677, 677 (Tex. App.—Texarkana 1983, pet. granted) (*Vaughan & Sons* convicted of criminally negligent homicide).

113. See 40 AM. JUR. 2D *Homicide* § 26 (1968).

114. See *id.* (citing *People v. Rochester R. & Light Co.*, 195 N.Y. 10, 88 N.E. 22 (1909) and *Commonwealth v. Illinois C.R. Co.*, 153 S.W. 459 (Ky. 1913)).

115. 40 AM. JUR. 2D *Homicide* § 26 (1968).

personal and not 'vicarious.'"¹¹⁶ It is also apparent that the recent cases discussed in section III of this article have outdated the case authority used to support the contentions in *American Jurisprudence*.¹¹⁷

The other authority, cited by the Texarkana court for the proposition that criminally negligent homicide liability is personal and not vicarious,¹¹⁸ is also unpersuasive. A review of the *American Law Reports Second* and *Corpus Juris Secundum* reveals the same non-commitment to the "lack of personal intent" argument, as well as the same use of the outdated authority.¹¹⁹ Furthermore, the three legal sources used by the Texarkana court to support their "personal not vicarious" conclusion of law should not be used as the basis for this far-reaching and inconsistent decision which contravenes public policy interests.¹²⁰ Hence, it appears that the Texarkana court's opinion represents a misapplication of outdated case authorities. Upon such bedrock, neither law nor public policy should be predicated.

116. See *Vaughan & Sons v. State*, 649 S.W.2d 677, 678 (Tex. App.—Texarkana 1983, pet. granted).

117. See *State v. Adjustment Dep't Credit Bureau, Inc.*, 483 P.2d 687 (Idaho 1971); *Rice v. Commonwealth*, 621 S.W.2d 911 (Ky. 1981); *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941 (Ky. Ct. App. 1980); *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33 (Mass. 1971); *People v. Lee Myles Corp.*, 385 N.Y.S.2d 339 (N.Y. App. Div. 1976); *State v. Oregon City Elks Lodge No. 1189, BPO Elks*, 520 P.2d 900 (Or. Ct. App. 1974); *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413 (Pa. Super. Ct. 1980); *Commonwealth v. J.P. Mascaro & Sons*, 402 A.2d 1050 (Pa. Super. Ct. 1979).

118. See *Vaughan & Sons v. State*, 649 S.W.2d 677, 678 (Tex. App.—Texarkana 1983, pet. granted) (citing Annot., 83 A.L.R.2d 1117 (1962); 19 C.J.S. *Corporations* § 1363 (1940)).

119. See Annot., 83 A.L.R.2d 1117, 1118-20; 19 C.J.S. *Corporations* § 1363, at 1076 (1940).

120. See Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 FED. B.J. 49, 51 (1979) (public policy favors corporate criminal liability); Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 NOTRE DAME LAW. 911, 922-23 (1979) (criminal prosecution of corporation follows public policy interests of deterrence and social and moral condemnation of illegal corporate activities); MODEL PENAL CODE § 2.07 Commentary at 154 (Tent. Draft No. 4, 1955) (primary purpose of fining corporation to encourage managers to supervise corporate personnel closely). Public policy interests in general deterrence of criminal corporate behavior would be contravened if corporate crimes are left unpunished and offenders are free to continue their conduct. Cf. *State v. LeHigh Valley R.R.*, 103 A. 685, 686 (N.J. 1917) (corporation should be held accountable for its illegal acts); *People v. Ebasco Services, Inc.*, 354 N.Y.S.2d 807, 811 (N.Y. Sup. Ct. 1974) (although corporation cannot be victim of homicide, it can commit the offense and be held answerable for it).

V. VAUGHAN & SONS CONTRARY TO PUBLIC POLICY

One may conclude that the Texarkana court's holding that "[t]he more serious the offense the more personal the liability," is contrary to some compelling public policy interests in general or specific deterrence.¹²¹ Professor George Fletcher of U.C.L.A. writes that: "[g]eneral deterrence . . . means . . . the good of punishing one criminal derives from the likelihood that others will thereby be influenced not to commit the same crime; special deterrence . . . means that the punished offender will be deterred from future offenses after his release. . . ."¹²² If it can be hypothesized that the people of Texas would place importance on the notion that corporations as well as individuals should be deterred from committing criminally negligent homicide, then it can be concluded that the more serious the offense the more public policy contrains the assignment of liability.

Unlike German criminal legislation, which does not create consensus, but follows it,¹²³ the criminal law in American jurisdictions has come to be relatively more dependent on the action of legislatures and courts.¹²⁴ This factor, combined with the democratic legislative selection process, allows the current general thinking on criminal law theory to be manifest in legislative mandate. It appears evident from the authority discussed in section III of this arti-

121. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 414 (1978). Many highly regarded thinkers and writers have commented on the nature of deterrence. Plato wrote in his *Laws* that "[p]unishment is not retribution for the past . . . it is imposed for the sake of the future and to secure that the person punished and those who see him punished may . . . abate much of their old behavior." M. GOLDING, *PHILOSOPHY OF LAW* 72, 74 (1975) (quoting PLATO, *LAWS* (xi, 934)). Bentham wrote that general deterrence is the "chief end" and "real justification" of legal punishment. *Id.* Kant reasoned that general deterrence "involves using the criminal as an instrument." *Id.*

