Policy Considerations in Corporate Criminal Prosecutions after People v. Film Recovery Systems, Inc.

Jay C. Magnuson

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation


Available at: http://scholarship.law.nd.edu/ndlr/vol62/iss5/5
On June 14, 1985, a corporate president, plant manager, and plant foreman were found guilty of murder and several counts of reckless conduct for their actions in exposing company employees to hydrogen cyanide. The exposure resulted in the poisoning death of one worker and serious injury to several others. Two corporations for which they worked were found guilty of involuntary manslaughter and reckless conduct in *People v. Film Recovery Systems, Inc.*

Until recently, corporations and their officials have rarely been criminally prosecuted for offenses that are considered individual in nature. Several factors, such as the lack of administrative enforcement of workplace safety standards, have led prosecutors to utilize the criminal laws to protect employees and the public from the misconduct of corporations and their officers. This Article initially discusses the facts that gave rise to one such prosecution, *People v. Film Recovery Systems, Inc.* The second part examines the corporate homicide doctrine, its statutory basis, applicability to corporations, and applicability to individuals acting on behalf of corporations. The third part examines the issue of foreseeability. In order to gain convictions in corporate criminal prosecutions for work-related hazards, the state must prove that the defendant's conduct could foreseeably result in death or bodily harm. Part four discusses the feasibility of piercing the corporate veil. In part five, the defenses of due diligence and federal preemption are examined. The last part evaluates policy considerations involved in bringing such corporate criminal prosecutions and concludes that such prosecutions are warranted because they sensitize prosecutors, regulatory agencies and employers to worker safety. Thus, the public’s interest in society’s welfare is protected.

I. *People v. Film Recovery Systems, Inc.*: Statement of Facts

Film Recovery Systems, Inc. and a parent company, Metallic Marketing Inc., operated a plant for the recovery of silver from used x-ray film. X-ray film, used in hospitals and clinics, contains small quantities of silver. Film Recovery Systems would buy large quantities of used x-ray film from hospitals and clinics. Workers then chopped the film into small
chips. They dumped the chips into large “mixing” tanks with five hundred gallons of water and seven and one half pounds of sodium cyanide which drew the film and the silver apart. The cyanide was added every three days. The human body assimilates cyanide by ingestion, inhalation or rapid absorption through the skin. After constant stirring, the silver became separated from the used film and a continuous flow system pumped the silver laden solution into a plating tank. These tanks were two feet by four feet rectangular polyurethane tanks about thirty inches tall. Inside of each tank there were two stainless steel electrode plates, one with negative and the other with positive charges. A continuous electrical flow ran through the tank causing the silver to separate from the cyanide and water and attach itself to one of the plates. Then workers pulled the stainless steel plates out of the tank and transported them to another room where they scraped off the accumulated silver. When the film was washed and the silver removed workers had to pump the liquid out of the tanks and shovel the cyanide coated chips out.

On February 10, 1983, Stefan Golab, a fifty-nine year-old undocumented worker from Poland, was at his job at Film Recovery Systems. He was stirring a tank filled with water, sodium cyanide and granulated x-ray film when he became dizzy and faint. Stefan Golab left the production area to go rest in the lunchroom. He then went into convulsions, frothed at the mouth and passed out. Within minutes he was dead—the cause of death: Acute cyanide toxicity.

Stefan Golab was just one of many undocumented workers from Mexico and Poland who made up the factory staff of Film Recovery Systems. Every day these men worked in the cyanide laden atmosphere of the plant and every day many of them had headaches, became dizzy and nauseated, and felt faint. In addition, the liquid solution caused their skin and eyes to burn and itch. It was Stefan Golab’s misfortune to be the only worker to die of the poison at the plant.

The company did not provide the workers with protection against the cyanide with which they worked. Indeed, the workers never even knew that they worked with cyanide. The men who put them in this peril and affirmatively hid the dangerous facts of their employment from them were Steven O’Neil, the company’s President, Charles Kirshbaum, the plant manager, and Daniel Roderiquez, the plant foreman. These men knew all the dangers of the poison to which they exposed their workers and they observed the workers’ illness and received workers’ complaints. Yet, nothing was done and the death of Stefan Golab was the direct and certain result.

After Stefan Golab’s death, Steven O’Neil, Daniel Rodriquez, Charles Kirschbaum, and Gerald Pett were charged by indictment with one count of murder and 20 counts of reckless conduct. Film Recovery Systems, Inc. and Metallic Marketing Systems, Inc., were indicted for involuntary manslaughter and reckless conduct. All defendants were jointly tried in a bench trial before the Honorable Ronald J.P. Banks. At
the close of the People's case-in-chief Judge Banks directed a verdict of not guilty as to defendant Gerald Pett and the People dropped six of the reckless conduct charges. After trial, defendants Steven O'Neil, Charles Kirschbaum, and Daniel Rodriguez were convicted of murder and fourteen counts of reckless conduct. Each defendant was sentenced to twenty-five years imprisonment on the murder charge and fourteen concurrent sentences of 364 days on each of the reckless conduct charges. Defendants O'Neil and Kirschbaum were also fined ten thousand dollars on the murder charge and fourteen thousand dollars on the reckless conduct charges. Film Recovery Systems, Inc. and Metallic Marketing Systems, Inc. were convicted of involuntary manslaughter, for which they were each fined ten thousand dollars, and fourteen counts of reckless conduct, for which they were fined a total of fourteen thousand dollars.

II. The Corporate Homicide Doctrine

A. Statutory Scheme

The initial inquiry examines the statutory basis for criminally prosecuting corporations and corporate officials for offenses that have historically been considered "individual" in nature. The Illinois Criminal Code, under which *Film Recovery Systems, Inc.* was prosecuted, defines murder as follows:

(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
(3) He is attempting or committing a forcible felony other than voluntary manslaughter.3

Illinois, at time of trial, did not differentiate between varying degrees of murder as many states do. However, the respective mental states necessary to prove murder in Illinois are consistent with those found in the Model Penal Code4 and the majority of states.5

Subsection (2) of the Illinois murder statute is the section under which the individual defendants in *Film Recovery Systems* were charged and convicted. There are several important aspects to subsection (2) that warrant attention. First, it does not require specific intent as subsection (1) does; rather, the mental state required in subsection (2) is merely knowledge that the acts committed create a strong probability of death or great bodily harm.

The definition of knowledge under the Illinois Criminal Code includes the following section: "Knowledge of a material fact includes awareness of the substantial probability that such fact exists."6 The

---

5 Id. § 2(b).
mental state of knowledge, which the prosecution must prove under subsection (2),\(^7\) is far easier to establish than the mental state of intent which subsection (1) requires.\(^8\)

A second aspect of subsection (2) is that the defendant must know that his acts create a “strong probability” of death or great bodily harm to an individual in order to be convicted.\(^9\) This aspect falls under the general heading of “Foreseeability” discussed in more detail below.\(^10\)

The corporations in the Film Recovery Systems case, namely, Film Recovery Systems, Inc. and its alter ego, Metallic Marketing Systems, Inc., were convicted of involuntary manslaughter.\(^11\) There are several significant features to the involuntary manslaughter statute as it affects corporate criminal prosecutions. First, like the murder statute set forth above,\(^12\) manslaughter requires the foreseeability that the acts complained of are likely to cause death or great bodily harm. Second, the mental state required in the statute is “recklessness,” which is obviously an easier mental state to establish than either knowledge or intent.\(^13\)

The third significant factor in the involuntary manslaughter statute is that any act, whether lawful or unlawful, can form the basis of the offense if it is performed recklessly.\(^14\) Thus, acts which are lawful in and of themselves, can nonetheless form the basis for a criminal charge if they are performed recklessly and it is foreseeable that they are likely to result in death or great bodily harm.

