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DEATH IN THE WORKPLACE: CORPORATE LIABILITY FOR CRIMINAL HOMICIDE†

KATHLEEN F. BRICKEY*

INTRODUCTION

On June 14, 1985, a Cook County Illinois trial judge announced criminal homicide verdicts that sent shock waves through the nation's business community. Concluding an eight week nationally publicized bench trial, Circuit Judge Ronald Banks pronounced the Film Recovery Systems Corporation guilty of involuntary manslaughter and three of its officers guilty of murder in connection with the death of Stefan Golab, an undocumented Polish immigrant who succumbed to cyanide fumes while working at the firm's silver-reclamation plant.¹

Until these verdicts attracted our collective attention, the concept of corporate homicide prosecutions seemed anomalous. More curious still, the conviction of corporate executives for *murder* in connection with a work-related death was thought to be unprecedented. Extraordinary as they seemed, however, these verdicts signaled the development of similar trends elsewhere in the country and presaged announcements that district attorneys in Los Angeles and in Milwaukee county planned to investigate every workplace death occur-

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1. People v. Film Recovery Systems, Report of Proceedings 10-11 (June 14, 1985) (on file with the author) [hereinafter Report of Proceedings]. One of two related corporations indicted along with Film Recovery Systems was also found guilty. *Id.* The company, Metallic Marketing Systems, was a half owner of the plant when the death occurred. *Id.* at 8. Of the two other individuals who were indicted, the judge dismissed the case against one at the close of the prosecution's case, Koszczuk, *Judge Frees One Exec in Cyanide Trial*, The Daily Herald (Chicago), May 15, 1985, at 1, and the other was not tried because the Governor of Utah refused the State of Illinois' request for extradition. Gibson, *A Worker's Death Spurs Murder Trial*, The Nat'l L.J., May 20, 1985, at 6. All of the defendants who were convicted of criminal homicide were also convicted of 14 counts of reckless conduct. Report of Proceedings 10-11. As of the date of this writing, the convictions are on appeal. Notices of Appeal (on file with the author).

Because a trial transcript was unavailable, this article relies upon court records on file with the author and extensive press coverage of the trial as sources of factual details about this prosecution.

ring within their respective jurisdictions for possible criminal violations.²

These developments have created a predictable set of concerns. Pursuit of aggressive prosecutorial policies may mean, for example, that every bad business judgment has potential criminal repercussions. If that is true, or perceived to be true, we must ask whether management can function effectively in that environment. Those who say it cannot argue that to subject companies and their managers to criminal liability on the basis of day-to-day business decisions would have "devastating effects" on the manner in which American business enterprises are conducted.³ This and other pragmatic concerns—among which are counted the dangers sometimes inherent in the workplace—are making management wary.

These developments have also created concern that local law enforcement agencies are intruding into a domain in which Congress has delegated primary (and perhaps exclusive) jurisdiction to federal regulatory agencies. In the view of some, comprehensive federal statutes that address the problem of workplace hazards should preempt application of conventional state criminal statutes to sanction employers for creating or tolerating unsafe work environments.⁴ Businesses that operate nation-wide, the argument runs, should be governed by a single, cohesive, civil and criminal regulatory scheme instead of an incoherent patchwork of federal, state and local regulations.

But perhaps the most perplexing problem confronting the business community is that of identifying a comprehensible rule of law under which corporations and their officers are held criminally responsible for workplace deaths and injuries. The Film Recovery Systems indictments charged that Mr. Golab was a victim of criminal homicide. But where is the instrumentality of death that felled him? There is, after

2. Middleton, *Prosecutors Get Tough on Safety*, The Nat'l L.J., April 21, 1986, at 1. See also Comment, *Corporate Homicide: Will Michigan Follow Suit?*, 62 U. DET. L. REV. 65 (1984) (considering viability of recent manslaughter prosecution initiated against General Dynamics Corporation); *Lawyers' Concerns Over Government Tactics Aired at ABA Convention*, 39 CRIM. L. REP. (BNA) 2400, 2405 (Aug. 27, 1986) (describing negligent homicide and reckless endangerment charges brought against PGP Corporation, a unit of Gerald Metals, Inc., for carbon monoxide poisonings of four security guards, one of whom died).

3. Gibson, *Murder Trial Set for Execs of Factory*, Chicago Tribune, April 14, 1985, at 1 (quoting Elliot Samuels, one of the defense attorneys in the FRS prosecution).

4. See Middleton, *supra* note 2.

all, no smoking gun or blood-stained weapon to incriminate these managers or the enterprise they controlled. And assuming there were, who would have wielded it? Who confronted this man and ended his life?

These issues are compelling, for we will rarely identify a corporate agent who has committed a direct act of aggression against the dead or injured worker. We are speaking, instead, of liability predicated as much upon what corporate officers neglect to do as it is upon their affirmative conduct.⁵ Thus, an underlying duty to act must be found, and it is here—in the source, nature and scope of that duty—that we gain insights into the governing rule of law. It is here that we find the conceptual basis for treating workplace “accidents” as assaults, batteries and homicides under the substantive law of crimes.⁶

I. THE FILM RECOVERY SYSTEMS CASE—A PARADIGM

The allegation in the Film Recovery case is, at bottom, a charge that the company and its managers exposed Mr. Golab to workplace hazards that caused his untimely demise. The specific hazard was hydrogen cyanide gas, the byproduct of a cyanide solution used to recover silver from exposed x-ray film. Film Recovery Systems employees were exposed to the fumes directly while working around open cyanide vats

5. It is not always clear whether particular conduct should be characterized as an act or an omission. In Film Recovery Systems, for example, it would be equally logical to allege that the defendants stored cyanide in open, unventilated vats as it would be to allege that they failed to provide for proper storage of the cyanide. Notwithstanding that the indictment generally charged the defendants with causing Golab's death through acts of commission and omission, however, the only enumerated acts of commission were the defendants' operation of the firm and their employment of Stefan Golab. Murder Indictment, *People v. O'Neil* (February 10, 1984) (on file with the author). The only offending conduct described with any particularity consisted of omissions. See *infra* text accompanying note 55. The prosecution thus was treated as a case of omission throughout. Once a duty to act is established, the distinction between acts (improper performance) and omissions (nonperformance) loses its importance.

6. See generally Glasbeek & Rowland, *Are Injuring and Killing at Work Crimes?*, 17 *OSGOODE HALL L.J.* 506 (1979); Radin, *Corporate Criminal Liability for Employee-endangering Activities*, 18 *COLUM. J.L. & SOC. PROBS.* 39 (1983); Spurgeon & Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 *J. CRIM. L. & CRIMINOLOGY* 400 (1981); Comment, *Corporate Criminal Liability for Homicide: Has the Fiction Been Extended too Far?*, 4 *J.L. & COM.* 95 (1984); Comment, *Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?*, 38 *Sw. L.J.* 1275 (1985); Comment, *supra* note 2.

and to ambient gas that hovered elsewhere in the plant as well.

On February 10, 1983, Stefan Golab left his post at a vat after complaining of nausea and dizziness. By the time he could reach the adjacent lunchroom, he had begun to shake and foam at the mouth. By the time his coworkers could carry him outside, his heart had stopped beating. By the time paramedics could transport him to a hospital, he was dead. That death is the paradigmatic homicide.

A. *The Manslaughter Charge against FRS*

If we are to rely on reported case law as an historical measure of the frequency with which prosecutors have charged corporations with criminal homicide, we must conclude that these prosecutions were indeed anomalies. Corporate homicide prosecutions appear throughout this century as relatively isolated phenomena,⁷ only a few of which were in-

7. Fifteen reported American judicial decisions are direct outgrowths of corporate homicide prosecutions. See *Granite Constr. Co. v. Superior Court*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983); *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941 (Ky. App. 1980); *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459 (1913); *State v. Lehigh Valley R.R.*, 90 N.J.L. 372, 103 A. 685 (1917); *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981); *People v. Deitsch*, 97 A.D.2d 327, 470 N.Y.S.2d 158 (1983); *People v. Ebasco Servs., Inc.*, 77 Misc. 2d 784, 354 N.Y.S.2d 807 (N.Y. Sup. Ct. 1974); *United States v. Van Schaick*, 134 F. 592 (C.C.S.D.N.Y. 1904); *People v. Rochester Ry. & Light*, 195 N.Y. 102, 88 N.E. 22 (1909); *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961); *Commonwealth v. Penn Valley Resorts, Inc.*, 343 Pa. Super. 387, 494 A.2d 1139 (1985); *Commonwealth v. McIlwain School Bus Lines*, 283 Pa. Super. 1, 423 A.2d 413 (1980); *Commonwealth v. Peoples Natural Gas Co.*, 102 Pitt. Legal J. 348 (1954); *Commonwealth v. Punxsutawney Street Passenger Ry.*, 24 Pa. C. 25 (1899); *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Crim. App. 1983).

Although it has been suggested that an early New Hampshire case in which a corporation was indicted in connection with a death was the first application of a homicide statute to a corporate entity, Maakestad, *A Historical Survey of Corporate Homicide in the United States: Could It Be Prosecuted in Illinois?*, 69 ILL. B.J. 772, 774 (1981), that case was not, strictly speaking, a criminal homicide prosecution. Instead, the New Hampshire case involved a proceeding under a statute that made the proprietors of railroad companies liable to the estate of anyone killed as a result of the railroad's negligence. *Boston, C. & M. R.R. v. State*, 32 N.H. 215, 220 (plaintiff's argument), 226-28 (opinion of the court). The indictment, in fact, did not charge the plaintiffs with the commission of a crime. The indictment charged them with neglect of their duties and was the statutorily prescribed method to provide recovery for the decedent's estate. *Id.* at 223

spired by industrial accidents.⁸

The relative rarity of these prosecutions reflects in part the difficulty of convincing courts that juristic persons are proper homicide defendants. For despite the settled rule that corporations are capable of committing intentional torts,⁹ many courts have been reluctant to hold corporations capable of committing crimes with elements of personal violence or an evil state of mind.¹⁰

Prosecutors in corporate homicide cases have encountered definitional obstacles as well. In jurisdictions where the common-law¹¹ or statutory¹² definition of criminal homicide was the killing of one human being *by another*, for example, most courts found that the "another"—i.e., the slayer—must

(argument for the state). In effect providing wrongful death recovery, the legislature required the action to proceed by way of indictment to insure that the action was well founded, and limited the amount of the fine that could be assessed to protect railroads from excessive awards. *Id.* at 226 (opinion of the court).

8. Among those that were, *see* Granite Constr. Co. v. Superior Court, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983) (approving manslaughter prosecution for deaths of 7 construction workers); *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980) (disapproving, on ground of causation, manslaughter prosecution for deaths of 6 workers killed in factory explosion), *cert. denied*, 450 U.S. 1031 (1981); *People v. Deitsch*, 97 A.D.2d 327, 470 N.Y.S.2d 158 (1983) (approving manslaughter prosecution for death of worker killed in factory fire); *People v. Ebasco Servs., Inc.*, 77 Misc. 2d 784, 354 N.Y.S.2d 807 (Sup. Ct. 1974) (approving manslaughter prosecution for deaths of 2 workers killed when cofferdam broke).

9. *See, e.g.*, *Philadelphia, W. & B.R.R. v. Quigley*, 62 U.S. (21 How.) 202 (1859) (libel); *Goodspeed v. East Haddam Bank*, 22 Conn. 530 (1853) (malicious prosecution); *Evansville & C.R.R. v. Baum*, 26 Ind. 70 (1866) (assault and battery); *Fogg v. Boston & L.R.R.*, 148 Mass. 513, 20 N.E. 109 (1889) (libel); *Reed v. Home Sav. Bank*, 130 Mass. 443 (1881) (malicious prosecution); *Brokaw v. New Jersey R.R. & Transp.*, 32 N.J.L. 328 (1867) (assault and battery).

10. *See, e.g.*, *Commonwealth v. Punxsutawney Street Passenger Ry.*, 24 Pa. C. 25 (1899); *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961); *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Crim. App. 1983); *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459 (1913). *See generally* Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393, 410-15 (1982).

11. *See, e.g.*, *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459 (1913); *Commonwealth v. Peoples Natural Gas Co.*, 102 PRTS. LEGAL J. 348 (1954).

