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# State Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.'s Succeed Where OSHA Failed?

S. Douglas Jones  
*University of Kentucky*

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# COMMENTS

## State Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.'s Succeed Where OSHA Failed?

### INTRODUCTION

In 1983, Stefan Golab, a sixty-one-year-old immigrant worker, died from inhaling cyanide fumes while working at the Film Recovery Systems plant in suburban Chicago.<sup>1</sup> The working conditions at the plant at the time of his death resembled an "industrial gas chamber."<sup>2</sup> The Occupational Safety and Health Administration (OSHA) issued a citation and fined Film Recovery less than \$5,000.<sup>3</sup> However, the Cook County State's attorney charged the company and its officials with criminal conduct.<sup>4</sup> In similar cases, corporate defendants have argued that the Occupational Safety and Health Act of 1970 (OSH Act) preempts<sup>5</sup> these state criminal prosecutions.<sup>6</sup>

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<sup>1</sup> *People v. O'Neil*, No. 85-1853, slip. op. (Ill. App. docketed July 1, 1985).

<sup>2</sup> Metz, *Death by Oversight: Because OSHA Fails to Protect Workers, Local D.A.'s are Hauling Employers Into Criminal Court*, STUDENT LAW., Sept. 1988, at 16.

<sup>3</sup> *Getting Away With Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations*, H.R. REP. No. 1051, 100th Cong., 2d Sess. 2 (1988).

<sup>4</sup> *Id.*

<sup>5</sup> Preemption doctrine is grounded in the supremacy clause of the Constitution, which declares that "the Laws of the United States shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Existing federal laws may preempt state action in the same field in three ways. The first, express preemption, occurs where the federal statute explicitly declares that it supercedes any state laws in the particular fields. The second, implied preemption occurs where Congressional intent to preempt state law is inferred because the scheme of federal regulation is so comprehensive that it is said to occupy the field, leaving no room for state regulation. Implied preemption is applicable where a dominant federal interest exists. Finally, preemption of state law occurs where there is a conflict that makes compliance with both federal and state law practically impossible.

For a discussion of preemption principles and the OSH Act, see generally Note, *infra* note 6, at 540-53 and note 12.

<sup>6</sup> See Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535 (1987).

Debate on the preemption of state criminal prosecutions is unsettled, but it appears that anti-preemption forces have gained the advantage.<sup>7</sup> Although OSHA has no formal position on the issue<sup>8</sup> and the Supreme Court recently declined to decide it,<sup>9</sup> strong arguments against preemption have come from academicians,<sup>10</sup> Congress,<sup>11</sup> the Justice Department,<sup>12</sup> and the high courts of three major industrial states.<sup>13</sup>

With the proliferation of state prosecutions for safety related crimes in the workplace, questions regarding the prosecutions' effectiveness and proper application become important.<sup>14</sup> This Comment addresses the effectiveness of such criminal prosecutions as a means of deterring safety-related crime in the workplace and how such prosecutions can best effectuate this goal. Part I

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<sup>7</sup> See *infra* notes 48-66 and accompanying text.

<sup>8</sup> See Dockser, *Michigan Court Rules Company Official Can Be Prosecuted in Employee's Death*, WALL ST. J., July 12, 1989, § B, at 5 (OSHA spokesman declares that agency still "ha[s] no formal position on the preemption issue").

<sup>9</sup> *Asta v. Illinois*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 52 (1989).

<sup>10</sup> See *supra* note 6.

<sup>11</sup> See H.R. REP. NO. 1051, 100th Cong., 2d Sess. 2 (1988). This House Committee on Government Relations report was based on a study completed by its Employment and Housing Subcommittee. The Committee recommended that OSHA take the official position that the OSH Act "does not preempt the use of historic police powers by the State to prosecute employers for acts against their employees that constitute crimes under State law," and suggested that Congress increase the criminal penalties of the Act and strengthen enforcement efforts. *Id.* at 5.

<sup>12</sup> See *infra* notes 65-66 and accompanying text.

<sup>13</sup> *People v. Hegedus*, 443 N.W.2d 127 (Mich. 1989) (allowing the prosecution of the supervisor of an employee of Jackson Enterprises who died of carbon monoxide intoxication while working in a company-owned van whose undercarriage and exhaust system were deteriorated); *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989), *cert. denied sub nom. Asta v. Illinois*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 52 (1989). The Illinois court allowed the state to prosecute Chicago Magnet Wire Corporation and five of its officers and agents on charges of aggravated battery and reckless conduct. The indictments charged that the defendants unreasonably exposed 42 employees to "'poisonous and stupefying substances' in the workplace and prevented the employees from protecting themselves by 'failing to provide necessary safety instructions and necessary safety equipment' " *Id.* at 963. *People v. Pymm* (C.A.N.Y. Oct. 16, 1990) (1990 WL 153774) (affirming convictions of corporate and individual defendants on charges, including assault and reckless endangerment, stemming from the unsafe operation of a mercury recovery operation by a thermometer manufacturer and its maintenance corporation, which caused an employee to suffer mercury poisoning).