**B. Applicability to Corporations**

The next inquiry is whether the statutory provisions are applicable to corporations. The Illinois Criminal Code provides two separate statutory bases to establish that they do so apply. Article 2, the general definitions section of the Code, defines the word “person” as follows: “‘Person’ means an individual, public or private corporation, government, partnership, or unincorporated association.”\(^15\) Most states, and the Model Penal Code, have essentially the same definition.\(^16\) Thus, the criminal law follows the traditional common law concept that a corpora-

\(^7\) Id. para. 9-1(a)(2).
\(^8\) Id. para. 9-1(a)(1).
\(^9\) Id. para. 9-1(a)(2).
\(^10\) See notes 39-52 infra and accompanying text.
\(^11\) ILL. ANN. STAT. ch. 38, para. 9-3 (Smith-Hurd 1979) defines involuntary manslaughter as follows:
   (a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.
\(^12\) See supra text accompanying note 3.
\(^13\) ILL. ANN. STAT. ch. 38, para. 4-6 (Smith-Hurd 1979) defines “recklessness,” in part, as follows:
   A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.
\(^14\) Id. para. 9-3; see supra note 11.
\(^15\) ILL. ANN. STAT. ch. 38, para. 2-15 (Smith-Hurd 1979) (emphasis added).
tion is a person with most of the legal rights and privileges appurtenant thereto.

A further statutory basis for applying homicide statutes to corporations is found in Article 5 of the Illinois Criminal Code. Section 5-4 specifically deals with the responsibility of a corporation under the criminal law. It allows for criminal liability to be imposed upon a corporation in any of the following circumstances: (1) the offense is a misdemeanor; (2) there is a legislative intent that the offense apply to corporations; or (3) that the offense is approved of by the board of directors or a high managerial agent. Several states and the Model Penal Code have similar provisions.

There are several important aspects to the corporate responsibility section of the Code. First, the section is situated within the "parties to crime" article of the Code. This article sets forth the "accountability doctrine" of the criminal law. Therefore, it can be argued that like the accountability doctrine, the section governing corporate accountability for criminal acts applies to any offense under the Code, unless specifically exempted by the statute defining the offense itself. This position is further substantiated by the qualifying and limiting language in subsections (1) and (2), which reflect a concern that corporations not be exposed to criminal liability for every perceived evil, or actions undertaken which are not in furtherance of the corporations' business.

The statute unambiguously exempts corporations from criminal liability when it would be contrary to the legislative purpose of the statute, or when the actor was not acting within the scope of his office, employment, or on behalf of the corporation. The statute further indicates that although any agent of the corporation could render it liable for a misdemeanor if he is acting within the scope of his employment, only a member of the board of directors or a "high managerial agent" could

17 ILL. ANN. STAT. ch. 38, para. 5-4(a) (Smith-Hurd 1979) provides as follows:

A corporation may be prosecuted for the commission of an offense if, but only if: (1) The offense is a misdemeanor, or is defined by Section 24-1 of this Code, or is defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation; and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, except that any limitation in the defining statute, concerning the corporation's accountability for certain agents or under certain circumstances, is applicable; or (2) The commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation.

18 Model Penal Code § 2.07 (1985); the following states have statutes providing for corporate criminal liability: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Missouri, Montana, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Texas, and Utah.

19 ILL. ANN. STAT. ch. 38, paras. 5-1 to 5-5 (Smith-Hurd 1979).

20 Id. para. 5-4.

21 Id. (But see Pennsylvania imposes criminal responsibility for a corporation when any agent acts in furtherance of corporate policy. Pa. Stat. Ann. tit. 18, § 307(e) (Purdon 1983). This may be the broadest exposure to criminal liability for corporations in any state although its drafters state that it presents "no radical departure from existing law." Id. para. 208 (Purdon Supp. 1986)).

22 ILL. ANN. STAT. ch. 38, para. 5-4(c) (Smith-Hurd 1979) defines "agent" and "high managerial agent" as follows:

(1) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.
expose the corporation to felony liability. This protects the corporation from felony liability unless two predicate conditions are met: (1) the person committing the acts must be a person of sufficient authority within the corporation; and (2) he must be acting within the scope of his employment. Further evidence of the general applicability of section 5-4 to all criminal offenses is found in the committee comments of the committee which drafted the section. The committee stated that under section 5-4, a corporation could be guilty of the offense of involuntary manslaughter.

C. Personal Criminal Liability for Acts Committed in Furtherance of One's Business or Occupation

Section 5-5 of the Illinois Criminal Code, the "accountability for conduct of corporation" section, also addresses individual criminal liability for acts undertaken on behalf of the corporation. It provides that an individual is personally liable for acts he performs on behalf of a corporation to the same extent as he would be if he performed them on his own behalf. The Model Penal Code has essentially the same language in its personal liability section.

The statute explicitly forecloses the "I was only following orders" defense, because it proscribes all illegal activities, whether undertaken for the benefit of the corporation, or for one's own ends. Further, it declares that an individual convicted of an offense pursuant to this section has no recourse if the corporation receives a lighter, or different sentence than his own. This section is analogous to the civil law doctrine that a person is individually liable for torts he has committed even if undertaken on behalf of, or pursuant to, his corporate employment.

(2) "High managerial agent" means an officer of the corporation, or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.
23 Id. para. 5-4(c)(2). It remains an open question whether a person with limited supervisory authority over others, such as a loading dock foreman, could commit acts exposing the corporation to felony liability. Although the term "high managerial agent" suggests that a dock foreman could not, the broad language defining it, such as "supervision of subordinate employees in a managerial capacity" suggests that under the appropriate circumstances, he could.
24 The criminal code does not define the term "within the scope of his employment." Black's Law Dictionary defines it as including not only actual authorization conferred upon an agent by his principal, but also that which has apparently or impliedly been delegated to him. BLACK'S LAW DICTIONARY 1208 (5th ed. 1979).
25 ILL. STAT. ANN. ch 38, paras. 5-4 to 5-5 committee comments - 1961 (Smith-Hurd 1979).
26 Id. para. 5-5(a) states as follows:
A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf.
28 ILL. ANN. STAT. ch. 38, para. 5-5(b) (Smith-Hurd 1979) provides:
An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation.
the court in *Donsco, Inc. v. Casper Corp.* reasoned: "A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort."31

In *People v. Floom* the court followed the reasoning set forth in section 5-5 in imposing individual criminal liability upon the defendants for their corporate conduct, even though it did not rely upon that section. The defendants were charged with violating the Retailers Occupation Tax Act by failing to make their business records and accounts available for audit. The defendants argued that the statutory prohibition against any "person" violating a revenue regulation applied to the corporation and not to them as individuals because the corporation was the registered taxpayer. The court rejected the defendants' claim and observed that the individual defendants, as chief officers, with decision making authority, for a corporation that sold tangible personal property at retail in the state, fell within the statute prohibiting any "person" engaged in the retail business in the state from violating a revenue regulation.33

Case law indicates that although a corporate structure will not protect an employee from criminal liability, an official working for a corporation may not be convicted solely by reason of his employment with a corporation absent any wrongdoing on his part. In *United States v. New England Grocers Supply Co.*, the defendants, a corporation and five individuals, were convicted of causing certain foodstuffs to become adulterated while being held for sale. On appeal, one of the individual defendants argued that his conviction must be set aside, since it was based solely on his position as the president of the corporation and there had been no showing that he personally had engaged in any wrongdoing. In reversing his conviction, the court pointed out that a conviction under the Federal Food, Drug, and Cosmetic Act could not be based upon a person's corporate position alone but rather required a finding as to the defendant's responsibility and authority to correct the violation of the Act.36

The court in *New England Grocers* applied the standard set forth by the United States Supreme Court which imposes a positive duty on corporate agents to seek out and remedy violations when they occur.37 It also provides a duty to implement measures that insure violations will not occur.38 Thus, although the law imposes upon management an ac-

---

30 587 F.2d 602.
31 Id. at 606.
33 Id. at 977, 368 N.E.2d. at 415.
36 488 F. Supp. at 232-34.
38 In *Park*, 421 U.S. at 673-74, the Court set forth the definitive test as follows: [T]he Government establishes a prima facie case [against a corporate officer] when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility, and authority either to prevent in the first instance, or promptly to correct the violation complained of, and that he failed to do so.
tive remedial duty respecting violations, it cannot impose criminal liability upon management by virtue of its status alone, absent such factors as individual knowledge and responsibility for the complained of conduct.