12. *See, e.g.*, *People v. Rochester Ry. & Light*, 195 N.Y. 102, 88 N.E. 22 (1909). *Cf.* *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961) (homicide statute defining offense in terms of a person who kills another).

be a member of the same class as the victim—i.e., a human being.¹³

A few early cases permitted prosecutions to proceed, however, either because the court disagreed that the common-law definition was so restrictive as to require a human slayer¹⁴ or on the ground that under a statute making owners of vessels amenable to prosecution for manslaughter, a corporation clearly could be an "owner."¹⁵

More recently amended penal codes have decreased the number of obstacles to corporate homicide prosecutions by omitting the troublesome "by another" element,¹⁶ by including corporations in the definition of "person,"¹⁷ or by creating a comprehensive statutory scheme of corporate criminal liability in general.¹⁸

Considering our paradigm within this framework, the Film Recovery Systems indictment could not, in all probability, have been maintained prior to a 1961 revision of the Illinois Criminal Code. Before that revision, Illinois courts had severely restricted corporate criminal liability to liability for misdemeanors for which a fine was an authorized punishment.¹⁹ Since corporate prosecutions for felonies²⁰ and for

13. *People v. Rochester Ry. & Light*, 195 N.Y. 102, 88 N.E. 22 (1909); *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459 (1913); *Commonwealth v. Peoples Natural Gas Co.*, 102 Pitt. Legal J. 348 (1954).

14. *See State v. Lehigh Valley R.R.*, 90 N.J.L. 372, 103 A. 685 (1917).

15. *See United States v. Van Schaick*, 134 F. 592 (C.C.S.D.N.Y. 1904).

16. *See, e.g., Granite Constr. Co. v. Superior Court*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983).

17. *See, e.g., People v. Ebasco Servs., Inc.*, 77 Misc. 2d 784, 354 N.Y.S.2d 807 (Sup. Ct. 1974); *Commonwealth v. McIlwain School Bus Lines*, 283 Pa. Super. 1, 423 A.2d 413 (1980) (vehicular homicide statute). *But see People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 303 n.1, 414 N.E.2d 660, 664 n.1, 434 N.Y.S.2d 159, 163 n.1 (1980), *cert. denied*, 450 U.S. 1031 (1981) (assuming, without deciding, that manslaughter and negligent homicide statutes apply to corporations, although concluding that no precedent for such a prosecution could be found in the jurisdiction). *Cf. State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961) (statute that includes corporation as a person unless context otherwise requires does not make corporation liable for homicide, a crime rooted in "inherently human relations").

18. *See, e.g., Ky. Rev. Stat. §§ 500.080(12), 502.050, 534.050* (Baldwin 1984). The Kentucky Court of Appeals construed § 534.050 as authorizing corporate manslaughter prosecutions in *Commonwealth v. Fortner LP Gas Co.*, 610 S.W.2d 941 (Ky. Ct. App. 1980).

19. A corporation could be prosecuted for misdemeanors punisha-

offenses only punishable by death or imprisonment²¹ thus were precluded, the Illinois rule effectively shielded corporations from criminal homicide prosecutions.²²

Even without these judicially imposed general limitations on corporate criminal liability, the Illinois homicide statutes themselves would have posed formidable obstacles for corporate prosecutions. For while they defined murder and manslaughter as "the unlawful killing of a human being" without reference to the classification of the slayer,²³ the only authorized punishment for these crimes was death or imprisonment²⁴—penalties obviously ill-suited for corporate defendants. Thus, it is by no means clear that corporations could have incurred criminal homicide liability under those statutes unless the issues of guilt and amenability to punishment could somehow be severed. While theoretically possible,²⁵ that option was foreclosed by an Illinois criminal code provision requiring that all offenses defined by the code "shall be prose-

ble by fine, imprisonment, or both, *People v. Strong*, 363 Ill. 602, 605, 2 N.E.2d 942, 944 (1936), because the two penalties function independently, *People v. Duncan*, 363 Ill. 495, 497, 2 N.E.2d 705, 706 (1936). *See also* *People v. McArdle*, 295 Ill. App. 149, 14 N.E.2d 683, *writ dismissed*, 370 Ill. 513, 19 N.E.2d 328 (1939).

20. *See* *People v. Strong*, 363 Ill. 602, 2 N.E.2d 942 (1936).

21. *See* *People v. Duncan*, 363 Ill. 495, 2 N.E.2d 705 (1936).

22. *See generally* Maakestad, *supra* note 7.

For examples of cases in which Illinois courts upheld corporate criminal prosecutions in other contexts, see *People v. City of Chicago*, 256 Ill. 558, 100 N.E. 194 (1912) (municipal corporation criminally liable for violation of labor law limiting hours of employment of females in factories); *Chicago, W. & V. Coal Co. v. People*, 214 Ill. 421, 73 N.E. 770 (1905) (conspiracy to fix prices); *Illinois Cent. R.R. v. People*, 95 Ill. 313 (1880), *aff'd*, 108 U.S. 541 (1883) (extortion).

23. *See* Ill. Rev. Stat. ch. 38, §§ 358, 361 (1959).

In contrast, the voluntary manslaughter statute referred to acts of aggression directed toward the "person killing," *id.* § 362, and the reckless homicide statute defined the offense in terms of a "person" who recklessly drives a vehicle and kills. *Id.* § 364.

24. Ill. Rev. Stat. ch. 38, §§ 360, 364 (1959).

25. *Compare* State ex rel. Losey v. Willard, 54 So. 2d 183, 185 (Fla. 1951) and *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 322, 153 S.W. 459, 463 (1913) (corporation may not be convicted of offenses for which the only penalty provided is death or imprisonment) with *United States v. Van Schaick*, 134 F. 592, 602 (C.C.S.D.N.Y. 1904) (overruling demurrers to indictment under manslaughter statute providing only penalty of imprisonment on ground that "[i]t seems a more reasonable alternative that Congress inadvertently omitted to provide a suitable punishment for the offense, when committed by a corporation, than that it intended to give the owner impunity simply because it happened to be a corporation").

cuted and on conviction punished as by this act is prescribed, and not otherwise."²⁶

The Revised Illinois Criminal Code diminishes the theoretical barriers to corporate homicide prosecutions in several important respects. Film Recovery Systems was indicted under a statute that provides "[a] *person* who unintentionally kills an *individual* without lawful justification commits involuntary manslaughter" if the death-producing acts are performed recklessly and are likely to cause death or great bodily harm.²⁷ The term "person" includes "an individual, public or private corporation, government, partnership, or unincorporated association."²⁸ Although the term "individual" is not defined by statute, the clear implication is that "individual" denotes only natural persons while "person" denotes both natural and juristic persons. A literal reading of the revised code would thus permit an involuntary manslaughter prosecution against a corporate person to go forward,²⁹ and Comments published in the code suggest that the Revision Committee did indeed contemplate that corporations might be liable for manslaughter in Illinois.³⁰

26. Ill. Rev. Stat. ch. 38, § 600 (1959).

27. Ill. Rev. Stat. ch. 38, § 9-3 (1985) (emphasis added).

28. Ill. Rev. Stat. ch. 38, § 2-15 (1985).

29. It should be noted, however, that courts in two other jurisdictions with similar statutory schemes reached opposite conclusions on the question whether a corporation was a prosecutable person. Compare *Granite Constr. Co. v. Superior Court*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983) (corporation may be prosecuted for manslaughter where offense defined as killing of a human being and penal code defines "person" to include corporation) with *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Crim. App. 1983) (corporation may not be prosecuted for manslaughter where offense defined as a person causing death of an individual because all homicides are different degree of same crime; as corporation cannot commit crimes requiring specific intent and so cannot commit murder, corporation cannot commit manslaughter, a lesser degree of that crime).

30. See Committee Comments accompanying Ill. Ann. Stat., ch. 38, § 5-4 (Smith-Hurd 1979) (Section 5-4(a)(2) "provides, in effect, that when a corporation is indicted for a felony such as embezzlement, *involuntary manslaughter*, and the like, the corporation may not be held liable unless the criminal conduct was performed or participated in by the Board of Directors or by a high managerial agent.") (emphasis added). These Comments amplify a provision fashioned after the Model Penal Code section that defines the limits of corporate criminal liability. Compare Ill. Rev. Stat. ch. 38, § 2-15 with Model Penal Code § 2.07 (P.O.D. 1962).

The Revision Committee was not, however, a legislative committee. It was, instead, a committee appointed by the Illinois and Chicago Bar Associations at the urging of the Governor and the Supreme Court of Illinois.

B. *The Murder Charge against FRS Executives*

It has long been recognized that corporate officers and agents who engage in criminal conduct during the course of their employment are personally accountable for their misdeeds.³¹ As early as the beginning of the eighteenth century—well before the common law worked through the theoretical barriers to prosecuting corporate entities—Chief Justice Holt observed in a dictum that “[a] corporation is not indictable but the particular members of it are.”³² By the middle of the next century, the amenability of corporate agents to criminal prosecution for offenses committed on behalf of the corporation was a point on which there could be “no doubt.”³³

But these judges were not speaking of murder. For the most part³⁴ they were seeking to redress the creation of a public nuisance,³⁵ the operation of a corporate enterprise

Ill. Ann. Stat. ch. 38, Committee Foreword to Tentative Final Draft of the Proposed Illinois Revised Criminal Code of 1961 (Smith-Hurd 1979).

31. See, e.g., *Elsberry v. State*, 52 Ala. 8, 10 (1875) (“it is the natural persons in and by whom it lives, moves, and operates that the law generally holds responsible for its offences against the public”); *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41, 44 (1841) (“when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business . . . should be indicted”); *Moore v. State*, 48 Miss. 147 (1873), writ dismissed, 88 U.S. 636 (1875); *State v. Morris & Essex R.R.*, 23 N.J.L. 360 (1852); *Crowley v. People*, 83 N.Y. 464 (1881); *State v. Patton*, 26 N.C. (4 Ired.) 16, 19 (1843) (“the individuals . . . were bound, by virtue of their offices, faithfully to exert all their powers and apply all their means, as such officers, to the keeping of the road in order; and . . . for a default in this public duty they were liable”); *Ex parte Schmidt*, 2 Tex. App. 196 (1877); *The Queen v. Great North of England Ry.*, 115 Eng. Rep. 1294 (Q.B. 1846); *The Queen v. Stephens*, 1 L.R.-Q.B. 702 (1866); *Rex v. Medley*, 172 Eng. Rep. 1246 (K.B. 1834). See generally 1 K. Brickey, *CORPORATE CRIMINAL LIABILITY* § 5:02 (1984). This principle is now codified in the Illinois statutes. Ill. Rev. Stat. ch. 38, § 5-5(a) (1985).

32. Anonymous, 88 Eng. Rep. 1518 (K.B. 1701).

33. *The Queen v. Great North of England Ry.*, 115 Eng. Rep. 1294 (Q.B. 1846). See also *Cowley v. People*, 83 N.Y. 464, 469 (1881) (“[i]t has . . . for years been the law of this State that the officers of a corporation might be indicted for the neglect of a duty resting upon it”).

Corporate agents could be prosecuted as principals, aiders and abettors, or as accessories. *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41 (1841). See also *State v. Pincus*, 41 N.J. Super. 454, 125 A.2d 420 (App. Div. 1956), and cases cited therein.

34. But see *Cowley v. People*, 83 N.Y. 464 (1881) (indictment of agent of incorporated benevolent association for endangering the welfare of a child).

35. See, e.g., *State v. Patton*, 26 N.C. (4 Ired.) 16 (1843) (indictment

without a proper license³⁶ or without paying required taxes,³⁷ the pursuit of unauthorized business activities,³⁸ violation of regulatory statutes³⁹ and the like. In Film Recovery Systems, on the other hand, the former president, the plant manager and the foreman of the company were prosecuted for killing an employee.

Notwithstanding the relatively greater frequency of purely regulatory prosecutions against corporate officers, as early as the beginning of this century managing officers of a steamship company were indicted under a federal manslaughter statute for failure to provide operable emergency equipment on a vessel that caught fire and sank, killing 900 people aboard.⁴⁰ Prosecutions initiated under conventional manslaughter laws sporadically followed thereafter.⁴¹

of president and directors of turnpike company for letting turnpike become ruinous); *The Queen v. Stephens*, 1 L.R.-Q.B. 1866 (indictment of slate quarry owner for throwing debris into navigable waters); *Rex v. Medley*, 172 Eng. Rep. 1246 (K.B. 1834) (indictment of directors and employees of gas company for discharging waste into river).