<sup>14</sup> These "safety-related" crimes include manslaughter, battery, and reckless conduct. The criminal actors are company managers and owners whose neglect of and disregard for worker safety is such that it meets the *mens rea* requirements of criminal statutes.

Violation of these criminal statutes should not be confused with violation of the relatively few criminal provisions of the OSH Act. See *infra* notes 29-37 and accompanying text.

presents the setting of the OSHA preemption debate.<sup>15</sup> Part II generally examines criminal prosecutions of corporations and individual corporate actors.<sup>16</sup> Part III discusses the desirability of allowing state criminal prosecutions against individuals responsible for safety-related crimes in the workplace.<sup>17</sup> Finally, this Comment concludes that criminal prosecutions, particularly those involving incarceration, are effective means of deterring unsafe conduct in the workplace and that the OSH Act was not intended to preempt such state action.<sup>18</sup>

## I. THE SETTING OF THE OSHA PREEMPTION DEBATE

### A. OSHA

In 1970, Congress passed the OSH Act,<sup>19</sup> which formed a new agency within the Department of Labor, whose purpose was to regulate and enforce worksite safety standards.<sup>20</sup> The Occupational Safety and Health Administration (OSHA) is the administrative agency created "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."<sup>21</sup> Congress gave the Secretary of Labor the responsibility of establishing health and safety standards for workplaces and gave OSHA the power to enforce these standards through routine inspections and investigations.<sup>22</sup>

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<sup>15</sup> See *infra* notes 19-71 and accompanying text.

<sup>16</sup> See *infra* notes 72-121 and accompanying text.

<sup>17</sup> See *infra* notes 122-66 and accompanying text.

<sup>18</sup> See *infra* notes 167-71 and accompanying text.

<sup>19</sup> 29 U.S.C. §§ 651-78 (1982).

<sup>20</sup> Members of Congress expressed concern that the state regulations were inadequate and underenforced. See, e.g., 116 CONG. REC. 37,628 (1970) (statement of Sen. Muskie) ("Only four States have adequate standards. Nowhere are enforcement mechanisms and penalties adequate to force industry compliance with existing standards."), reprinted in SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 513 (1971) [hereinafter LEGISLATIVE HISTORY]. Members of Congress repeatedly noted that the United States has more game wardens than workplace health and safety inspectors. See, e.g., *id.* at 38,387 (Statement of Rep. Gaydos) ("Elk and deer are better protected than working men and women."), reprinted in LEGISLATIVE HISTORY, *supra* at 1033.

<sup>21</sup> Occupational Safety and Health Act, 29 U.S.C. § 651(b) (1982).

<sup>22</sup> See 29 U.S.C. § 657 (1982). OSHA annually makes about 60,000 safety inspections. See *Fewer Federal OSHA Inspections in 1988 Due to Focus on Lengthier Health Inspections*, 16 O.S.H. Rep. (BNA) No. 49, at 1415 (May 13, 1987). The agency also inspects all workplaces where a death occurs or where there is an accident resulting in the hospitalization of five or more employees. See DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., OSHA FIELD OPERATIONS MANUAL ¶ 324 (1983).

Violations<sup>23</sup> discovered in these inspections can be punished with abatement orders, civil penalties, or criminal sanctions.<sup>24</sup>

This regulatory enforcement scheme is regarded by many as a failure.<sup>25</sup> Indeed, OSHA has been criticized since its inception.<sup>26</sup> Recent commentators propose a number of reasons for the failure, including ineffective inspections and sanctions that are too weak to deter unsafe conduct.<sup>27</sup> The criminal sanctions of the OSH Act are frequent targets of this criticism.<sup>28</sup>

OSHA has authority to seek criminal prosecution for workplace violations in three situations: (1) the willful violation of a specific OSHA standard, resulting in death to an employee,<sup>29</sup> (2) the giving of advance notice of an OSHA inspection,<sup>30</sup> and (3) the knowing falsification of statements or documents supplied to OSHA.<sup>31</sup> However, OSHA has no independent power to prosecute and must refer these cases to the Department of Justice for possible criminal action.<sup>32</sup> The criminal prosecution of these cases requires both the recommendation of the Justice Department and the agreement of the local U.S. attorney's office, which has ultimate responsibility

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<sup>23</sup> These may be violations of a specific OSHA regulation or of the general duty to provide a workplace free from recognizable hazards. *International Union v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575-76 (D.C. Cir. 1987).

<sup>24</sup> 29 U.S.C. §§ 658-59, 666 (1982). Abatement orders are administrative orders that require a regulated party to abate, or cease, operations until a specified action is taken. Specified action usually includes the bringing of the activities of the regulated party into conformity with administrative guidelines, such as making an unsafe worksite safe.

<sup>25</sup> See generally Metz, *supra* note 2, at 13.