The foregoing statutes and cases demonstrate how a criminal statutory scheme can facilitate the prosecution of corporate criminal conduct which results in death, injury, or danger of personal injury to people. Essentially, this is merely applying traditional concepts of criminal liability in the corporate context, and does not reflect a radical departure from American criminal jurisprudence. The common element that recurs throughout the various statutes is the requirement that in order for a corporation or corporate agent to incur criminal liability, there must be foreseeability or an awareness on the part of the actors that the conduct complained of may result in death or injury to others.

III. The Foreseeability Issue

The case histories indicate that it is not merely enough that defendants engage in conduct of a generally dangerous nature. The emerging trend indicates a requirement of specific foreseeability. A showing that the defendant was able to foresee that his conduct might result in death or great bodily harm is necessary. Obviously, this requirement does not mean that the actor must be aware of the precise manner of death or injury, but it does reveal the need that the ordinary prudent or reasonable man would foresee the strong probability of death or harm.

In *People v. Warner-Lambert Co.*, this requirement is made clear. In *Warner-Lambert*, a worker in a plant manufacturing “Freshen-Up” brand gum was killed when gas, which was a by-product of the manufacturing process, caused an explosion. The court ruled that although there was a generally known risk of danger in the use of the particular substances in the manufacturing process and the volatile nature of the gases produced, the defendants could not specifically foresee that the process used was likely to result in an explosion causing death or great bodily harm. Absent foreseeability, the state can establish neither the mental state of recklessness nor knowledge against the defendants.

A series of Pennsylvania cases applied a “reasonably prudent man” standard in prosecutions for involuntary manslaughter, finding that acts were performed so recklessly that the resulting death and injuries were foreseeable. In *Commonwealth v. Feinberg*, a storeowner was convicted of manslaughter resulting from the death of a customer to whom he had sold a product. The storeowner had sold “Sterno” brand canned heat to a vagrant in a depressed area of Philadelphia, who drank the substance and died. The court indicated that the storeowner knew the victim was not purchasing the product for its intended use, but would, in fact, consume it and possibly die.

40 Id. at 298, 414 N.E.2d at 661.
41 See ILL. ANN. STAT. ch. 38, paras. 9-1(a) and 9-3 (Smith-Hurd 1979).
43 Id. at 567-68, 253 A.2d at 641.
A case outside of the employment context demonstrates the distinction between what constitutes a generally dangerous situation within acceptable legal limits and the specific foreseeability necessary to impose criminal liability. In Commonwealth v. Keith, the owner of a bungalow set a spring gun trap to dissuade intruders from entering when he was not present. The spring gun was wired to the entrance to the bungalow and designed to discharge the gun upon entry. An inquisitive eleven-year old boy was killed when the gun discharged during his unauthorized entry. The owner of the bungalow was convicted of involuntary manslaughter. The foreseeability requirement was met because a reasonable man could foresee that death or great bodily harm would result from the operation of the spring gun.

An older Pennsylvania case demonstrates the foreseeability concept as applied in the employment context. In Commonwealth v. Inglis, the defendant was the owner operator of a coal company which operated a deep mine shaft. The defendant removed a support pillar near the surface of the mine without warning the miners or taking adequate precautions to protect them from injury. In the ensuing cave-in, several persons were killed. The court ruled that the defendant may be subject to a charge of involuntary manslaughter even though the act, removing the support pillar, was perfectly lawful. If lawful acts are performed recklessly, the resulting death and injury may be foreseeable. In this case, the defendant’s criminal liability cannot be predicated on the general knowledge that mining is hazardous and that cave-ins occur; rather, it is predicated upon the specific foreseeability that moving support pillars without adequate precautions is likely to result in a disaster.

Compliance with applicable law may negate the foreseeability of harm. In State v. Cochran, the defendants were charged with involuntary manslaughter resulting from a fire in an attraction at an amusement park they operated. At trial, the defense demonstrated that they were in compliance with the applicable governmental fire and building code regulations. They argued that because they were, in fact, in compliance with all regulations, they could not specifically foresee the fatal fire and the corporation could not have the requisite mental state to commit a crime. The jury found the defendants not guilty of all charges.

Another New Jersey case, State v. Ireland, illustrates the converse of the Cochran case; specifically, that noncompliance with applicable law alone may be sufficient to establish foreseeability of harm. In Ireland, an architect was charged with involuntary manslaughter after a building he designed collapsed resulting in fatalities. The state alleged that in preparing the plans for the building, the architect knowingly ignored building code regulations which led to the collapse of the building. The court

44 46 Berks. 137 (1954).
45 Id. at 140.
46 21 Lack. 21 (1919).
47 Id.
48 No. 65084 (Ocean County, N.J.; December 17, 1984) (commonly referred to as the Six Flags Case).
49 126 N.J.L. 444, 20 A.2d 69 (1941).
denied the defendant's motion to dismiss for failure to state a cause of action, ruling that such allegations, if proven, would provide the basis for a cause of action under the involuntary manslaughter section of the New Jersey Criminal Code. 50

Thus, whereas compliance with the local building and safety codes may have provided the margin of victory for the defense in the Cochran 51 case because it would have been impossible to foresee disaster under the circumstances, in Ireland, 52 the knowing circumvention of building and safety codes demonstrated an awareness of the risks involved and a disregard for the consequences. The above mentioned cases suggest that compliance, or the lack of compliance, with the local safety codes and regulations will go a long way towards establishing the foreseeability requirement. The important factor to keep in mind about foreseeability is that even though it is not an element of the offense, failure to prove it may result in a failure by the prosecution to establish the requisite mental state necessary to make the conduct criminal.

IV. Derivative Liability: Criminally Piercing the Corporate Veil

As the number of criminal prosecutions of corporations increases, one option that will become increasingly attractive to prosecutors is the concept of criminally piercing the corporate veil. The principal reason to attempt this is to establish criminal liability for the entity (individual, partnership, association, or corporation) that is legally accountable for the criminal conduct of a corporation by virtue of its control, influence, or relation to the corporate defendant. Conceptually, a prosecutor could pierce the corporate veil to attack the owner of a solely owned corporation, the associates controlling a closely held corporation, or a parent corporation for the criminal conduct of a subsidiary or related corporation. Although there is very little case law on the subject, what there is suggests that piercing the corporate veil is an appropriate remedy. A strong public policy argument supports piercing of the corporate veil.

There is disagreement over whether the court criminally pierced the corporate veil in People v. Film Recovery Systems, Inc. 53 In its findings of fact, the trial court found that defendant Steven O'Neil, who was the president of Film Recovery Systems and Metallic Marketing Systems, exercised control over both corporations. 54 In addition, the former bookkeeper of Film Recovery Systems, testified that checks were written on the accounts of either company interchangeably depending upon which

---

51 No. 65084 (Ocean County, N.J.), supra note 48.
52 126 N.J.L. 444, 20 A.2d 69.
53 Nos. 84 C 5064 and 83 C 11091 (Cir. Ct. of Cook County, Ill., June 14, 1985).
54 In its finding of facts the court stated:
I also find that Steven O'Neil, who was the President of Film Recovery Systems, President of Metallic Marketing Systems, Metallic Marketing Systems owning fifty percent of Film Recovery Systems, was in control and exercised control over both Film Recovery Systems and Metallic Marketing Systems before and after the death of Stefan Golab, which was on February 10, 1983.
Nos. 84 C 5064 and 83 C 11091, Report of Proceedings, 8-9.
one had funds in it at any given time.\textsuperscript{55} Furthermore, the court found partial ownership of one corporation by the other. Both corporations were found guilty of involuntary manslaughter. These findings form the basis of the argument that the court in fact pierced the corporate veil, even though it did not use that terminology. Conversely, one can argue that the court’s findings reveal that all individuals and corporations were convicted in their own right for their own conduct and no intermediate step such as piercing the corporate veil was necessary. The authors are of the opinion that a criminal piercing of the corporate veil did, in fact, occur.\textsuperscript{56}

A recent case stating the rationale for piercing the corporate veil in the context of civil liability is \textit{Federal Deposit Insurance Corp. v. Allen.}\textsuperscript{57} In \textit{Allen}, the court held that the corporate identity exists for convenience and cannot be used as a cover for illegality or to defeat the public good.\textsuperscript{58} An earlier case that allowed for a de facto criminal piercing of the corporate veil, although it never used that terminology, was \textit{United States v. Milwaukee Refrigerator Transit Co.}\textsuperscript{59} In that case, the defendant corporation was a wholly owned subsidiary of the Pabst Brewing Company which was controlled by the Pabst family. The Elkins Act\textsuperscript{60} made it unlawful for any “person” to receive rebates from commercial carriers for shipping their product at less than the published rate. In order to circumvent the Elkins Act and continue to receive the rebates, which had proved to be a handsome sum, the defendant corporation was formed. Its sole purpose was to arrange to transport Pabst beer and receive rebates from the commercial carriers. The United States Government sought injunctive relief against the corporation, claiming that obtaining rebates from carriers was prohibited under the Act.