36. See, e.g., *Elsberry v. State*, 52 Ala. 8 (1875).

37. Ex parte Schmidt, 2 Tex. App. 196 (1877).

38. See, e.g., *Moore v. State*, 48 Miss. 147 (1873), writ dismissed, 88 U.S. 636 (1875) (indictment of agent for selling lottery ticket).

39. Cf. *United States v. Wise*, 370 U.S. 405, 407 n.1 (1962) (observing that in 1914 alone there were 40 cases in which corporate officers were indicted for Sherman Act violations).

40. *United States v. Van Schaick*, 134 F. 592 (C.C.S.D.N.Y. 1904).

41. See, e.g., *Commonwealth v. Godin*, 374 Mass. 120, 371 N.E.2d 438 (1977) (prosecution of company president for deaths of employees killed in fireworks plant explosion), cert. denied, 436 U.S. 917 (1978); *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944) (prosecution of nightclub owner for deaths of patrons killed in fire); *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), cert. denied, 450 U.S. 1031 (1981) (prosecution of corporation and individual officers and employees for deaths of workers in chewing gum plant explosion); *People v. Deitsch*, 97 A.D.2d 327, 470 N.Y.S.2d 158 (1983) (prosecution of president and other managers of company for death of employee killed in warehouse fire); *People v. Ebasco Services, Inc.*, 77 Misc. 2d 784, 354 N.Y.S.2d 807 (Sup. Ct. 1974) (prosecution of corporation and unidentified individuals for deaths of two workers killed when improperly constructed cofferdam broke); *People v. Harris*, 74 Misc. 353, 134 N.Y.S. 409 (Gen. Sess. 1911) (prosecution of owners and proprietors of factory for deaths of employees killed in fire); *State v. Ginsberg*, 15 Wash. App. 244, 548 P.2d 329 (1976) (prosecution of corporation and part-owner for death of tenant killed in fire); *State v. Serebin*, 119 Wis. 2d 837, 350 N.W.2d 65 (1984) (prosecution of nursing home administrator for homicide by reckless conduct for death of nursing home resident). See also *A Death at Work Can Put the Boss in Jail*, *Bus. Wk.*, Mar. 2, 1987, at 37; Kendall, *Criminal Charges on the Rise for Workplace Injuries, Deaths*, *OCCUPATIONAL HAZARDS*, Dec. 1985, at 49.

Thus, to the extent that the Film Recovery Systems prosecution sought to hold the managers criminally responsible for a death they caused during the course of their employment, the case against the officers—like that against the corporation itself—is unusual but not pioneering. To the extent that the charge against the Film Recovery Systems officers was murder—as opposed to manslaughter—no one could recall a single precedent for the prosecution.

II. BREACH OF DUTY

The indictment in the Film Recovery Systems case did not allege that any of the defendants physically assaulted Mr. Golab. The fault in this case—if fault there may be—lies in their conduct of the enterprise and their failure to act where action was called for. The fault, therefore, is a derogation of duty. But breach of a duty will trigger liability only if the obligation is imposed by common law or statute.⁴² Breach of a moral duty alone does not suffice.⁴³ Thus we must seek the nature and source of the duty that triggered this extraordinary criminal prosecution.

Common-law duties often arise by virtue of special personal or contractual relationships.⁴⁴ Duties based on jural relationships such as parent and child⁴⁵ or husband and wife⁴⁶

42. See generally W. LaFave & A. Scott, *CRIMINAL LAW* § 3.3(a) (2d ed. 1986); R. Perkins, *CRIMINAL LAW* 658-69 (3d ed. 1982); Model Penal Code § 2.01 Comment (Tentative Draft No. 4, 1955). The duty may, and customarily does, arise under the civil law.

43. "The non-action of one who has no legal duty to act is nothing." Beale, *The Proximate Consequences of an Act*, 33 *HARV. L. REV.* 633, 637 (1920). Cf. *State v. Ulvinen*, 313 N.W.2d 425 (Minn. 1981) (failure to warn daughter-in-law of plan to kill her, though morally reprehensible, does not constitute criminal conduct); *Anderson v. State*, 27 *Tex. App.* 177, 11 S.W. 33 (1889) (brakeman who neglects to see child on tracks or who sees child but neglects to signal engineer to stop train not liable because he has no legal duty to signal).

44. Duties to act may also arise by virtue of special circumstances such as creation of the peril, voluntary assumption of care, and ownership of land. See generally W. LaFave & A. Scott, *supra* note 42, at § 3.3(a); Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 *N.Y.L. SCH. L. REV.* 101 (1984).

45. See, e.g., *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (1960) (parental duty to protect unemancipated child from harm by third person); *State v. Mason*, 18 N.C. App. 433, 197 S.E.2d 79 (parental duty to feed child and prevent it from starving), *cert. denied*, 283 N.C. 669, 197 S.E.2d 878 (1973); *Commonwealth v. Breth*, 44 Pa.C. 56 (1915) (parental duty to provide medical care).

46. *State v. Smith*, 65 Me. 257 (1876) (husband has duty to provide clothing and shelter for insane wife in winter); *State v. Mally*, 139 *Mont.*

are personal obligations owed by one to the other. Duties arising from contractual relationships, on the other hand, may be obligations that run either to the public⁴⁷ or to particular individuals for whose benefit the contract has been made,⁴⁸ including one's servants.

In the past, a master's contractual duties to rescue a seaman who falls overboard⁴⁹ and to provide a stricken servant emergency medical care⁵⁰ have provided foundations for criminal homicide charges.⁵¹ Liability imposed under these theories is limited, however, in that it arises only when the employer fails to respond to an emergency that renders the servant helpless.⁵²

To be sure, Stefan Golab's rapidly deteriorating condition utterly disabled him. But when the emergency arose, paramedics were quickly called to the scene.⁵³ Thus, the

599, 366 P.2d 868 (1961) (husband has duty to provide medical care to ailing wife). *But see* *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907) (man has no legal duty to aid mistress rendered helpless by morphine) (criticized in Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 624 (1958)).

47. *See, e.g.*, *State v. Benton*, 38 Del. 1, 187 A. 609 (1937) (railroad crossing watchman who failed to warn motorist of oncoming train liable for manslaughter); *State v. Harrison*, 107 N.J.L. 213, 152 A. 867 (1931) (same).

48. *See, e.g.*, *People v. Montecino*, 66 Cal. App. 2d 85, 152 P.2d 5 (1944) (defendant who assumes contractual obligation to care for elderly woman may be criminally liable for death resulting from neglect of that duty); *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962) (recognizing that if defendant assumed contractual duty to care for another's infant, neglect of that duty could result in criminal liability for infant's death).

49. *See, e.g.*, *Reyes v. Vantage*, 609 F.2d 140, 142 (5th Cir. 1980); *Kiesel v. American Trading & Prod. Corp.*, 347 F. Supp. 673, 679 (D. Md. 1972).

50. *The Queen v. Brown*, 1 N.W.T.L.R. (No. 4) 35 (1893) (reported more fully in 1 Terr. L.R. 475 (1893)) (master liable for failure to obtain proper medical treatment for servant rendered helpless by severe frostbite).

51. *Id.*; *United States v. Knowles*, 26 F. Cas. 800 (N.D. Cal. 1864) (No. 15,450).

52. *Cf.* Restatement (Second) of Agency § 512 (1957) (duty to protect endangered or hurt employee); Restatement (Second) of Torts § 314B (1963 & 1964) (same).

53. *See* Dold, *Ex-Worker Says Firm Masked Cyanide Peril*, Chicago Tribune, April 16, 1985, at 1 (quoting testimony of co-worker). The paramedics did not, however, administer a cyanide antidote because no one present could (or would) confirm that Golab had been exposed to cyanide. Siegel, *Murder Case a Corporate Landmark*, Los Angeles Times, Sept. 15, 1985, at 1, col. 1.

indictment did not fault the defendants for neglecting to *respond* to the emergency.⁵⁴ It faulted instead their failure to *prevent* the emergency from arising at all.

The indictment charged that the defendants failed to advise Mr. Golab of the nature and dangers of the chemicals used in the plant or to instruct him in the proper handling of the deadly poisons; that they failed to provide safety and first-aid equipment and health-monitoring systems; and that they failed to provide for proper storage, detoxification and disposition of cyanide used in the ordinary course of the company's business.⁵⁵ These allegations are clearly based upon omissions to act.⁵⁶ The indictment, however, failed to specify what legal duty would make these omissions actionable.

A. *Common-Law and Statutory Duties*

In our effort to define the defendants' duty toward Mr. Golab, we will rarely discover the source of the duty articulated in the reported criminal case law. It is found, instead, in the established body of agency and tort law that defines the limits of a master's obligation to protect his employees from workplace hazards.

Employers have a common-law duty to exercise ordinary care to provide a reasonably safe workplace in which their employees may perform their day-to-day tasks.⁵⁷ Employees,

54. The indictment did, however, enumerate the failure to provide first aid equipment as one of the omissions upon which the prosecution was based, *Murder Indictment, State v. O'Neil* (April, 1984) (on file with the author) [hereinafter *Murder Indictment*], and after Mr. Golab's death the company was cited for OSHA violations that included failing to stock cyanide antidote in first aid kits. Owens, *Death of Worker Puts Factory Safety on Trial*, *Newsday*, June 6, 1985, at 4 (Nassau ed.). To the extent that the availability of additional medical supplies might have improved Golab's condition, then, the indictment did fault the defendants for being ill-equipped to respond as effectively as they might have done.

55. *Murder Indictment, supra* note 54.

56. *But see supra* note 5.

57. *Northern Pacific R.R. v. Herbert*, 116 U.S. 642, 647-48 (1886); *Hough v. Railway Co.*, 100 U.S. 213, 217 (1880); *People v. Harris*, 74 Misc. 353, 361, 134 N.Y.S. 409, 414 (Gen. Sess. 1911); *Southern Package Corp. v. Mitchell*, 109 F.2d 609, 610 (5th Cir. 1940); *Clark v. Employers Muts. of Wausau*, 297 F. Supp. 286, 290 (E.D. Pa. 1969); *McElligott v. Randolph*, 61 Conn. 157, 161, 22 A. 1094, 1095 (1891); *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 324, 66 N.E. 882, 884 (1903); *Lytell v. Hushfield*, 408 So. 2d 1344, 1347-48 (La. 1982); *Hume v. Ft. Halifax Power Co.*, 106 Me. 78, 82, 75 A. 300, 302 (1909); *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596 (1869); *Hannah v. Mallinckrodt*,

in turn, are entitled to assume the employer's proper discharge of his obligation to them.⁵⁸ To fulfill his duty the employer must inspect his business premises and equipment as often as is reasonably necessary,⁵⁹ repair or alter dangerously defective conditions,⁶⁰ and see that rules promulgated to insure workers' safety are enforced.⁶¹

The duty to provide a safe workplace is "personal, continuous and non-delegable."⁶² Liability for fulfilling this implied-in-contract obligation cannot, therefore, be discharged by simply entrusting responsibility for its performance to another.⁶³ The employer remains liable whether the person who acts in his stead performs the assigned function poorly or not at all.⁶⁴

Inc., 633 S.W.2d 723, 724 (Mo. 1982) (en banc); *Macklin v. Dowler*, 53 N.C. App. 488, 490, 281 S.E.2d 164, 165-66 (1981); *Overstreet v. Norman*, 44 Tenn. App. 343, 349, 314 S.W.2d 47, 50 (1957); *J. Weingarten, Inc. v. Sandefer*, 490 S.W.2d 941, 944 (Tex. Civ. App. 1973); *Richland's Iron Co. v. Elkins*, 90 Va. 249, 261, 17 S.E. 890, 894 (1893); *Richmond & D.R. Co. v. Williams*, 86 Va. 165, 167, 9 S.E. 990, 991 (1889); *Kasparian v. Old Nat'l Bank*, 6 Wash. App. 514, 517, 494 P.2d 505, 507 (1972). See also *Restatement (Second) of Agency* § 492 (1957) (master must exercise due care to provide reasonably safe working conditions and to warn employees of risks they might not be reasonably expected to discover for themselves).

58. *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 324, 66 N.E. 882, 884 (1903); *Richmond & D.R. Co. v. Williams*, 86 Va. 165, 167, 9 S.E. 990, 991 (1889).