122. G. FLETCHER, *RETHINKING CRIMINAL LAW* 414 (1978). While Professor Fletcher maintains that the extent to which deterrence is actually the result of punishment remains speculative, especially in a specific case, his reservations are more philosophical than practical. See *id.* at 415-18. He is concerned that placing too much stress on issues of "social protection" may tend to suppress notions of justice that only the guilty should suffer conviction and punishment, and secondly, that the degree of punishment should be proportionate to the crime. See *id.* at 415-16 (discusses historical instances of arbitrary executions in prison camps and extreme deterrent effects of such "punishment"). It would appear that arbitrary executions do not technically fit the definition of "punishment." An innocent prison inmate is not "punished" by being executed, he should be more correctly considered "murdered" for special organizational purposes.

123. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 408 (1978).

124. See *id.* at 408.

cle, that current general thinking on the criminal law theory of corporate liability is positive across the nation. It would seem appropriate that in an age of increased corporate and technological sophistication the public would be interested in deterring those corporate activities which are difficult to monitor and which are criminally contrary to the laws designed to protect the public at large.¹²⁵ There may even exist public policy interests in retribution or rehabilitation for such corporate behavior.¹²⁶ But in the case of homicide, it is not rational to expect that the public would wish to adopt criminal sanctions against only a portion of those corporations which engage in criminal activity unless the unhampered existence of the corporate entity is valued more highly than the life of even one human being.¹²⁷ It appears that public policy interests in deterrence would act to distribute liability to *all* parties involved, *especially in the face of a serious offense*, and not to limit its application because of fear that some party to the offense would be meted serious punishment.¹²⁸

Principles of deterrence mandate that offenders be given punishment sufficient to inhibit the commission of such crime by either the same parties or other persons and corporations, in order to protect

125. See Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 NOTRE DAME LAW. 911, 924 (1979) (deterrence of "reckless disregard for consumer safety" one justification for corporate criminal liability).

126. It is possible that statutes which impose corporate criminal liability in Texas were also promulgated with an eye towards notions of contemporary minimalist retribution. This means that there may be a feeling among the general public that a corporation should be punished for criminally negligent homicide because it *deserves* the punishment. M. GOLDING, *PHILOSOPHY OF LAW* 85 (1975). Contemporary minimalist thinking would, however, also allow a judge to absolve a corporation or lessen punishment if it would serve purposes of rehabilitation or deterrence. See *id.*

127. This analysis does not reach the economics of the threat of major corporate extinction versus the life of even one individual. Neither does the Texas statute reach this question. No provision is made in the Texas Penal Code for the extinction of a corporate entity as punishment for a crime of criminal negligence or specific intent.

128. The Texarkana court's apparent concern that a party should not be held liable for so serious a crime when the crime is committed "[b]y someone other than the person charged," is not a valid one. See *Vaughan & Sons v. State*, 649 S.W.2d 677, 679 (Tex. App.—Texarkana 1983, pet. granted). There can be no legitimate concern that the corporation will be meted unjust punishment because it is too amorphous to formulate intent, in light of the statutory burdens of proof which must be met before corporate liability attaches. Corporations are amply protected by the statutes which compel a thorough showing of a corporate agent's "high managerial agency" status, acting in the scope of employment, before specific intent criminal liability can attach to the corporation. See TEX. PENAL CODE ANN. § 7.22 (Vernon 1974).

the public from recurrence of the crime.¹²⁹ Limitation of the rational distribution of punishment may therefore be antithetical to public policy interests in functionally deterring the commission of crime in every sector of society.¹³⁰

VI. CONCLUSION

Corporate criminal liability for specific intent crimes and offenses of criminal negligence has not yet been imposed in Texas. Up until the 1974 edition of the Penal Code, no machinery existed whereby such liability could be assigned. The statutes now contain a procedure for such assignment; however, this procedure has not yet been interpreted by the court of criminal appeals.

The Texarkana Court of Appeals in *Vaughan & Sons* based its decision on the lack of plain legislative intent justifying the imposition of corporate liability and on the proposition that liability for such a serious offense is personal and not vicarious.¹³¹ Neither basis for the opinion is persuasive. The Texas Court of Criminal Appeals recently granted the State's petition for discretionary review of the Texarkana court's decision.¹³² The high court's decision is likely to have a heavy impact upon the future assignment of corporate criminal liability for offenses of criminal negligence and will inevitably determine the direction of corporate criminal liability for specific intent crimes. It appears that in light of the existence of Penal Code statutes that provide guidelines for the assignment of corporate criminal liability, and analogous case law authority from other jurisdictions, as well as public policy interests in general, corporate criminal liability for specific intent crimes as well as offenses of criminal negligence should be imposed in Texas.

129. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 416 (1978); Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 *NOTRE DAME LAW.* 911, 921 (1979) (punishment of fines reduces corporation's financial gain from illegal conduct).

130. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 416 (1978).

131. See *Vaughan & Sons v. State*, 649 S.W.2d 677, 678-79 (Tex. App.—Texarkana 1983, pet. granted).

132. See *id.* at 677.