The defendant argued that it was an independent corporation and that the rebates paid to it by common carriers were actually compensation for its services in soliciting and procuring freight for the common carriers. The court, in ruling for the government, focused on the issue of

\textsuperscript{55} \textit{Id.} Testimony of Debra Sadzeck, 1-10 to 1-12.

\textsuperscript{56} The “Doctrine of Corporate Alter Ego” means that: courts, ignoring forms and looking to substance will regard stockholders as owners of corporation’s property, or as the real parties in interest whenever it is necessary to do so to prevent fraud which might otherwise be perpetrated, to redress a wrong which might otherwise go without redress, or to do justice which might otherwise fail. \textit{Black’s Law Dictionary} 306 (5th ed. 1979). Clearly, at least under such a general definition as this, the court’s findings of fact in \textit{Film Recovery Systems} constitute a piercing of the corporate veil.

\textsuperscript{57} 584 F. Supp. 386 (E.D. Tenn. 1984).

\textsuperscript{58} The court in \textit{Allen} stated:

\textit{[T]he doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for the purposes of convenience. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts. Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate cloak being disregarded where used as a cover for fraud or illegality and the corporation and individual or individuals owning all of its stock and assets will be treated as identical.}

\textit{Id.} at 397.

\textsuperscript{59} 142 F. 247 (E.D. Wis. 1905).

\textsuperscript{60} 32 Stat. 847 (1903).
intent and corporate identity or control in determining whether the corporation had a legitimate business purpose or was merely designed to circumvent the Act. 61 Thus, even at this early date, courts were willing to consider the notion that corporations, which enjoy so many of the same rights and privileges as natural persons, should bear some of the same responsibilities as natural persons and not be allowed to hide behind the corporate form of doing business.

In United States v. Andreadis 62 the court set the outside parameters of both the criminal piercing and individual accountability concepts as applied to corporate conduct. Defendant Andreadis was the president of the defendant corporation. The corporation manufactured and sold Regimen brand tablets, which it claimed were weight loss pills. The corporation engaged an advertising firm to help market their product. The advertising firm relied upon a strategy of live endorsements from people who had supposedly used Regimen tablets and achieved substantial weight loss. The evidence showed that the claims of the live endorsers were greatly exaggerated and that the advertising firm knew that they were false. It also showed that prior to broadcasting the endorsements, a copy of the endorsements were shown to Andreadis who knew the claims were false. Andreadis authorized the endorsements anyway. In upholding Andreadis’ conviction, the court pointed out that even though he did not direct the advertising agency to use knowingly false claims, he reviewed and approved the live endorser campaign, and thus could not insulate himself from liability for their propagation. 63 Furthermore, the court ruled that the defendant had an affirmative duty to insure that the claims the advertising agency made were true. The court would not permit a person in the defendant’s shoes, having failed totally to discharge his responsibility in even the slightest measure, to escape the consequences of his inattention. 64 The Andreadis decision is significant, not only because it holds a corporate president criminally liable when it is clear that he had personal knowledge of illegality, but also because it imposes liability on him for the illegal conduct of another corporation. It would appear that not only can prosecutors criminally pierce the corporate veil, but they can also hold officials criminally liable for the conduct of a wholly independent corporation if that official is deemed responsible for their decisions.

A recent New York case suggests that the concept of criminally piercing the corporate veil is implicit in the state’s statutory scheme. In People v. Aquarian Age 2000, Inc., 65 a corporation and individual defendants were indicted under section 359 of New York’s General Business

61 142 F. at 252-56. The court stated:
[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

62 366 F.2d 423 (2d Cir. 1966).
63 Id. at 430.
64 Id.
Law for operating a pyramid financial scheme. The evidence indicated that the individual defendants were agents of the corporation who had participated in public sales meetings to enlist membership. New York's penal law holds an individual criminally liable for conduct he engages in for a corporation exactly the same as if he had done it for himself. In denying the individual defendants' motion for a directed verdict, the court relied upon the penal law authority to pierce the corporate veil in a criminal as well as a civil context. The court reasoned that a wrongdoer could no more hide behind a corporate curtain for criminal purposes than he could for civil purposes.

The willingness of courts to criminally pierce the corporate veil is the triumph of substance over form; it places the realities of corporate conduct, which may be criminal, over the corporate structure's purpose of expediting business conduct.

V. Defenses to Corporate Criminal Liability

A. Due Diligence

The Model Penal Code and the statutory schemes modeled after it set forth an affirmative defense of due diligence of which corporations may avail themselves. In order to establish the affirmative defense of due diligence, the corporation must prove by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission. Essentially, the affirmative defense of due diligence serves to negate the required mental state or mens rea that a high managerial agent must have in order for the corporation to commit a crime. A corporation, as an artificial legal entity, has no mental state separate or apart from its employees, officers, and directors. Therefore, for the analytical purpose of assessing criminal culpability on the part of a corporation, the mental state of the high managerial agent with respons-

---

66 N.Y. PENAL LAW § 20.25 (McKinney 1975) states as follows: "A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or on behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf."

See also ILL. ANN. STAT. ch. 38, para. 5-5 (Smith-Hurd 1979) and MODEL PENAL CODE § 2.07(6) (1985).

67 In _Aquarian Age_ the court stated:

Obviously, this section eliminates the possibility that a culpable defendant might evade criminal responsibility simply because he was acting in a corporate capacity or in the interest of a corporation. The corporate veil can be pierced, if appropriate, in criminal as well as civil cases. The culpable actor can no longer hide behind a corporate curtain.

85 Misc. 2d at 506, 380 N.Y.S.2d at 548.

68 MODEL PENAL CODE § 2.07(5) (1985) states as follows:

In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

See also ILL. ANN. STAT. ch. 38, para. 5-4(b) (Smith-Hurd 1979).

sibility for a given subject matter is imputed to the corporation. Criminal liability may flow from the high managerial agent to the corporation, but it may not necessarily flow the other way around, as the case of *New England Grocers* demonstrated.\(^{70}\)

The due diligence defense is further justified because, in limiting it to the high managerial agent with supervisory authority for the subject matter of the offense, the law isolates the actor who exposed the corporation to criminal liability in the first place. Also, by limiting the due diligence defense to such a high managerial agent, the law limits its availability to instances where the due diligence represents corporate policy and not merely the concerns of an isolated individual. There are no reported cases dealing with due diligence as an affirmative defense. Due diligence is an issue for the trier of fact to determine. The trier of fact must find that the preponderance of evidence presented by the defendant establishes the defense.

In the case of *People v. Film Recovery Systems, Inc.*,\(^{71}\) the individual defendants did attempt to show that they were duly diligent with respect to providing safety equipment to employees. The defendants expended considerably less effort, however, to establish that they were duly diligent in areas such as industrial hygiene, health monitoring of the employees, and safety training and procedures. The trial court judge, in his role as finder of fact, weighed the evidence presented by defendants on this point and held it was insufficient to rise to the level of due diligence.\(^{72}\)

### B. Federal Preemption of State Law

Another possible line of defense available to both individual and corporate defendants is that state criminal proceedings for death or injuries arising in the workplace are preempted by the federal Occupational Safety and Health Act.\(^{73}\)

The only reported decision to date with respect to this defense is *People v. Chicago Magnet Wire Corp.* In that case the circuit trial court granted defendant's motion to dismiss criminal charges of aggravated battery and reckless conduct brought against a corporation which allegedly exposed employees to toxic substances in the workplace. The Illinois Appellate Court affirmed this decision stating that "OSHA does not permit the state to prosecute conduct or conditions in the workplace under state criminal laws in so far as the conduct or conditions are regulated by OSHA."\(^{74}\) The People intend to appeal this decision.\(^{75}\)

The essence of the federal preemption defense, if it is recognized by the courts, is as follows: (1) in enacting the Occupational Safety and

\(^{70}\) 488 F. Supp. 230. See supra notes 34-37 and accompanying text.