59. *Clark v. Employers Muts. of Wausau*, 297 F. Supp. 286, 290 (E.D. Pa. 1969); *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 328, 66 N.E. 882, 885 (1903); *Kasparian v. Old Nat'l Bank*, 6 Wash. App. 514, 517, 494 P.2d 505, 507 (1972).

60. *Clark v. Employers Muts. of Wausau*, 297 F. Supp. 286, 290 (E.D. Pa. 1969).

61. *Southern Package Corp. v. Mitchell*, 109 F.2d 609, 611 (5th Cir. 1940); *J. Weingarten, Inc. v. Sandefer*, 490 S.W.2d 941, 944 (Tex. Civ. App. 1973); *Kasparian v. Old Nat'l Bank*, 6 Wash. App. 514, 517, 494 P.2d 505, 507 (1972).

62. *Overstreet v. Norman*, 44 Tenn. App. 343, 349, 314 S.W.2d 47, 50 (1957).

63. *Northern Pacific R.R. v. Herbert*, 116 U.S. 642, 647-48 (1886); *Southern Package Corp. v. Mitchell*, 109 F.2d 609, 610 (5th Cir. 1940); *McElligott v. Randolph*, 61 Conn. 157, 162, 22 A. 1094, 1095 (1891); *Hume v. Ft. Halifax Power Co.*, 106 Me. 78, 82-3, 75 A. 300, 302 (1909); *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 599 (1869); *Overstreet v. Norman*, 44 Tenn. App. 343, 349, 314 S.W.2d 47, 51 (1957); *J. Weingarten, Inc. v. Sandefer*, 490 S.W.2d 941, 944 (Tex. Civ. App. 1973); *Walton, Witten & Graham v. Miller's Adm'x*, 109 Va. 210, 219, 63 S.E. 458, 462 (1909).

64. *Id.*

It does not follow, however, that employers are insurers of their employees' safety⁶⁵ or that they are liable for injuries caused by obvious and ordinary hazards known to the employees or merely incident to the business itself.⁶⁶ Employers may satisfy the duty to provide a safe workplace by making reasonable efforts to avoid exposing their employees to risks greater than those normally incident to the employment⁶⁷ and by warning workers of special risks and dangerous conditions.⁶⁸

As is true in a number of other jurisdictions,⁶⁹ moreover, the Illinois legislature has imposed on employers a statutory duty to protect their employees from workplace hazards. The Illinois Health and Safety Act requires every employer "to provide reasonable protection to the lives, health and safety [of employees] and to furnish [them] employment and a place of employment which are free from recognized hazards that are causing or are likely to cause [them] death or serious physical harm."⁷⁰

It thus appears that the Film Recovery Systems indictment could well have premised liability either upon breach of a common-law contractual duty developed under master-servant law to protect workers from enhanced workplace hazards associated with an increasingly industrialized econ-

65. *Hough v. Railway Co.*, 100 U.S. 213, 218-19 (1880); *J. Weingarten, Inc. v. Sandefer*, 490 S.W.2d 941, 944 (Tex. Civ. App. 1973); *Richland's Iron Co. v. Elkins*, 90 Va. 249, 261, 17 S.E. 890, 894 (1893); *Kasparian v. Old Nat'l Bank*, 6 Wash. App. 514, 516, 494 P.2d 505, 507 (1972).

66. *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 325, 66 N.E. 882, 884 (1903); *Lytell v. Hushfield*, 408 So. 2d 1344, 1348 (La. 1982); *Keith v. Granite Mills*, 126 Mass. 90, 91 (1878); *Huda v. American Glucose Co.*, 154 N.Y. 474, 481-82, 48 N.E. 897, 899 (1897); *Richmond & D.R. Co. v. Williams*, 86 Va. 165, 167, 9 S.E. 990, 991 (1889).

67. *Northern Pacific R.R. v. Herbert*, 116 U.S. 642, 647-48 (1886); *Hough v. Railway Co.*, 100 U.S. 213, 214 (1880); *Richmond & D.R. Co. v. Williams*, 86 Va. 165, 167, 9 S.E. 990, 991 (1889). *Cf.* *Richland's Iron Co. v. Elkins*, 90 Va. 249, 261, 17 S.E. 890, 894 (1893) (employer must avoid exposing employees to extraordinary risks).

68. *Hume v. Ft. Halifax Power Co.*, 106 Me. 78, 82, 75 A. 300, 302 (1909); *Engelking v. City of Spokane*, 59 Wash. 446, 451, 110 P. 25, 27-28 (1910); *Macklin v. Dowler*, 53 N.C. App. 488, 490, 281 S.E.2d 164, 166 (1981); *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596 (1869); *Lytell v. Hushfield*, 408 So. 2d 1344, 1348 (La. 1982).

69. *See, e.g.*, Cal. Lab. Code § 6400 (Deering 1976); Mich. Comp. Laws § 408.1011 (1979); N.Y. Labor Law § 200 (McKinney 1986); Pa. Stat. Ann. tit. 43, § 25-2 (Purdon 1964 & Supp. 1986).

70. Ill. Rev. Stat. ch. 48, § 137.3(a) (1985).

omy, or upon breach of a statutory duty to safeguard those same interests.⁷¹

III. CULPABILITY

Although the Film Recovery Systems indictment faulted the defendants for failing to discharge a duty to provide a reasonably safe workplace, we must recognize that we are speaking of a duty imposed by civil—not criminal—law, and that not every breach of a civil duty constitutes a crime. Indeed, common experience tells us that violation of a civil duty not to injure normally leads to tort liability or to statutory compensation for the injury under workman's compensation laws. The prosecutor customarily plays no role in this scheme of liability.

It is necessary, then, to establish a base line to differentiate civil and criminal wrongs. As part of that process, we must redirect our thinking momentarily and consider the role of omissions in the criminal law. Criminal liability is based upon conduct.⁷² Although some offenses are defined in terms of an omission to act,⁷³ most definitions assume the commission of affirmative acts. The Illinois homicide statutes, for example, define homicide as the unlawful killing of a human being,⁷⁴ and the act of killing usually consists of observable assaultive conduct. An omission to perform a legally required act, however, may also kill—as, for example, a parent's withholding of food and sustenance from an infant.⁷⁵

71. A more recently enacted statute could also provide a basis for future prosecutions based on similar facts. The Toxic Substances Hazards Disclosure to Employees Act, Ill. Rev. Stat. ch. 48, §§ 1401-1419 (1985), imposes on employers the duty to inform employees of the nature and hazards of toxic substances to which they are routinely exposed and to train them in the proper handling of the substances. Ill. Rev. Stat. ch. 48, § 1419 (1984). This statute was enacted after Mr. Golab's death, however, and so could not have constitutionally applied retroactively to impose liability on the Film Recovery Systems defendants. U.S. Const. art. I, §§ 9, 10. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

72. One cannot be subjected to criminal liability for thinking evil thoughts or for having a certain status, for example.

73. See, e.g., 26 U.S.C. § 7202 (1982) (willful failure to collect or pay over tax); 31 U.S.C. §§ 5312, 5322 (1982 & Supp. III 1985) (willful failure to file reports on exporting and importing monetary instruments); 31 U.S.C. §§ 5313, 5322 (1982 & Supp. III 1985) (willful failure to report large cash transactions handled through financial institutions).

74. Ill. Rev. Stat. ch. 38, §§ 9-1, 9-3 (1985).

75. See *Harrington v. State*, 547 S.W.2d 616 and 547 S.W.2d 621 (Tex. Crim. App. 1977) (parents who permitted 2-year-old child to starve

Thus, proof of an omission to act is proof of but one element—the conduct element—of a crime.⁷⁶ Whether the conduct actually constitutes a crime depends in turn on the presence or absence of each of the other constituent elements of the offense—as, for example, causation.

As in the case of wrongful death liability in tort, criminal homicide liability requires a causal relationship between the conduct and the forbidden result. The conduct must not only be capable of killing, it must actually cause a death.⁷⁷ But assuming for the moment that our defendants' failure to provide a safe workplace caused Mr. Golab's death—as Judge Banks was convinced that it did—what makes one unintentional loss of life a wrongful death under the civil law and another a criminal homicide? And why were Film Recovery Systems' officers charged with so serious a crime as murder?

The answer lies in the role of the mental element in criminal liability. To constitute a crime, prohibited conduct must be accompanied by a culpable mental state.⁷⁸ Whereas a plaintiff suing in tort need only prove negligence (failure to exercise ordinary care⁷⁹) and one seeking recovery under workmen's compensation law is relieved of proving any fault at all,⁸⁰ the state is not similarly situated in a criminal homicide prosecution. For in addition to proving the defendant's conduct bore a causal relationship to the death, the state must also establish *mens rea*, a blameworthy state of mind.

Film Recovery Systems and its managers were charged with different degrees of homicide—involuntary manslaughter and murder—that are distinguished from one another only by the required state of mind. Involuntary manslaughter

found guilty of murder).

76. See Ill. Rev. Stat. ch. 38, § 2-2 (1985) ("Act" includes a failure or omission to take action).

77. For a brief discussion of the problem of proving causation in homicide by omission cases, see LaFave, *supra* note 42, at § 3.3(d); Note, State v. Serebin: *Causation and the Criminal Liability of Nursing Home Administrators*, 1986 WIS. L. REV. 339. For a more extended consideration of causation in cases of omission see A. Becht & F. Miller, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* §§ 2, 3 (1961).

78. There are exceptions, however. Some criminal statutes, particularly those defining public welfare offenses, may impose strict liability for violations. See Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337 (1982).

79. See generally W. Keeton, D. Dobbs, R. Keeton, D. Owen, *PROSSER AND KEETON ON TORTS* ch. 5 (5th ed. 1984).

80. See generally *id.* at 572-76; J. Dooley, *MODERN TORT LAW* §§ 22.14-22.14.40 (1982 Rev.).

consists of recklessly causing the death of another.⁸¹ To act recklessly in this context is to act with conscious disregard of a substantial and unjustifiable risk that the conduct will cause death. To be reckless, the actor's disregard of the risk must constitute a gross deviation from the standard of care a reasonable person would observe under the circumstances.⁸²

Manslaughter is augmented to murder when the conduct is accompanied by a more blameworthy state of mind. Murder, under Illinois law, consists of death-producing conduct that is accompanied by intent to do great bodily harm, by knowledge that the conduct will cause death,⁸³ or by knowledge that the conduct creates a strong probability of death or great bodily harm.⁸⁴ The prosecution did not proceed, then, on the theory that the corporate managers carelessly disregarded an insignificant risk. It proceeded instead on the theory that these men knew it was likely that workers exposed to conditions existing at the plant would be killed or seriously injured. That is, indeed, a serious accusation.

And what evidence warrants such harsh accusations against them? Let us examine the circumstances that led to their prosecution.

The Employees: At any given time approximately 30 workers were employed to man the cyanide vats.⁸⁵ Most were Hispanic or Polish immigrants⁸⁶ and most, if not all, were undocumented and non-English speaking.⁸⁷ In the prosecutor's view, this hiring practice was inspired by the belief that the immigrants would be reluctant to complain about conditions

81. Ill. Rev. Stat. ch. 38, § 9-3 (1985).

82. Ill. Rev. Stat. ch. 38, § 4-6 (1985).

83. A person has knowledge that his conduct will cause death when he is consciously aware that the conduct is practically certain to bring about that result. Ill. Rev. Stat. ch. 38, § 4-5(b) (1985).

84. Ill. Rev. Stat. ch. 38, § 9-1(a).

85. Tucker, *Execs on Trial Today in '83 Cyanide Death*, Chicago Sun-Times, April 15, 1985, at 16; see Owens, *supra* note 54, at 4.

86. Of the former workers who were potential witnesses at trial, 89 were Hispanic and 15 were Polish. Gibson, *supra* note 3. Those called as witnesses testified through an interpreter. See, e.g., Nelson, 'I Always Felt Dizzy, Had Headaches': Plant Worker, The Daily Herald (Chicago), April 18, 1985, at 1; Dold, *supra* note 53.

87. Office of the State's Attorney, Cook County, Illinois, Press Release: Five Film Recovery Systems Managers Indicted for Murder in Death of Laborer: Three Corporations Also Indicted for Manslaughter (October 19, 1983) (on file with the author) [hereinafter State's Attorney October Press Release].

at the plant, partly because of their inability to understand English and partly out of fear that their illegal status would be exposed.⁸⁸

Stefan Golab, an undocumented Polish immigrant who spoke no English, had worked at the Film Recovery Systems plant for about two and a half months.

Plant Conditions: The workers mixed dry sodium cyanide with water to produce a cyanide solution in which used film chips were immersed as part of the silver recovery process.⁸⁹ The cyanide solution was stored in open vats which gave off noxious fumes that caused burning in the eyes and throat, difficult breathing, dizziness, and nausea. These symptoms were common not only among employees who were regularly exposed to the fumes,⁹⁰ but to occasional visitors to the plant as well.⁹¹

Notwithstanding that no emission-control devices were installed over the vats⁹² and that the plant was poorly ventilated,⁹³ the level of cyanide gas in the plant was not monitored.⁹⁴ The workers commonly complained about inadequate ventilation and some—including Golab himself—had asked to be transferred to another plant to escape the sickening fumes.⁹⁵ It was later determined that the level of cyanide in the air exceeded permissible federal standards.⁹⁶

88. *Id.*

89. *Id.*

90. Office of the State's Attorney, Cook County, Illinois, Press Release: Film Recovery Executives Face Prison Terms (June 18, 1985).

91. A medical supplier's saleswoman testified that after she became nauseated and experienced other unpleasant symptoms on two visits to the plant, she unsuccessfully tried to sell the company additional medical and safety supplies and to contract for safety training classes. Gibson, *Plant Played Down Cyanide, Inspector Says*, Chicago Tribune, May 9, 1985, at 10; Gibson, *Cyanide Gas Killed Worker, Coroner Says*, Chicago Tribune, May 7, 1985, at 1; Tucker, *Cyanide in Body: Examiner*, Chicago Sun-Times, May 7, 1985, at 70.

92. Gibson, *supra* note 1.

93. A Polish co-worker of Mr. Golab's testified, for example, that there were no ceiling fans in the plant and that windows in the facility could not be opened. Tucker, *A Shout . . . A Gasp . . . A Corporate Murder?*, Chicago Sun-Times, April 17, 1985, at 1.

94. State's Attorney October Press Release, *supra* note 87.

95. Tucker, *supra* note 93.

96. Because the company did not monitor cyanide gas levels in the plant, the precise level on the date Mr. Golab died is unknown. What is known, however, is that 12 days after his death the cyanide level remained

The workers' daily routines included mixing cyanide granules with water, stirring film chips in the solution with long rakes, removing cyanide saturated chips from the vats, and cleaning the tanks in preparation for the next batch.⁹⁷ Yet few safety precautions were evident. Flimsy paper masks and cloth gloves were about all that protected these workers from the deadly substance around which they worked,⁹⁸ and their cloth gloves became saturated with cyanide.⁹⁹ As a result of direct contact with the solution, some workers suffered chemical burns and partial loss of eyesight.¹⁰⁰

According to the product label, cyanide can be fatal in three different ways: (1) ingestion; (2) absorption into the skin; and (3) inhalation of hydrogen cyanide gas.¹⁰¹ The workers were not told, however, what the chemical was, how hazardous it could be, or what precautions should be taken when working with it.¹⁰² Instead, a sign with the word "poison" written in English and in Spanish was posted without further explanation.¹⁰³ Mr. Golab spoke neither English nor Spanish.¹⁰⁴

50% higher than that allowable under applicable federal standards and the plant was not operating at full capacity that day. Gibson, *Plant Played Down Cyanide, Inspector Says*, *supra* note 91. When county environmental officials required the plant to install emission control devices before processing the remaining film at the plant, cyanide emissions decreased twentyfold. Gibson, *supra* note 1.

97. Owens, *supra* note 54.

98. Tucker, *supra* note 93. A former worker testified that he wore five paper masks at a time in order to breath better, but that the fumes still came through. Gibson, *Masks Didn't Stop Cyanide, Worker Says*, Chicago Tribune, April 25, 1985, at 4.

99. Dold, *The Charge: Murder by Executive Decision*, Chicago Sun-Times, April 16, 1985, at 1.

100. Blanc, Hogan, Mallin, Hryhorczuk, Hessel & Bernard, *Cyanide Intoxication Among Silver-Reclaiming Workers*, 253 J. A.M.A. 367, 370 (1985); Owens, *supra* note 54; Tucker, *supra* note 93.

101. Report of Proceedings, *supra* note 1, at 7.

102. *Id.* at 6-7. *But see* Gibson, *No Cyanide Fumes, Plant Manager Says*, Chicago Tribune, May 23, 1985, § 2, at 13 (plant manager testified that he told employees they were working with cyanide but that they did not understand what cyanide was; he testified further that he warned them about wearing proper safety gear and fired some who refused to wear it).

103. Report of Proceedings, *supra* note 1, at 6-7. An Hispanic employee testified through an interpreter that he interpreted the "poison" sign in Spanish as a warning not to swallow the substance. Nelson, *supra* note 86.

104. Report of Proceedings, *supra* note 1, at 7.

Causation: Stefan Golab died of acute cyanide toxicity.¹⁰⁵ The cyanide level found in his blood was twice the lethal dose.¹⁰⁶

Mr. Golab's coworkers, former FRS employees, insurance and government inspectors, and police officers who investigated the incident on the day Golab died testified that conditions at the plant were unbearable.¹⁰⁷ According to the investigating officers, a "yellowish haze" that hovered over the area where Golab had been working was abrasive to their eyes and throats and made them feel nauseous.¹⁰⁸ The symptoms they described are classical effects of exposure to high levels of hydrogen cyanide gas.¹⁰⁹

Culpability: The three individual defendants who were convicted knew that cyanide was regularly used at the plant and that cyanide could be fatal.¹¹⁰ All of them knew of the workers' complaints about conditions at the plant and the physical symptoms they routinely endured.¹¹¹

Yet the defendants failed to disclose to the workers what they themselves knew about hazards in the plant. Some trial testimony suggests, moreover, that they may have actively concealed the nature and extent of the danger as well. A bookkeeper, for example, testified she had been instructed not to use the word "cyanide" in the presence of plant workers and not to linger in the part of the plant where the fumes were heaviest.¹¹² Another witness testified that he had observed the removal of skull and crossbones symbols from vats

105. *Id.* at 5-6. This cause of death was first suspected during the performance of the autopsy. Mr. Golab's chest cavity smelled of almonds, an odor associated with cyanide, and the odor was so strong that it stung the eyes of the coroner and his assistant. Tucker, *supra* note 91.

106. Tucker, *supra* note 91.

107. Report of Proceedings, *supra* note 1, at 5.

108. Nelson, 'Foul Haze Veiled Factory Death', The Daily Herald (Chicago), April 16, 1985, at 1.

109. Report of Proceedings, *supra* note 1, at 5-6. See also Blanc, Hogan, Mallin, Hryhorczuk, Hessel & Bernard, *supra* note 100.

110. Report of Proceedings, *supra* note 1, at 7-8.

111. *Id.* at 8. An inspector for the state-required workers compensation insurance program had earlier warned that too many vats were in the plant. The number of vats was later increased threefold. Owens, *supra* note 54.

112. *Mum was the Word on Cyanide: Worker*, Chicago Tribune, May 3, 1985, at 4.

containing the deadly poison,¹¹³ and yet another that he had been told to lie to safety inspectors after Mr. Golab died.¹¹⁴

Upon evidence such as this Judge Banks concluded that the individual defendants operated the silver-reclamation plant in a manner they knew created a strong probability of death or great bodily harm and upon which he judged them guilty of murder.¹¹⁵

And what of the corporation? Upon what state of the evidence was Film Recovery Systems found guilty of involuntary manslaughter? The indictment alleged that the company authorized and performed acts of commission and omission through the individual defendants acting in their managerial capacities.¹¹⁶ Under Illinois law, a corporation may be held criminally liable for acts of its board of directors or high managerial agents—i.e., corporate officers and other agents who have comparable authority either to formulate corporate policy or to supervise subordinate employees in a managerial capacity¹¹⁷—acting within the scope of their employment.¹¹⁸

The corporate prosecution, then, proceeded on the theory that the president, vice-president and plant foreman

113. Tucker, *supra* note 93. See also State's Attorney October Press Release, *supra* note 87. One explanation for this conduct was a desire to keep the process Film Recovery Systems used secret from the company's competitors. Owens, *supra* note 54. Whether the symbol we so readily identify as a poison warning would convey the same message to the immigrant workers is another matter. See Tucker, *supra* note 93 (Polish worker testified that in Poland the skull and crossbones symbol signified electrical hazard).

114. Gibson, *Foreman Told Me to Lie After Man's Death, Worker Testifies*, Chicago Tribune, May 10, 1985, at 2.

115. The former president of the company claimed he was not responsible for plant operations and conditions on the date of Mr. Golab's death because he had resigned his post before the incident occurred, Nelson, *Film Recovery Leadership Can't Be Pinned Down*, The Daily Herald (Chicago), April 24, 1985, at 7, col. 1; Gibson, *supra* note 1, and was not present in the State of Illinois on the date of death. People v. Film Recovery Systems, Answer to People's Motion for Discovery (filed April 24, 1985) (on file with the author). He continued to receive a salary from an affiliated company that shared the same address as FRS, however, Nelson, *supra*, and the court concluded that he continued to direct the operations of FRS. Report of Proceedings, *supra* note 1, at 8-9. See also United States v. Cattle King Packing Co., 793 F.2d 232, 239 (10th Cir. 1986) (rejecting a similar argument by founder of meat packing company in prosecution for company's violation of federal meat inspection laws).

116. State v. Film Recovery Systems, Inc., Indictment of October, 1985 Grand Jury (on file with the author). See *supra* note 5.

117. Ill. Rev. Stat. ch. 38, § 5-4(b)(2).

118. Ill. Rev. Stat. ch. 38, § 5-4(a)(2).

caused Mr. Golab's death while acting within the scope of their authority as managers of the firm. Judge Banks concluded that the corporation recklessly tolerated mismanagement of its affairs by allowing its officers and managers to conduct its business in a manner that led to the death of one employee and to the injury of numerous others.¹¹⁹ That, in his view, amply supported the verdict of guilt.

Each of the defendants was, in addition, convicted of fourteen counts of reckless conduct¹²⁰ for recklessly injuring or endangering other employees by failing to disclose the identity and properties of the cyanide products in the plant and failing to take appropriate measures to assure their safety.¹²¹

IV. ALTERNATIVE APPROACHES

And where is the wisdom in all of this? Let us examine the consequences of entrusting resolution of the Film Recovery Systems problem to local law enforcement agencies. Three corporate officers, each convicted of murder and fourteen counts of reckless conduct, have been fined and sentenced to serve twenty-four years in prison for mismanaging the firm.¹²² A defunct corporation, convicted of involuntary manslaughter and fourteen counts of reckless conduct, has been sentenced to pay a fine.¹²³ To achieve these results, it was necessary to rely upon a novel application of state penal laws to deal with what is at bottom a tragic industrial accident.

There are, of course, alternative approaches, principal among them the federal Occupational Safety and Health Act (OSHA). Congress enacted OSHA in 1970 to respond to a "worsening trend" in the safety record of American industry.¹²⁴ With this legislation, Congress strove to remedy not just problems indigenous to particular industries but to respond, instead, to a problem of urgent national concern. More Americans were being killed on the job than had been killed in the Vietnam war.¹²⁵

119. Report of Proceedings, *supra* note 1, at 10-11.

120. Ill. Rev. Stat. ch. 38, § 12-5.

121. Report of Proceedings, *supra* note 1, at 10-11; *People v. Film Recovery Systems*, No. 8311091 (Oct. 3, 1983) (filed Nov. 4, 1983) (indictments on file with the author).

122. Each defendant was fined \$10,000. Dold, *supra* note 53.

123. The corporations were fined a total of \$48,000. *Id.*

124. S. Rep. No. 1282, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5178.

125. In the four years preceding enactment of the Occupational

To promote OSHA's goal of providing all American workers "safe and healthful working conditions,"¹²⁶ Congress authorized the Secretary of Labor to set mandatory safety and health standards for businesses that affect interstate commerce¹²⁷ and encouraged other initiatives to reduce occupational deaths, injuries, and illnesses.¹²⁸

OSHA's scheme of liability derives from the imposition of two duties upon employers. The first is a general duty to furnish employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."¹²⁹ The second is a duty to comply with specific occupational safety and health rules promulgated by the Secretary of Labor.¹³⁰ Violation of either of these duties is punishable by a civil fine¹³¹ that may be imposed administratively,¹³² and willful violation of a specific rule or regulation is punishable as a crime when the violation results in an employee's death.¹³³

Safety and Health Act, industrial accidents killed 14,500 persons annually. American industry was then experiencing a 20% higher rate of disabling injuries per million man hours worked than had been the case in 1958. *Id.*

126. 29 U.S.C. § 651 (b).