\(^{71}\) Nos. 84 C 5064 and 83 C 11091 (Cir. Ct. Cook County, Ill., June 14, 1985).

\(^{72}\) In his finding of facts in *Film Recovery Systems* Judge Ronald J.P. Banks stated, "I also find that the defendants created the conditions present in the plant by their acts of omission and commission." Report of Proceedings, 9. See also testimony of Debra Sadzeck, 2-15 to 2-18, 3-6 to 3-8, 3-15 to 3-18.


\(^{75}\) Id.
Health Act, Congress established a comprehensive plan to regulate and control safety in the workplace; (2) the Act, as adopted by Congress, is all encompassing and leaves no place for the individual states to enact parallel safety regulations absent an express approval of the state’s safety plan by OSHA; and, (3) to the extent that the state’s criminal law seeks to regulate conduct within the workplace, Congress has expressed an intent that the federal government, through OSHA, exclusively occupies that role, and that states may not also occupy it.

Defendants can most readily use the federal preemption argument in those states that have not enacted federally approved state occupational health and safety plans. In those states that have enacted state OSHA plans, federal preemption will not work because the federal government has already agreed to let the states regulate their own workplaces.

In determining whether Congress intended to federally preempt an entire area of regulation, one must examine the statutory scheme adopted by Congress. In some instances, the legislation will expressly address the issue of preemption; in others, its structure or purpose implies preemption.

The Occupational Health and Safety Act does not expressly preempt state criminal laws, and as the critics of the federal preemption argument are quick to point out, the Act’s only pronouncement on state laws appears to expressly disavow an intent to preempt. Despite this seemingly clear section against preemption, the proponents of the argument claim that section 653(b)(4) of the OSHA Act notwithstanding, the comprehensive nature of the Act implies an intent to federally preempt the field. They further argue that state criminal laws, if applied to the workplace, constitute an attempt to regulate working conditions, and this the states may not do absent federal approval of a comprehensive plan submitted to OSHA and formally approved by the agency. This potential for conflict, the proponents maintain, requires federal exclusivity.

This argument appears weak because the enforcement of criminal laws by the states is a traditional exercise of their police power, and enforcement of the criminal law is not intended to regulate business activity. Further, opponents argue that absent an express conflict between OSHA provisions and state criminal law, courts should not use an inference of conflict as a basis for preemption.

An analogous situation occurred in the case of Silkwood v. Kerr-McGee Corp. In that case a decedent’s estate sought to recover under a state

77 Preemption may be either express or implied, and it “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure or purpose.” Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).
79 29 U.S.C. § 653(b)(4) (1982) states as follows:

Nothing in this chapter 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.
80 See, e.g., People v. Coleman, 111 Ill. 2d 87, 488 N.E.2d 1009 (1986).
punitive damages provision\textsuperscript{82} for injuries suffered by Karen Silkwood during her employment at the defendant's nuclear energy facility in Oklahoma. Defendants responded that recovery by the plaintiff was barred, because the entire field of nuclear energy had been preempted by the federal government in enacting the Atomic Energy Act.\textsuperscript{83} The United States Supreme Court rejected defendant's position, stating that congressional silence on the subject of punitive damages under state law for nuclear torts could not be construed as an intent to federally preempt all state tort remedies.\textsuperscript{84}

Opponents of the federal preemption argument point out that if any field is exclusively federally regulated, from its birth ushering in the atomic age until the present day, it is the field of nuclear energy. If the Court was unwilling to apply preemption even in this field, it certainly will not invoke preemption against claims for deaths and injuries in the workplace.

Finally, opponents maintain that since OSHA regulations apply only to the employers and employees in the workplace, and not to guests or business visitors, preemption could lead to an absurd legal result. If a business visitor and an employee both succumb to a toxic event that constitutes an OSHA violation, it is absurd to imagine that the state could bring homicide charges on behalf of the visitor, who is not subject to OSHA regulation, but could do nothing on behalf of the employee who is. Although the law frequently reaches absurd results, it should never strive to do so.

Practitioners must watch the developments of the federal preemption argument in this context as it works its way through the court system. Whatever the infirmities of the proponents argument are, the fact that its successful adoption by courts could completely preclude states from bringing criminal charges in the workplace merits close attention. If successful, the federal preemption argument potentially represents a definitive bar to such prosecutions.

VI. Policy Considerations in Corporate Criminal Prosecutions

After analyzing whether a state has the authority to bring criminal prosecutions against corporations, and/or their agents, the prosecutor must further determine when to bring such actions, against which entities, and why?

A prosecutorial agency traditionally exercises discretion in a wide range of matters, from traffic violations, consumer affairs, juvenile crimes, and welfare fraud, to the more traditional forms of violent crimes. Along with this prosecutorial discretion, the traditional duty of a prosecuting agency is to insure the welfare of the citizens within its jurisdiction, whether they be in their homes, on the streets, at work or in various places of public entertainment. This duty arises out of the purpose of criminal prosecution which is protecting the public's interest in

\textsuperscript{82} OKLA. STAT. tit. 23, § 9 (1981).
\textsuperscript{83} 42 U.S.C. §§ 2301-2394 (1982).
\textsuperscript{84} 464 U.S. at 255-56.
society's welfare. That welfare necessarily entails protection from both financial loss and physical harm.

The public has long expected protection by prosecutorial agencies from physical harm and financial loss. The public places its trust in those agencies to do their duty. When corporations and their agents engage in wilful misconduct, which endangers members of society, the prosecuting agent should employ the criminal justice system to redress that conduct.

Many critics of the application of criminal laws to the workplace have argued that the systems of agency regulation, workers' compensation, and civil courts are more appropriate forums to remedy such problems. However, civil suits and workers' compensation will not deter illegal and injurious conduct in situations where the profits of such conduct exceed the monetary punishment meted out. In situations where the monetary punishment, civil or criminal, does in fact exceed the amount of profits attained, corporations may take refuge in the bankruptcy courts, or simply pass the cost on to other parties. Agency regulation and a system of fines poses similar problems, in addition to unique problems of resource allocation and philosophical commitment. Again, a system of fines through agency citations, will only prove effective if they make the cost of such conduct outweigh any profits derived.

A corporation has no soul, no conscience. It cannot be imprisoned. Its liberty is reflected in the freedom it enjoys to do acts which enable it to make a profit. Therefore, it may be punished in at least two ways. First, restrict its ability to make money, and second, take away profits it has already made. The state may limit the ability of a corporation to profit from conduct in a number of ways. Upon a criminal conviction it could revoke corporate status and void tax benefits. Courts could further restrict its conduct. Levying fines is an effective way of taking

---


87 Model Penal Code § 6.04 (1985) provides for penalties against corporations and unincorporated associations. Specifically § 6.04(1) states the court may suspend the sentence or may sentence the corporation or unincorporated association to pay a fine. Section 6.04(2) authorizes a court to order a forfeiture of the Corporate Charter or revocation of the certificate authorizing a foreign corporation to do business in the state. A court may order forfeiture or revocation only in a certain limited circumstance.