127. 29 U.S.C. § 651 (b)(2).

128. See generally 29 U.S.C. § 651(b)(1)-(13), §§ 669-673.

129. 29 U.S.C. § 654(a)(1).

130. 29 U.S.C. § 654(a)(2). Employees also have a duty to comply with OSHA rules, regulations and orders that are applicable to their own conduct. 29 U.S.C. § 654(b).

The Act relies upon two enforcement-related agencies. The Secretary of Labor promulgates safety and health standards that are enforced through periodic workplace inspections and issuance of citations, see 29 U.S.C. §§ 655, 657, and the Occupational Safety and Health Review Commission adjudicates contested citations. 29 U.S.C. §§ 659(c), 661.

131. The maximum fine for most civil violations is \$1,000. 29 U.S.C. § 665(b), (c). An employer who willfully or repeatedly violates the Act is subject to a fine of as much as \$10,000, however. 29 U.S.C. § 665(a).

132. The Occupational Safety and Health Review Commission is authorized to assess civil penalties. 29 U.S.C. § 666(j).

133. An employer whose willful violation of a standard, rule, or regulation causes the death of an employee is subject to a fine of up to \$10,000 and/or six months imprisonment. 29 U.S.C. § 666(e). A fine of \$20,000 and/or a one year prison term may be imposed for conviction of a subsequent violation.

Willfulness does not require a finding of evil intent. *United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975). A violation is willful if it is "conscious, intentional, deliberate, and voluntary," *F.X. Messina Constr. Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974), or exhibits "intentional disregard of, or plain indifference to the Act's requirements."

OSHA's regulatory scheme seems well tailored to our paradigm. The regulations, for example, require employers to instruct employees in the safe and proper handling of poisonous or toxic materials used in the workplace;¹³⁴ to advise them of potential hazards and of personal protective measures needed to avoid injury;¹³⁵ to provide appropriate first aid services and medical attention;¹³⁶ to provide personal protective equipment for employees exposed to hazardous conditions;¹³⁷ to classify the hazard potential of open surface tanks like the cyanide vats and to ventilate the tanks to a degree that eliminates the hazard to workers.¹³⁸

Since OSHA directly addresses a host of technical industrial health and safety issues upon which our homicide verdicts of necessity are based, we must inquire whether it would make better sense to fit the Film Recovery Systems case into this model of liability and view OSHA as the appropriate—and perhaps exclusive—mechanism through which employers are penalized for workplace deaths and injuries. Although that prospect has simplicity and logic to recommend it, closer scrutiny undermines its initial appeal.

First, the civil enforcement scheme is relatively weak. The Act is directed primarily toward prevention of work-related injuries and illnesses. Although an employer may be cited and fined for violations that have yet to produce a single injury, a principal purpose of these citations is abatement of the unsafe condition or practice.¹³⁹ Imposition of a monetary penalty is purely discretionary unless the violation is designated as "serious,"¹⁴⁰ and the maximum civil penalty for

Intercounty Constr. Co. v. OSHRC, 522 F.2d 777, 780 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976).

134. 29 C.F.R. § 1926.21(a)(3), (5) (1985).

135. 29 C.F.R. § 1926.21(a)(3) (1985).

136. 29 C.F.R. § 1926.23 (1985).

137. 29 C.F.R. § 1926.28(a) (1985).

138. 29 C.F.R. § 1910.94(1)(i), (2), (3) (1985).

139. 29 U.S.C. § 658(a).

140. For purposes of civil liability, the Act differentiates between serious and nonserious violations. An employer who is cited for a nonserious violation—i.e., a violation that is not likely to result in death or serious physical harm but that nonetheless directly affects employee safety and health—is subject to a discretionary fine of up to \$1,000. 29 U.S.C. § 666(c). An employer who is cited for a serious violation—i.e., a hazard that creates a substantial probability of death or serious physical harm—is subject to a mandatory fine that may not exceed \$1,000. 29 U.S.C. § 666(b). A violation is not classified as a serious violation if the employer could not have learned of the violation by the exercise of reasonable diligence. 29 U.S.C. § 666(j).

serious violations is \$1,000.¹⁴¹ Thus the civil penalty structure has no *in terrorem* deterrent value, especially where correction of the violation would be more costly than the penalty.¹⁴²

The limited compliance incentives the Act provides are further undercut by budgetary and staffing constraints. OSHA has so few inspectors that it is able to inspect only a small fraction of covered workplaces annually.¹⁴³ And under a Reagan administration policy initiated in 1981, OSHA field agents could inspect only businesses whose injury rates exceeded the national average, as determined by examination of employer-maintained injury records.¹⁴⁴

That policy effectively prevented an OSHA inspector, who visited the Film Recovery Systems office *before* Golab died, from entering the plant to observe the offending conditions.¹⁴⁵ Although workers later testified that they were sent home for days at a time to rest rather than receiving treat-

141. 29 U.S.C. § 666(b).

142. Once a citation and abatement order have been issued, however, the threat of a significant punitive financial exaction becomes more real. If the employer fails to correct the violation within the time allotted, a civil penalty of up to \$1,000 a day for each day the violation continues may be assessed. 29 U.S.C. § 665(d).

Civil OSHA violations may result in years of protracted litigation. *Cf.* N.Y. Times, Apr. 29, 1986, at 9. (Inland Steel fined \$100,000 for contempt for failing to correct unsafe conditions at plant in accord with agreement with OSHA; apparently concludes a 12 year battle begun by OSHA in 1974 to correct major health hazards).

143. According to the Congressional Office of Technology Assessment, OSHA's 1,200 inspectors evaluate fewer than 4% of the nation's workplaces annually. Noble, *Work Safety Agency Never Checked Fatal Factory*, N.Y. Times, June 27, 1985, at 10.

144. Office of Technology Assessment, *PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 14* (1983). OSHA inspection procedures were later modified to put every work site at risk of inspection, "although high-hazard industries have a significantly higher chance of inspection." Noble, *Certain Numbers Can Kill*, N.Y. Times, November 28, 1986, at 12, col. 4 (quoting Labor Department spokesman). On the targeting of high-hazard industries, *see generally* U.S. DEPARTMENT OF LABOR SEVENTY-SECOND ANNUAL REPORT, FISCAL YEAR 1984, at 34-35 (1985). As of mid-1986, OSHA began conducting in-plant inspections of every tenth plant it visits regardless of the plant's safety records. *OSHA Cracking Down on Underreporting of Accidents*, St. Louis Post Dispatch, Feb. 8, 1987, at 10E.

145. Owens, *supra* note 54. *Cf.* Noble, *supra* note 144 ("There's no doubt that the worker's life would have been saved if the inspector had simply walked from the office to the shop floor.") (quoting Eric Fruming, director of health and safety for the Amalgamated Clothing and Textile Workers Union).

ment for signs of poisoning,¹⁴⁶ the company records reflected little time lost due to work-related injury or illness.¹⁴⁷ In consequence, the inspector could not inspect a plant that had become or was about to become "a huge gas chamber"¹⁴⁸ that was "totally unsafe."¹⁴⁹

The results of the few inspections that actually do occur scarcely reflect an aggressive enforcement policy. In fiscal year 1983, for example, the average penalty assessed for serious violations—that is, violations that create a probability of death or serious physical harm—was less than \$200.¹⁵⁰ And because the Commission may take into consideration the appropriateness of any particular penalty in light of the size of the business and other related factors,¹⁵¹ the penalty ultimately imposed may result from a compromise that does not accurately reflect the true gravity of the violation.¹⁵² Indeed,

146. A Cook County Hospital later reported that at least two thirds of the workers suffered from the major symptoms of cyanide poisoning at least ten times a month. Owens, *supra* note 54.

147. *Id.* A Labor Department spokesman recently acknowledged that OSHA's reliance on employer records may result in unreliable statistics on work-related injuries and illnesses. Noble, *supra* note 144 (quoting Janet L. Norwood, Commissioner of Labor Statistics). *Cf.* Noble, *U.S. May Fine Chrysler in Worker Safety Case*, N.Y. Times, Nov. 6, 1986, at 22, col. 5 (OSHA proposed fine of \$910,000, second largest ever, for alleged willful failure to keep accurate records in 182 cases of work-related injuries); *OSHA Cracking Down on Underreporting of Accidents*, *supra* note 144 (reporting that, without admitting guilt, Chrysler agreed to pay fine of \$295,332 and to bring record-keeping procedures into compliance with OSHA and Bureau of Labor Statistics guidelines; alleged violations included failure to report accidents sufficiently serious to cause lost workdays and result in workers' compensation claims).

Although making false statements in required records may subject an employer to criminal prosecution under 29 U.S.C. § 666(g), as of mid-1985 this provision had never been invoked. Owens, *supra* note 54.

148. State's Attorney October Press Release, *supra* note 94.

149. Report of Proceedings, *supra* note 1, at 6.

150. Office of Technology Assessment, *supra* note 144.

151. 29 U.S.C. § 666(j). Other factors specifically enumerated in the statute include the seriousness of the violation, the employer's good or bad faith, and any history of previous violations.

152. In the Film Recovery Systems case, for example, OSHA cited the company for two violations in the aftermath of Stefan Golab's death. The citations faulted the company for failing to classify the vats' hazard potential, failing to provide safe clothing and equipment, failing to provide respirators, failing to provide cold running water to rinse cyanide off of the skin, and failing to provide cyanide antidote in first aid kits. Although the Commission originally proposed to fine the company \$4,850, the amount was later reduced by half because of the company's financial embarrassment. Owens, *supra* note 54. A month after Golab died, Film Recovery

recent policy changes encourage "settlement" of citations by eliminating or reducing financial penalties in exchange for the employer's promise to abate the hazardous condition and comply with the law.¹⁵³

Considering these factors in tandem, a three-year study of OSHA conducted by the congressional Office of Technology Assessment concluded that "given the low probability of inspections and the relatively low penalty rates, the incentive for complying with OSHA standards before an OSHA inspection occurs is actually quite low."¹⁵⁴ Thus, the nature and enforcement history of the civil compliance scheme suggest that it is an unreliable tool for protecting worker health and safety.

OSHA's criminal enforcement mechanism has proven no more effective. For a number of possible reasons, only seven criminal OSHA prosecutions were instituted during the first twelve years the statute was in effect.¹⁵⁵ One obvious disincentive to proceeding under OSHA's criminal provision is that for first time offenders, the maximum fine for willful criminal violations is the same as the maximum fine for willful civil violations.¹⁵⁶ Thus, when the employer is a corpora-

Systems filed for bankruptcy in the wake of state and federal investigations and a separate civil suit for injuries claimed to be suffered by eleven former employees. Tucker, *supra* note 85.

153. Office of Technology Assessment, *supra* note 144.

154. *Id.*

155. See Levin, *Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act*, 14 AM. CRIM. L. REV. 717, 735-36 (1977); Radin, *supra* note 6, at 66-67; Sheahan, *The Employer's Criminal Liability Under OSHA*, 15 CRIM. L. BULL. 322, 342 (1979). Of these seven prosecutions, only one produced a reported decision. See *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975). *But cf.* *United States v. Pinkston-Hollar, Inc.*, 4 O.S.H. Cas. 1697 (D. Kan. 1976). No other criminal OSHA decisions have been published in the national reporter system since that time.

156. Both are subject to a maximum \$10,000 fine. Compare 29 U.S.C. § 666(e) with 29 U.S.C. § 666(a). The few criminal prosecutions that have been pursued, moreover, have resulted in nominal penalties—if any at all. See Levin, *supra* note 155, at 735-37; Radin, *supra* note 6, at 66-67.

The Criminal Fine Enforcement Act of 1984 will augment the fines that can be imposed for most federal offenses, including criminal OSHA violations. Under the Act a corporation that is convicted of any federal felony or of any federal misdemeanor resulting in death may be fined up to \$500,000, and an individual convicted of an offense in either of these categories may be fined as much as \$250,000. 18 U.S.C.S. § 3623 (Law. Co-op. 1979 & Supp. 1986). A criminal OSHA violation is a federal misdemeanor resulting in death. See 29 U.S.C. § 666(e) (1982); 18 U.S.C. § 1 (1982). These changes in the law were originally scheduled to take effect on No-

tion or other entity that cannot suffer imprisonment, the Commission may perceive little or no immediate value in referring the matter to the Justice Department for criminal prosecution.¹⁵⁷ Unless the conduct of an employer who is an individual—as opposed to an entity—is so egregious that imprisonment seems an appropriate sanction to pursue, OSHA provides little incentive to follow the criminal enforcement route.

Whether Congress meant to extend liability beyond the corporate employer to the corporation's responsible officers and agents is not entirely clear, moreover.¹⁵⁸ The term "employer" is defined to mean "a person engaged in a business affecting commerce who has employees."¹⁵⁹ Although a number of individual agents have been cited for civil and criminal OSHA violations¹⁶⁰ courts have, on occasion, cast doubt on the question whether individual corporate agents are employers within the contemplation of this definition.¹⁶¹ Thus, it

vember 1, 1986, but Congress held them in abeyance pending the completion of Sentencing Guidelines by the United States Sentencing Commission. See 18 U.S.C.A. § 3553 note (Law. Co-op. 1979 & Supp. 1986). Unless Congress delays the effective date again, the enhanced penalties authorized by the Fine Enforcement Act will become operative in November, 1987.

157. The employer's liability could be enhanced, on the other hand, by imposition of both civil and criminal penalties for the same violation. See Levin, *supra* note 155, at 736 (discussing United States v. Crosby & Overton, No. CR-74-1832-F (D. Cal. 1975)).

Although greater penalties may be imposed upon a second conviction, 29 U.S.C. § 666(e), given what we know about OSHA enforcement policy the prospect of two successful criminal prosecutions of the same employer seems remote. Cf. F.X. Messina Constr. Corp. v. OSHRC, 505 F.2d 701, 702 (1st Cir. 1974) (employer who was earlier convicted of violating shoring and trenching standards when trench cave-in killed employee pursued civilly but not criminally after second fatal trench cave-in).

158. Compare Levin, *supra* note 155, at 731-32 (§ 666(e) provides both corporate and individual liability) with Sheahan, *supra* note 155, at 331 n.46 (although a statutory scheme providing both corporate and individual liability would be far preferable, the Act as presently drafted does not admit to such an interpretation).

159. 29 U.S.C. § 652(5). The term "person" means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4).

160. All of the first four criminal prosecutions proceeded against both corporate and individual defendants, see Levin, *supra* note 155, at 735-36, and two of the next three prosecutions named individual defendants as well. See Radin, *supra* note 6, at 66-67.

161. Compare United States v. Dye Constr. Co., No. 73-CR-417 (D. Colo. March 22, 1974) (motion to dismiss indictment against company's president granted on the ground that the company, not the president, was

remains uncertain whether OSHA's scheme of liability ascribes personal fault to individual business managers, except in the case of a sole proprietor who had not the foresight to do business in corporate form.

To conclude under these circumstances (as one judge seems to have done)¹⁶² that OSHA preempts the use of state laws to penalize employers who act in disregard of their employees' safety would create an obvious enforcement void. But laying aside policy considerations for the moment, the preemption argument fairly misses the mark. Since Congress specifically provided that OSHA shall not be construed to supersede or affect employers' common-law or statutory duties and liabilities relating to work-related employee deaths and injuries,¹⁶³ it is difficult to construct a credible argument that

the employer) (reported in Levin, *supra* note 155, at 735), *aff'd*, 510 F.2d 78 (10th Cir. 1975) with *United States v. Pinkston-Hollar, Inc.*, 4 O.S.H. Cas. 1697 (D. Kan. 1976) (rejecting company vice-president's claim that he could not be prosecuted as an employer). *See also* *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670, 672 (E.D. La.), *aff'd per curiam*, 483 F.2d 67 (5th Cir. 1973) (OSHA does not impose duties on "employees of an employer, executive or otherwise").

The Justice Department believes that corporate officers and agents may be criminally prosecuted for OSHA violations under the aiding and abetting statute, 18 U.S.C. § 2 (1982), for causing or assisting the employer's violation. U.S. Atty's Manual § 9-78.111 (Mar. 16, 1984).

162. *See* Middleton, *supra* note 2 (reporting dismissal, on federal preemption grounds, of prosecution against five corporate officers for aggravated battery, reckless conduct, and conspiracy to commit aggravated battery by subjecting workers to "'poisonous and stupefying substances,'" for failing to provide proper safety instructions and equipment, and for "'maintaining an unsafe workplace'").

163. 29 U.S.C. § 653(b)(4) provides: "Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." OSHA preempts only those state laws that duplicate or conflict with specific federal standards promulgated under § 655, and then only to the extent that the state has failed to gain federal approval of a state plan to regulate on that subject. 29 U.S.C. § 667 (1982).

Cf. *State ex rel. Kroger Co. v. Industrial Comm'n*, 62 Ohio St. 2d 4, 402 N.E.2d 528 (1980) (OSHA does not preempt state safety requirement providing basis for award of additional worker's compensation benefits); *West Virginia Mfgs. Assoc. v. West Virginia*, 542 F. Supp. 1247 (S.D.W. Va. 1982), *aff'd*, 714 F.2d 308 (4th Cir. 1983) (OSHA does not preempt state statute requiring notice and posting of workplace hazards absent a specific federal standard); *P & Z Co. v. District of Columbia*, 408 A.2d 1249 (D.C. App. 1979) (OSHA does not preempt misdemeanor provision of District of

Congress nonetheless intended to preclude the use of state penal statutes to punish employers who recklessly kill and injure in the workplace.¹⁶⁴

V. COMPETING POLICIES

A decision to permit imposition of criminal liability in a case like this inevitably requires the balancing of competing policy considerations. Corporate enterprises like Film Recovery Systems are engaged in legitimate commercial activity, and if local prosecutors are to second-guess reasoned business judgments, we must recognize the risk that adverse consequences may follow. It may be unwise to permit a jury to speculate about management's knowledge of the probability of death or injury, for example, for once the untoward result has occurred the jury acts with the benefit of hindsight. Managers who would otherwise choose to assume an active role in making the workplace safer may therefore feel a need to insulate themselves from learning too much lest they become subject to criminal prosecution for making an erroneous business judgment.¹⁶⁵

Despite its facial appeal as a means of limiting liability, remaining ignorant of crucial facts is at best a dubious solution for management's dilemma. Under the willful blindness/conscious avoidance doctrine—which is well established in other contexts¹⁶⁶—deliberate ignorance of the truth may

Columbia Industrial Safety Act); *Smith v. Western Elec. Co.*, 643 S.W.2d 10 (Mo. App. 1982) (absent a specific federal standard, OSHA does not preempt state common law concerning exposure to tobacco smoke in workplace); *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976) (OSHA does not preempt common-law right to safe working environment, including air free from tobacco smoke).

For examples of when and how OSHA does preempt state law, see *Ohio Manufacturers' Ass'n v. City of Akron*, 801 F.2d 824 (6th Cir. 1986); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985); *United Steel Workers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985).

164. That is not to say, of course, that Congress lacks the power to preempt state penal laws. See generally *Crampton, Pennsylvania v. Nelson: A Case Study in Federal Pre-emption*, 26 U. CHI. L. REV. 85 (1958).

165. See *Tucker, supra*, note 93.

166. See, e.g., *United States v. Rubinson*, 543 F.2d 951, 959 (2d Cir.) (Securities Act of 1933), *cert. denied*, 429 U.S. 850 (1976); *United States v. Jewell*, 532 F.2d 697, 700-04 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976) (Comprehensive Drug Abuse Prevention and Control Act); *United States v. Thomas*, 484 F.2d 909, 912-13 (6th Cir.), *cert. denied*, 414 U.S. 912 (1973) (firearms offense); *United States v. Jacobs*, 475 F.2d 270, 287-88 (2d Cir.) (stolen securities), *cert. denied*, 414 U.S. 821 (1973); *United States v.*

serve as a substitute for positive knowledge. One who deliberately closes his eyes to the obvious may be charged with knowledge of that which he ought to have seen,¹⁶⁷ so guilty knowledge may be inferred when others in the actor's situation would have known facts he has consciously avoided discovering himself.¹⁶⁸ The willful blindness/conscious avoidance standard thus may prevent corporate management "from circumventing criminal sanctions merely by deliberately closing [their] eyes to the obvious risk that [they are] engaging in unlawful conduct."¹⁶⁹

But lines of corporate authority are often blurred. Corporations are, after all, organized and managed by committees and boards, and this fact of organizational life makes more difficult the task of tracing where responsibility ultimately should lie. To ascribe personal blame to a few select individuals when responsibility is collective raises the disquieting spectre that one who has neither authority nor control over an offending hazard may be held to account for failing to prevent or abate it. The unfairness inherent in that prospect suggests compelling grounds for declining to pierce the corporate veil.¹⁷⁰

The law is not so illogical, however, as to punish one for failing to accomplish that which is beyond his power to

Grizaffi, 471 F.2d 69, 75 (7th Cir. 1972) (mail fraud), *cert. denied*, 411 U.S. 964 (1973); United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972) (false statements).

167. United States v. Weiner, 578 F.2d 757, 786-87 & n.28 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978); United States v. Gentile, 530 F.2d 461, 469 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976); United States v. Benjamin, 328 F.2d 854, 862 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

168. United States v. Vasen, 222 F.2d 3, 7, 8 (7th Cir.), *cert. denied*, 350 U.S. 834 (1955). "Deliberate disregard" for the truth may be found, and knowledge thus imputed, when the actor was "aware of the risk that his conduct was illegal but proceeded nonetheless." United States v. Gentile, 530 F.2d 461, 470 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976); Stone v. United States, 113 F.2d 70, 75 (6th Cir. 1940).

169. United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972).

170. *But cf.* United States v. Wise, 370 U.S. 405, 417 (1962) (Harlan, J., concurring) ("[T]he fiction of corporate entity, operative to protect officers from contract liability, ha[s] never been applied as a shield against criminal prosecutions . . ."). See also United States v. Sherpix, Inc., 512 F.2d 1361, 1372 (D.C. Cir. 1975) (corporate officers are criminally liable for conduct performed in their representative capacities even though they may not have directed or authorized the corporation's violation of the law). If the rule were otherwise, "the fines established to deter crime become mere license fees for illegitimate corporate business operations." United States v. Wise, 370 U.S. 405, 409 (1962).

achieve.¹⁷¹ The duty must, therefore, coalesce with the capacity to act,¹⁷² and one cannot act upon that over which he wields no control. Thus, a corporate officer's inaction constitutes a criminal omission only if he has some degree of affirmative control—albeit indirect¹⁷³—over the critical operation.¹⁷⁴

But even assuming a degree of control, what about the danger that may be inherent in the workplace? Consider a construction site, for example. There is at least a substantial risk (if not a probability) that one of the construction workers at a high-rise building site will be killed or seriously injured on the job,¹⁷⁵ and that risk is clearly known and understood by the construction company's management. Does it therefore follow that the managers are forever in peril of criminal prosecution for the foreseen (or at least foreseeable) death or injury when it occurs?

The answer, of course, is no. As a general matter, employees are deemed to assume the ordinary risks inherent in the nature of their work.¹⁷⁶ When the market functions as we

171. *United States v. Weisenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964). Nor can a corporate officer be said to have *caused* a forbidden result that he was "powerless" to prevent. *United States v. Park*, 421 U.S. 658, 673 (1975). A causal relationship between the inaction and the result will exist only if the actor is capable of influencing the outcome.

172. *See LaFave, supra* note 42, at § 3.3(c).

173. *Cf. United States v. Park*, 421 U.S. 658, 665 n.9 (1975) (upholding conviction of president of national grocery chain for Food, Drug, and Cosmetic Act violation that occurred in a distant warehouse; he had a "responsible relation to the situation even though he may not have participated personally"); *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (upholding conviction of president of pharmaceutical company for shipping misbranded drugs; test for determining personal guilt under Food, Drug, and Cosmetic Act is whether the officer "shares responsibility in the business process" that results in the violation); *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240 (10th Cir.) (approving responsible share standard of liability under Federal Meat Inspection Act), *cert. denied*, 107 S.Ct. 573 (1986); *Carolene Prods. Co. v. United States*, 140 F.2d 61, 66 (4th Cir.), *aff'd*, 323 U.S. 18 (1944) (convictions under Filled Milk Act). *See generally Brickey, supra* note 78.