Some states have provided that "when an organization is convicted of an offense, the court may require the organization to give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise." Model Penal Code § 6.04 comment. One such statute is N.D. Cent. Code § 12.1-32-03 (1985). An alternative formulation of a similar sanction which is used in Me. Rev. Stat. Ann. tit. 17-A § 1153(1) (West 1983) and in Utah Code Ann. § 76-3-303(1) (1978) states:

When a corporation or association is convicted of an offense, the court may . . . require the corporation or association to give appropriate publicity of the conviction by notice to the
profits already realized from the entity. Since corporations seek to maximize profits, this punishment goes to the heart of the matter; or does it? Who bears the cost of this punishment? Corporations will not sell capital investments to cover the costs of levied fines. Those costs are generally reflected in reduced value of stocks, lesser dividends, and increased costs to consumers. Thus, fines punish the shareholder or consumer for the acts of the operators of the physical plant. Except in the most closely held corporations, shareholders are not blameworthy for the misconduct giving rise to the conviction, and surely the consumer is not.  

The prosecution solely of the corporation would allow the individual’s misconduct to go unpunished. An individual officer, a supervisor, or high managerial agent, does have a conscience. He has a personal liberty which human nature dictates he wishes to protect. Therefore, the state can deter his conduct by threat of imprisonment. He is also less able to minimize the effects of financial punishment by passing the cost on to others. Punishment of an individual for misconduct carried out under the name of corporate purpose also satisfies society’s desire to make “the actor” responsible for his actions. It seems then, to achieve society’s goals in these types of prosecutions, that the best approach is to prosecute both the corporation and the individual from whose conduct corporate liability is derived.

Problems will continue to exist as corporate America grows and controls more and more of our existence. As this growth occurs and becomes more complex, the cost of effective agency enforcement becomes prohibitive. This requires agencies to find and allocate resources in efficient and meaningful ways. As decisions are made as to “selective enforcement,” dangerous conduct will continue to fall through the cracks. For example, OSHA’s record inspection policy allowed the executives at Film Recovery Systems to maintain the conditions which threatened the lives of its workers until Stefan Golab died on February 10, 1983 from those conditions. OSHA, in the fall of 1982, had inspected the alleged records of illness and injury occurring at Film Recovery Systems. How-

---

88 See Coffee, supra note 86.
ever, no such records were kept. Having no accurate documentation to indicate the rate of injuries or disease, OSHA did not perform an on-site inspection. An inspection would have readily revealed that the workers were being exposed to potentially lethal amounts of hydrogen cyanide gas and solutions of sodium cyanide, without adequate training or safety gear. It is interesting to note that after the death of Mr. Golab, OSHA inspectors easily found seventeen serious violations and fined Film Recovery Systems a little more than two thousand dollars. That fine went unpaid.

It is precisely this agency failure, combined with the other discussed issues, which beg for criminal sanctions as a deterrent to conduct which threatens the public interest. The ability to prosecute corporate entities, whether for public health and safety violations, or for various financial crimes, depends upon whether the prosecuting body, not unlike a regulatory agency, has adequate resources to mount an investigation and prosecution. This problem is compounded when facing a well financed corporate body, which in all likelihood, controls most of the information upon which a successful prosecution must be based.91

Extending criminal sanctions against corporations, especially in the area of human safety, is not happening in a vacuum. Conduct by employers who willfully expose workers to hazards, in some jurisdictions, is an exception to workers' compensation provisions which bar employee personal injury suits for job related injuries and disease.92 This exception is either statutory or comes about through judicial interpretation. Generally, the basis for the exception is intentional conduct causing bodily harm. Employers who rely upon the limitations of their liability through workers' compensation benefits have no incentive to promulgate industry standards which favor worker safety. Indeed, the same limitations have allowed employers to tread the fine line between minimal safety and maximum profit, instead of emphasizing safety balanced against reasonable profit.

The intentional tort exception to workers' compensation has given rise to actions against employers where employees allege intentional torts causing bodily harm. Traditionally, such torts causing bodily harm may have also been actionable as criminal offenses. Therefore, if an employee can prove that the employer, by an intentional tort, caused him bodily harm and thereby succeed in a personal injury suit, why should not the criminal justice system redress such conduct? Of course, such actions must always be determined in light of the varying standards of proof involved in each forum. Nevertheless, the risk of criminal prosecutions, which parallel actions in tort, provide a compelling reason for employers to insure worker safety. The relationship between these types of actions is certainly worthy of comment.

As the use and the resultant exposure to toxic substances and occupational hazards increases, so will the legal community's involvement in

91 Id.
such issues. The trend in allowing personal injury suits beyond the limits of workers' compensation, whether by statute or judicial interpretation, clearly indicates that when employer conduct, which endangers his employees, is so intentional, wanton, or wilful, traditional notions of tort law are needed to deter such conduct and to compensate the victim of said conduct. Likewise, when such conduct reaches the level of clearly endangering the safety and health of employees, the criminal justice system has a right and a duty to intervene.

A few recent decisions in the area of the intentional tort exception to workers' compensation are quite interesting in that the language used in plaintiff's allegations are strikingly similar to the language used in a criminal indictment. An injured worker's right to be compensated, outside the limits of workers' compensation in tort, is not unlike society's right to insure the safety of its citizens through the use of the criminal law. For example, in Martin v. Granite City Steel, a federal district court held that a complaint, alleging the defendant steel manufacturer intentionally exposed its employees to toxins and carcinogens, was not barred by the exclusivity of either the Illinois Workers' Compensation Act or the Illinois Worker's Occupational Disease Act. The Martin court relied heavily on Handley v. Unarco Industries. The court in Martin referred to the suit in Handley as an action alleging murder, fraud and battery. Indeed, the complaint in Handley was that the defendant intended to kill the plaintiff and coworkers. The Illinois Appellate Court, in Handley, allowed the plaintiff to maintain an action in tort outside the exclusive remedy provided by the Illinois Worker's Occupational Disease Act, where the plaintiff's complaint alleged that "defendant intended to kill the plaintiff and his coworkers, that defendant's conscious purpose was that asbestos would become trapped in the lungs and bodies of the workers, and that the defendant intended bodily harm." In Handley, there was also a fraud count which alleged that the defendant represented to the plaintiffs that asbestos dust was not harmful, that the defendant knew its representations were false, and that the plaintiffs would become ill and die. Further, that the defendant knew that the plaintiffs were not aware of the hazardous properties of asbestos dust, and the defendant made the representations with the intent that the decedent and his coworkers would rely on them. These allegations are strikingly similar to the types of allegations made in the criminal indictments of Film Recovery Systems and its executives.

93 Id.
95 ILL. ANN. STAT. ch. 48, paras. 138.13-.30 (Smith-Hurd 1986).
96 Id. paras. 172.36-.62.
99 Handley, 124 Ill. App. 3d at 71, 463 N.E.2d at 1023.
100 Id. at 72, 463 N.E.2d at 1023.
101 The text of the indictment reads in part:
The Grand Jurors chosen, selected, and sworn in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on February 10, 1983 at and within the County, Steven J. O'Neil, Michael T. MacKay, Gerald Pett, Charles Kirshbaum, and Daniel Rodriguez, as individuals,
In Mandolidis v. Eklins Industries, the Supreme Court of Appeals of West Virginia ruled that "wilful, wanton, and reckless misconduct . . . requires a subjective realization of the risk of bodily injury created by the activity, and, as such, does not constitute any form of negligence." Such negligence would have put the particular case into the area of workers' compensation, limited by its exclusive remedies. The court went on to say that an employer is subject to common law tort liability where he commits an intentional tort, or engages in that wilful, wanton, and reckless misconduct. However, for an employer to be liable, there must have been a "strong probability" that harm would result. The language of the murder indictment in Film Recovery Systems parallels the language in Mandolidis; allegations were contained in both cases that the defendants knowingly created a strong probability of death or great bodily harm. Therefore, if such a mental state can be shown in a suit for personal injury, could not the same mental state be used in a criminal prosecution? The Supreme Court of Ohio in Blankenship v. Cincinnati Milacron Chemicals, Inc., also addressed this issue. The court held that a complaint was not barred by workers' compensation provisions where it alleged that the plaintiff workers were intentionally exposed to noxious chemicals during their employment, notwithstanding the fact that the employers knew that such conditions existed and failed to warn or correct the hazards. The same court, two years later, in Jones v. VIP Development Co., held that "an intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to

and in their capacity as officers and high managerial agents of Film Recovery Systems, Inc., a Delaware Corporation licensed to do business in the State of Illinois, committed the offense of murder in that they, while acting in their individual capacity and as officers and high managerial agents of Film Recovery Systems, Inc., a Delaware Corporation licensed to do business in the State of Illinois, without lawful justification, killed Stefan Golab, knowing that the following acts of commission and acts of omission by them, created a strong probability of death and great bodily harm to said Stefan Golab:

1) As individuals and officers and members of the Board of Directors and high managerial agents of Film Recovery Systems, Inc., a corporation, a firm engaged in the business of recovering, extracting the precipitating silver from x-ray films through the use of cyanide and substances containing cyanide, they directed the operations and systems of said corporation;

2) They hired and employed Stefan Golab to engage in the aforesaid work of processing and obtaining silver and failed to disclose and make known to him that he was working with cyanide and substances containing cyanide and failed to instruct him as to matters involving safety procedures and proper handling of said chemicals;

3) They failed to provide Stefan Golab with appropriate and necessary safety and first aid equipment and sundry health-monitoring systems for his protection while working with and handling cyanide and substances containing cyanide;

4) They failed in conduct of their corporate business, to properly provide for the storage, detoxification and disposition of said cyanide and substances containing cyanide;

5) Although they knew and were aware of the hazards and danger to life and health entailed in the handling and use of said cyanide and substances containing cyanide, to a human being, they failed to advise Stefan Golab of the dangerous nature of his work, and the conditions under which he engaged in it in the course and conduct of his employment in their company.

103 Id. at 913.
104 See supra note 101.
105 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).
106 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
The court went on to say, "[w]e hereby reject the proposition that a specific intent to injure is necessary to a finding of intentional misconduct." The court further stated that it found the conduct complained of was an intentional tort, saying, "[a] defendant who fails to warn of a known defect or hazard which poses a grave threat of injury may reasonably be considered to have acted despite a belief that harm is substantially certain to occur." Therefore, for the purposes of a civil suit, intention can be proven through conduct by employers which is known to harm its workers; it follows that the same intent could be proven in a criminal matter through the same analysis.

Indeed, the conduct of the employers and the exposure of the workers to hazards in the cases mentioned above are very similar to the conduct complained of in the case of Film Recovery Systems. The foregoing cases also mirror a growing public acceptance of actions against corporate misbehavior. Criminal actions against corporations, and/or their agents, have long been maintained where fraud, tax violations, and other financial crimes have become known to the authorities. Also, administrative regulation such as undertaken by the Environmental Protection Agency and the Occupational Safety and Health Administration have been accepted, if not expected, by the public as a routine and ongoing matter.

Why then, has there been an increase in criminal prosecutions that have been entertained in situations arising out of workplace hazards?

Various authorities have offered possible explanations. First, the public, including local public prosecutors, may have held the perception that agency regulation was, in fact, effective in insuring safety in the workplace. The lack of publicity surrounding workplace hazards has probably contributed to that notion. The media, however, in recent years, has taken a closer look into the dangers of workplace hazards and in effect, has raised the public conscience to those situations. Second, the increased use of toxic substances in the workplace has increased individual and collective fear of the consequences of exposure to those substances. This fear is enhanced by the continuing medical findings indicative of the short and long range damage done by such exposure. In addition, the public has become more aware of toxic exposure to the environment and hence, has also increased its interest in the potentially toxic workplace. Third, society is beginning to realize that some employers have been willing to conceal and expose their workers to those dan-

107 Id. at 95; 472 N.E. 2d at 1051.
108 Id.
109 Id. at 96, 472 N.E. 2d at 1052.
bers when they can profit from such action. Society also realizes that an employer who is willing to expose a worker to a toxic substance is also very likely to expose the environment to the same substance through the means of illegal dumping. Finally, the cumulative effect of all the aforementioned, coupled with the extraordinary callousness toward safety portrayed in many work situations, has given rise to increased demands for local prosecutors to take action within the criminal arena.

In approaching the question of whether to charge a corporation with a criminal offense, a prosecutor must bear in mind that corporate entities do serve a legitimate purpose. It is undeniable that corporations have enabled our society to progress. Advancements made in many fields are directly tied to the advantages arising out of corporate structure, resource allocation and efficiency. However, a prosecutor must balance those advancements against the cost of resulting injuries or disease associated with these endeavors. Every endeavor presents some risk. Construction of mammoth buildings or giant bridges has always held an associated risk of death or bodily harm. Yet, few would argue that such construction be stopped. The fact is that the employers in those trades, most often, do everything in their technical ability to reduce that risk. Surely, the criminal law should not be applied when those risks are realized in light of the due diligence of the employer. Society sees the necessity of taking that risk as the cost of progress. However, in many cases of worker neglect exhibited by wilful, wanton, and reckless misconduct by employers, society’s moral outrage will tip the balance in favor of criminal prosecutions. Society finds it particularly reprehensible for an employer to increase the risk to his work force, especially for the sake of increased profit. This moral outrage creates in society a need to readdress the situation, to seek retribution, to deter. Therefore, it can be seen that the decision to prosecute a corporation, and/or its officers, is in large part subjective in nature.

Once the legal elements which would sustain a criminal conviction are determined to exist, a prosecutor must determine whether the conduct would call for condemnation by society through its criminal laws. Further, the prosecutor must determine whether or not a particular prosecution would have the desired deterrent effect. If neither retribution nor deterrence are achievable, it is questionable as to whether a prosecution should take place. To allocate the resources of the criminal justice system to an effort in which society will not realize any benefits is indeed wasteful. Once the prosecutor decides to bring a prosecution, the question arises as to whom the charges should be directed so as to achieve the desired goals. Decisions to prosecute the corporation, individuals, or both, are dependent upon the proof of conduct against each entity. The prosecutor must also look to the ultimate goal desired. This discretion

112 See articles cited supra note 110.
113 See Stone, supra note 89.
vested in prosecutors, requires the same type of analysis utilized in all complex criminal cases.

To a large degree the subjective decision to prosecute a corporation rests with the sensitivity of the prosecuting body and its perception of the realities of society. If the prosecuting body perceives that the illegal conduct so transcends society's moral standards, it may well wish to invoke the criminal justice system to achieve retribution in the hopes of satisfying societal demands. It may also wish, by such prosecution, to deter others from similar conduct. However, both goals must be balanced against the resources available with which to accomplish those purposes. If the decision to prosecute corporate entities would sap the resources of the prosecution away from traditional areas of criminal law, so as to make those prosecutions impossible, corporate prosecutions cannot be maintained.

Further, an elected prosecutor cannot ignore political risks. Such an elected official faces two possible problems. If he chooses not to prosecute in a certain situation he may incur the wrath of employees, unions and environmental organizations. If he chooses to prosecute, potentially powerful members of society, who identify with corporate defendants, will be disturbed. If such prosecutions are lost, the wrath of the latter is greatly enhanced. Needless to say these decisions are poised in terms of public need versus public desire. Each decision must rest on a case by case analysis.

Once the prosecuting agency resolves the issues of resource allocation and the need for societal condemnation/retribution it must then decide how to attain the necessary deterrent effect within the context of corporate actors and existing criminal law.

Illinois law specifically provides for criminal sanctions against both the corporation and for the individual who performs unlawful conduct in the name, or on behalf of the corporation. In fact, criminal liability of the corporation rests upon the criminal acts of the individual who acts within the scope of his employment. The individuals indicted in Film Recovery Systems were charged as individuals and as acting in their corporate capacity as high managerial agents, so as to insure both personal and corporate liability. This is because the prosecutions of individuals in their corporate sphere must be based upon their actions as individuals. Prosecutions of corporations must be based upon those same actions. Thus the state can only hold high managerial agents accountable criminally for workplace hazards because they exert control over the day-to-day operations and decision making. It is not likely that the state would hold a secretary, treasurer, member of the board, or stockholder, who performs no acts which contribute to hazardous conditions in a workplace, criminally liable. However, it may hold an executive who participates in the decision making process which creates those hazardous conditions so accountable. Therefore, it appears that the dual prosecutions of corporations and individuals best satisfies society's goals of retri-
bution and deterrence, while complying with existing statutory authorization.