174. *People v. International Steel*, 266 P.2d 587, 592 (Cal. App. Dep't Super. Ct. 1951).

175. The construction industry has the highest rate of occupation-related injuries and illnesses and the second highest rate of occupational fatalities. U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States by Industry, 1984*, at 3, 6 (May 1986).

176. *Hough v. Railway Co.*, 100 U.S. 213, 215 (1879). *Cf. Restatement (Second) of Agency* § 521 (1957) (master not liable for harm caused by unsafe premises or working conditions if servant knows the facts and understands the risks).

expect it to, they will have taken the risks into consideration when they arrange their compensation.¹⁷⁷ The construction workers with whose fate we are concerned are paid to assume commensurately greater risks,¹⁷⁸ and their employers presumably have an interest in protecting them from injury.¹⁷⁹

But if the picture portrayed by the prosecution in the Film Recovery Systems case is reasonably accurate, the market can fail miserably. For rather than discovering that the hazards were accounted for in the employees' compensation arrangement, we find the situation at Film Recovery Systems portrayed as the exploitation of unskilled workers who urgently needed gainful employment.¹⁸⁰ Laboring under what they knew were unbearable conditions, they were both helpless to complain and unable to appreciate the lethal nature of the hazard to which they were routinely exposed.

Although assumption of the risk will bar an injured party from recovering damages from a negligent party, the assumption of risk doctrine has no formal role in the criminal law. That is not to say, however, that an injured party's consent or contributory negligence can never be considered relevant in a criminal prosecution. When individuals subject themselves to a risk of harm by engaging in lawful activities such as organized contact sports, for example, one may legitimately consent to infliction of bodily harm within the rules of the game. See LaFave, *supra* note 42, at § 5.11. Thus to the extent that an employee's consent to normal workplace hazards is uncoerced and no fraud is involved, neither civil nor criminal liability should lie.

177. For explanations of the theory of compensating wage differentials and descriptions of its empirical foundations, see generally R. Posner, *ECONOMIC ANALYSIS OF LAW* 246-47 (2d ed. 1977); W. Viscusi, *RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE* ch. 3, ch. 6 (1983) [hereinafter *RISK BY CHOICE*]; W. Viscusi, *EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE* ch. 15-16 (1979); Smith, *Compensating Wage Differentials and Public Policy: A Review*, 32 *INDUS. & LAB. REL. REV.* 339 (1979); Thaler & Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, 40 *STUDIES IN INCOME AND WEALTH* 265 (1975); Viscusi, *Union, Labor Market Structure, and the Welfare Implications of the Quality of Work*, 1 *J. LAB. RES.* 175 (1980) [hereinafter cited as *Quality of Work*].

178. See Greenhouse, *Responsibility for Job Safety*, *N.Y. Times*, June 25, 1985, at 30, col. 2 ("[s]ome construction companies pay people enormous premiums to do dangerous work way up high") (quoting Richard A. Epstein).

179. See *Interviews with Ronald Reagan: Sharp Contrasts with Carter's Economics*, *BUS. WK.* March 31, 1980, at 94, 95.

180. The theory of compensating wage differentials has major limitations when, as here, workers possess inadequate risk information and are less risk averse. *RISK BY CHOICE*, *supra* note 177, at ch. 4; see also *Quality of Work*, *supra* note 177, at 175.

If the prosecution's evidence is to be believed, moreover, Film Recovery Systems' management concealed the danger even after Mr. Golab died. One coworker who continued to work at the plant testified that he was not informed that Golab had died. He was told, instead, that Golab was recovering and that the workers "shouldn't worry about it."¹⁸¹ And according to an OSHA inspector who visited the plant after Golab died, the company president even then expressed his desire not to overemphasize plant hazards for fear of scaring the workers away.¹⁸²

But working with cyanide—like doing high-rise construction work—will always pose risks, and the risks are incurred at the behest of enterprises engaged in socially useful pursuits.¹⁸³ Taking risks—perhaps even substantial risks—may be necessary to encourage socially productive activity. At what point, then, do we say the employer's risk taking becomes a criminal matter?

The line of demarcation between acceptable and unacceptable risks obviously cannot be drawn solely with reference to the degree of risk involved. It must accommodate, instead, both the utility and morality of risk-taking under a given set of circumstances. Thus, to ascribe criminal culpability requires more than a finding that a risk is substantial. It must be both substantial and *unjustified*.

To expose one's employees to known risks would be warranted, for example, if the risks are inherent in the nature of the work and reasonable precautions have been taken to minimize them. Thus, the construction company management would be justified in having a properly trained and equipped welder work on the twentieth floor of a steel superstructure, provided that permanent or temporary flooring, guardrails, safety nets, safety lines, or other appropriate safety devices were in place.¹⁸⁴ In stark contrast, to expose one's employees to concealed risks when few—if any—precautions have been taken, would be manifestly unjustifiable.

Management's decision to proceed in either case inevitably affects the bottom line, of course. At some point management must make a calculated cost-benefit judgment about

181. Nelson, *supra* note 86.

182. Gibson, *supra* note 91. The president flatly denied this allegation. *Id.*

183. As contrasted with a drunk driver who careens into a pedestrian.

184. See, e.g., 29 C.F.R. § 1926.750 (1985) (enumerating OSHA flooring requirements for skeleton steel construction in tiered buildings).

profitability, and one can only draw unfavorable inferences from the Film Recovery Systems trial. One worker testified, for example, that the only response to his complaints about inadequate plant ventilation was "no money."¹⁸⁵ Yet when silver prices were climbing, the company grossed \$13-20 million annually and capitalized on the favorable market by expanding its operations.¹⁸⁶

As this expansion occurred, a worker's compensation insurance inspector noted that the converted warehouse contained too many vats.¹⁸⁷ But business is business. To meet market demands for the reclaimed silver, the number of cyanide vats more than doubled.¹⁸⁸ In the meantime, management offices were moved to newly acquired space in an adjacent building. And as of the date of Stefan Golab's death, not a soul would claim—or even acknowledge—responsibility for plant operations or conditions.¹⁸⁹

CONCLUSION

If only one lesson were to be drawn from this unfortunate state of affairs it would be this: issues of workplace safety must transcend profit maximization. We cannot allow management to follow the line of least resistance by foregoing—on economic grounds—a course of action that would make a workplace safe while at the same time pursuing—on pragmatic grounds—a course of action that masks the seriousness of the hazards in order to minimize their workers' concerns. The law should not permit them "to make so unso- ciable a gamble."¹⁹⁰

185. Tucker, *supra* note 93.

186. Owens, *supra* note 54.

187. *Id.* Siegel, *supra* note 53.

188. Owens, *supra* note 54.

189. Nelson, *supra* note 115.

190. Stone, *Corporate Social Responsibility: What it Might Mean, If it Were Really to Matter*, 71 IOWA L. REV. 557, 565 (1986). For a cook's tour of the literature, see J. Braithwaite, *CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY* (1984); C. Stone, *WHERE THE LAW ENDS* (1975); *CORRIGIBLE CORPORATIONS & UNRULY LAW* (B. Fisse & P. French eds. 1985); *CORPORATIONS AT THE CROSSROADS: GOVERNANCE AND REFORM* (D. DeMott ed. 1980); *CORPORATIONS AS CRIMINALS* (E. Hochstedler ed. 1984); Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099 (1977); Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976); Glasbeek, *Why Corporate Deviance is Not Targeted as a Crime—The Need to Make "Profits" a Dirty Word*, 22 OSGOODE HALL L.J. 393 (1984); Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1171 (1979). See

Suppose, however,—as his lawyer insists—that the rise of the president of this enterprise represents the “epitome of the American dream.”¹⁹¹ These were not, after all, wealthy captains of industry. They began a modest business that became, in the end, a casualty of a declining market and its own management style.¹⁹² Is it appropriate to invoke the threat of criminal prosecution as a barrier to market entry for the inexperienced, and perhaps the unwise?

The answer may be yes. Every year the introduction of toxic substances and other hazardous products and processes into the work environment becomes increasingly commonplace.¹⁹³ As the dangers inherent in the workplace increase, one might posit, so should the entrepreneurial stakes be raised. Inexperience and undercapitalization are, after all, inadequate to justify industrial Russian roulette. Thus, threatened use of criminal prosecution in cases like this may discourage the proliferation of irresponsible businesses in industries where they threaten the most harm.¹⁹⁴

That purpose need not be singular, however. For even though some would suggest that this episode could not have occurred in a normal corporate environment,¹⁹⁵ we are left to wonder why that is true. Can we forget so quickly the many dead or dying asbestos workers whose claims still lan-

also Corporate Criminal Liability: Hearings on H.R. 4973 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. (1979-1980) [hereinafter cited as Hearings].

191. Gibson, *Judge Prepares to Rule in Murder Trial of Company Officials*, Chicago Tribune, June 11, 1985, §2 at 3.

192. See Gibson, *Cyanide Level Safe, Executive Testifies*, Chicago Tribune, May 30, 1985, at 1.

193. As early as 1970, when OSHA was enacted, it was estimated that new and potentially toxic chemicals were being introduced into industry at a rate of one every 20 minutes. S. Rep. No. 1282, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5178.

194. See Spiegel, *The Liability of Corporate Officers*, 71 A.B.A. Journal 48, 50 (Nov. 1985) (quoting Christopher Stone).

195. *But cf.* Comment, *supra* note 2 (detailing manslaughter prosecution initiated against General Dynamics Corporation for death of employee overcome by toxic solvent while servicing a tank). *Philip Morris Unit Facing Manslaughter Indictment*, Wall St. J. Nov. 13, 1986, at 4 (reporting indictment of Philip Morris U.S.A. for involuntary manslaughter in connection with the death of an employee in a tobacco processing machine). In a civil context, see Reinhold, *Jurors Assess Monsanto \$108 Million Over Death*, N.Y. Times, December 13, 1986, at 10 (city ed.) (jury award of \$8 million actual and \$100 million punitive damages for leukemia death of worker; worker's predecessor also contracted leukemia, and suit alleged that company did not properly monitor benzene level in workers' bodies and did not equip them with protective gear).

guish in the courts, for example? We cannot dismiss out of hand the charge that known dangers to those workers were concealed or minimized by the asbestos industry for a considerable period of years.¹⁹⁶ Nor can we dismiss out of hand the charge that consumer product manufacturers likewise make—at least on occasion—cost benefit decisions that exalt profit over life and limb, that calculate the economics of anticipated wrongful death claims resulting from a known and correctable hazard and then offset against that cost the economics of preventing the deaths.¹⁹⁷

Perhaps, then, it is not inappropriate that the criminal justice system should play a role in the regulatory process when management crosses the line. It may play a particularly effective role at that, for the prosecutor has at his disposal the coercive investigatory powers of the state. His investigation, moreover, is immune from the automatic stays in bankruptcy proceedings that permit witnesses and claimants to die and evidence to grow stale before the truth can be found and the blameworthy judged accountable.¹⁹⁸ Perhaps, upon reflection, the criminal justice system will prove to be a highly desirable regulatory alternative because of the swiftness and sureness of its response.

196. See, e.g., *Johns-Manville Prods. Corp. v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980); *Hearings*, *supra* note 190, at 36-116 (statement of Barry Castleman, environmental consultant and engineer). See generally P. Brodeur, *OUTRAGEOUS MISCONDUCT—THE ASBESTOS INDUSTRY ON TRIAL* (1985); Motley, *The Lid Comes Off*, 16 TRIAL 21 (April 1980).

197. See, e.g., L. Strobel, *RECKLESS HOMICIDE? FORD'S PINTO TRIAL* 286 (Figure 11) (1980).

198. Cf. 11 U.S.C. § 523(a)(7) (1982 & Supp. II 1984) (fines, penalties and forfeitures payable to and for benefit of government not dischargeable in bankruptcy); *Kelly v. Robinson*, 107 S.Ct. 353 (1986) (restitution obligation imposed as condition of probation in state criminal proceeding not dischargeable in bankruptcy).