The executive who dictates policy as well as the individual who carries it out should account for their actions. The executive should account for his actions just as an accomplice or a conspirator in any plot to do damage to any citizen must do. The corporation should face liability so that its various members will bring pressure to bear upon the corporate officers to ensure that such conduct does not recur in the future. The same principle applies to other corporations who are tempted, in the name of profit, to engage in unlawful conduct at the sacrifice of worker safety. The personal reputation of an executive and the prestige and public image of a corporation make those entities particularly susceptible to the desired deterrent effect. Therefore, in less extreme cases than *Film Recovery Systems*, where imprisonment is not likely, the mere fact of a conviction without imprisonment will act as a deterrent.

In the last analysis, with the *Film Recovery Systems* decision still on appeal at this writing, it may require a significant passage of time to determine its practical effect. How prosecutors, corporate entities, various regulatory agencies, and the public will react is unresolved. Factors important in this determination include but are not limited to the following:

1. Have there been noticeable changes in prosecutorial attitudes toward these types of situations?
2. What does the gauge of public awareness and opinion indicate?
3. Has there been significant rethinking of agency philosophical approaches?
4. Have corporate entities responded in a positive way on the issue of safety?

Although there has not been a large body of data to determine the above, experts have offered some interesting predictions and some case developments are worthy to note.

Immediately after the decision in *Film Recovery Systems* many experts stated opinions on the impact of the prosecution and conviction. While there was no clear consensus as to the import of the decision it had become clear that a debate had developed involving the legal, factual, and societal implications of the case. Some argued that the case would work for society's benefit while others suggested that a murder charge was too extreme. Others have argued that the *Film Recovery Systems* decision will encourage prosecutors to review such cases with a view to possible criminal actions while at the same time having an effect on corporate attitudes.

---

117 Chicago Sun-Times, June 16, 1985:
Noted scholar Marshal Shapo, Northwestern University School of Law Professor, stated that "[t]his case is a remarkable addition to the armament that society has for dealing with dangerous products and processes. Corporate executives are going to look at this decision and are going to tread a little more lightly."

118 Contrast the statement of James F. Neal, successful defense attorney in the 1980 Pinto Prosecution, that "[t]he charge of murder is wild . . . [b]ut the ruling, I believe, expresses the feelings of the community that civil judgments are not effective enough to deter outrageous corporate conduct."

118 Chicago Tribune, June 16, 1985, § 2, at 1, col. 1.

Professor Christopher Stone, University of Michigan Law School said, "[c]ertainly, it is going to
Since then, there have been a number of related cases taken by local prosecutors, as reported in legal and industrial journals. Corporate criminal charges have been brought by local prosecutors in a number of work related injuries and deaths, involving trench cave-ins, exposure to carbon monoxide, and exposure to toxic mercury, among others. In addition, local prosecutors have, in some jurisdictions, created specialized approaches to these cases. Special prosecution units have been set up to investigate workplace deaths.

What is the public perception of this activity and how does that affect agency and corporate attitudes in the area? One indication may be reflected in a Detroit Free Press poll taken the day after the Film Recovery Systems decision. It was reported that eighty percent of those responding did not feel murder was too harsh a charge for negligent employers. Professor William Maakested noted at that time, the “polls show a growing concern about corporate crimes over the last 15 years. . . . [T]he public’s perception of the seriousness of such crimes is rising. . . . Also, the public’s perception of what are acceptable risks in the workplace, the environment, and in consumer products are narrowing.”

While doubts may exist as to the ultimate impact of Film Recovery Systems on the issues discussed immediately above, it appears to have had an immediate impact on agency and corporate attitudes in the area. If Film Recovery Systems type prosecutions have an effect of changing agency philosophy and corporate responsibility, does it not justify such actions? In light of public opinion of local prosecutions, have the desired goals been achieved? It may be too soon to tell. However, reported comments by those in the field shed light on these questions. We must exercise caution, however, in light of the rapidly changing environment, the wide range of conditions and various complexities before formulating any assumptions or trends.

Officials at OSHA might rethink their approaches to these situations. Rather than relying on records inspections as a basis to perform on site inspections, as was the case in Film Recovery Systems, OSHA will now do random on site inspections regardless of the safety history disclosed in a

send a shock wave through the executives of companies that deal in toxic chemicals and expose workers to those chemicals. . . . I think three guilty verdicts is really stunning and is going to draw the attention of prosecutors across the country.” Id. Ralph Nader, consumer advocate, said, “I think this case will properly embolden prosecutors to bring corporate criminal cases, and other judges to stop looking the other way.” Id. “Basically, it is an example of the criminal law catching up with public expectation that well-dressed business executives who engage in criminal activities leading to death or injury should be prosecuted and convicted.” Id.

119 Kendall, Criminal Prosecution at Odds with the OSH Act?, OCCUPATIONAL HAZARDS, Oct. 1986, at 62-63; Kendall, supra note 110, at 51-52; McClory, Murder on the Shop Floor, ACROSS THE BOARD, June 1986, at 82; Plant Executives Indicted for Mercury Poisonings, AFL-CIO NEWS, Oct. 25, 1986, at 6 (In the mercury poisoning of a worker in Pymm Thermometer Co., a set of facts was uncovered that bear a striking resemblance to those in Film Recovery Systems. Agency failure, a pattern of deception by the employers, and ignorance of the work force led to permanent brain damage to an employee.).


King’s County, New York, Los Angeles County, California, and Milwaukee County, Wisconsin District Attorney’s Offices have formed special units to address the problem of workplace fatalities with an eye toward possible criminal prosecutions.

121 Kendall, supra note 119, at 51-52.
company's records. All firms are theoretically vulnerable to such inspections. Corporate officials seem more concerned over civil and possible criminal liability arising out of work related injuries. They are seeking opinions from corporate law firms concerning their potential personal liability in these matters. Some experts feel that funds are more available for safety improvements. An increase in the safety consulting business was evidenced by the tripling of attendance at the 1986 annual Illinois State Chamber of Commerce workshop on safety and health.

VII. Conclusion

If the Film Recovery Systems and related prosecutions have had the effect of sensitizing prosecutorial bodies, regulatory agencies, and corporate entities with regard to worker safety, then important societal goals been achieved. If the ultimate goals of preserving life and health of members of our society who labor in the workplace have been satisfied, then expenditures of societal resources are justified. To save a life is as important as it is to redress a wrong which takes a life. If lives are saved through these types of prosecutions then the efforts in this regard will be more than vindicated. While it remains to history to determine whatever long-term benefits the Film Recovery Systems type of prosecutions will have, the short-term realization has caused a debate which can only inure to the benefit of workers in all industries.

122 Crain's Chicago Business, Mar. 17, 1986, 19, 22. Patrick Tyson, former acting head of OSHA, stated then, "[w]e've had a lot of focus on these cases because they're cases where we dropped the ball." Id. He went on to explain the agency's new policy. "We inspect one out of every 10 workplaces whether the records indicate it or not. Everybody's got a chance." Id. For a discussion of OSHA's Hazard Communication Standard by Patrick Tyson, see Tyson, The Preemptive Effect of the OSHA Hazard Communication Standard on State and Community Right to Know Laws, 62 Notre Dame L. Rev. 1010 (1987).

123 Jay Norco, president of ETA, Inc., a workplace safety and environmental consultant firm feels that "A lot of executives are running scared in terms of liability aspects, especially criminal liability." Crain's Chicago Business, supra note 122, at 22. He continued. "[t]hey'll [companies] have a third party like us come in to make sure they're in compliance, make sure they have the proper permits, and look for situations they might not recognize on a day-to-day basis." Id.

124 Ronald K. Barnard, Chairman of Chemical Industries Council of Illinois stated: "It [Film Recovery Systems] raised the level of consciousness." "We're much more aware of the liabilities that members of our industry can be exposed to." Id. at 19. "If we see something that needs to be corrected, it's a whole lot easier now to get capital funds." Id. at 20.

125 According to Sidney Marder, environmental consultants to the Illinois State Chamber of Commerce, the ISCO 1986 conference on workplace safety grew to 360 firms. Id. at 22.