<sup>26</sup> For a discussion of criticisms of OSHA, see B. MINTZ, OSHA. HISTORY, LAW AND POLICY 339-53 (1984).

<sup>27</sup> Metz, *supra* note 2, at 13-15, 19; Note, *supra* note 6, at 539-40 nn.30-34.

<sup>28</sup> Note, *supra* note 6, at 539-40. "Advocates of strong workplace safety regulation have found the agency too weak." *Id.* at 539; see also Koprowicz, *Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?*, 52 BROOKLYN L. REV. 183 (1986); Radin, *Corporate Criminal Liability for Employee-endangering Activities*, 18 COLUM. J.L. & Soc. PROBS. 39, 63-67 (1983); see *infra* notes 29-37 and accompanying text.

<sup>29</sup> As originally enacted, the maximum criminal penalty was a \$10,000 fine plus six months imprisonment. See 29 U.S.C. § 666(e) (1982). In 1984, Congress raised the monetary penalties for all federal crimes. The maximum fine for a misdemeanor resulting in death is now \$250,000 for individuals and \$500,000 for corporations. See 18 U.S.C. § 3623 (Supp. III 1985). Although a top Justice Department official said that these fines would apply to OSHA violations, see *Safety Violations Resulting in Death Punishable by High Fines, Official Says*, 17 O.S.H. Rep. (BNA) No. 12, 483 (Aug. 19, 1987), the issue remains untested.

<sup>30</sup> 29 U.S.C. § 666(f) (1982) (maximum penalty is a \$1,000 fine plus six months imprisonment).

<sup>31</sup> *Id.* § 666(g) (maximum penalty is a \$10,000 fine plus six months imprisonment).

<sup>32</sup> See H.R. REP. NO. 100-1051, *supra* note 3, at 3.

for prosecuting the case.<sup>33</sup> Since the establishment of OSHA in 1970, a mere forty-two cases have been referred to the Justice Department for criminal prosecution.<sup>34</sup> Only fourteen of those cases were prosecuted, and only ten resulted in convictions. The ten convictions carried punishments of fines or suspended sentences.<sup>35</sup> In fact, no one has been incarcerated for a criminal violation of the OSH Act.<sup>36</sup> Because of the infrequency and ineptness of these prosecutions, state and local law enforcement officials have started using their police powers to prosecute company officials for knowing and reckless conduct resulting in death or injury in workplaces.<sup>37</sup>

### B. State Prosecutions and the Preemption Debate

Although state prosecutions for workplace safety crimes are still relatively scarce,<sup>38</sup> they have been brought with "increasing frequency" during the 1980's,<sup>39</sup> largely in response to the abysmal performance of OSHA.<sup>40</sup> A defense often raised in these cases asserts that the state prosecutions are preempted by the OSH Act's criminal provisions.<sup>41</sup>

The high courts of Michigan, Illinois and New York, the only high courts that have considered this issue, ruled that the OSH Act does not preempt state criminal prosecutions of employers who maintain hazardous worksites.<sup>42</sup> However, in *Sabine Consolidated*,

<sup>33</sup> *Id.* at 3-4.

<sup>34</sup> *Id.* at 4-5. See also Note, *supra* note 6, at 538.

<sup>35</sup> H.R. REP. NO. 100-1051, *supra* note 3, at 4-5.

<sup>36</sup> *Id.*

<sup>37</sup> See *infra* notes 38-40 and accompanying text.

<sup>38</sup> But see Metz, *Los Angeles Gets Results With Roll-Out Unit*, STUDENT LAW., Sept. 1988, at 16. The Los Angeles County D.A.'s office assumes an active role in safety-related prosecutions. The office's program, anchored by a 24-hour "roll-out unit" able to respond to the scene of "traumatic occupational fatalities," investigated more than 80 workplaces and caused about 12 cases to be prosecuted from the beginning of the program in 1985 until the publication of Metz's article in 1988.

<sup>39</sup> See H.R. REP. NO. 100-1051, *supra* note 3, at 4.

<sup>40</sup> See Note, *supra* note 6, at 540.

<sup>41</sup> See generally Note, *supra* note 6 (concluding that state criminal prosecutions should be permitted as a supplement to a stronger OSH Act).

<sup>42</sup> *People v. Hegedus*, 443 N.W.2d 127 (Mich. 1989) (supervisor charged with involuntary manslaughter for death of employee from carbon monoxide inhalation); *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989), cert. denied *sub nom.*, *Asta v. Illinois*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 52 (1989) (corporation and five of its officers and agents charged with aggravated battery and reckless conduct in unreasonably exposing employees to poisonous substances); *People v. Pymm*, (C.A.N.Y. Oct. 16, 1990) (1990 WL

*Inc. v State*,<sup>43</sup> a Texas appellate court held that the OSH Act does have preemptive effect in this kind of case.

The conflict in these cases, and thus the crux of the OSH Act preemption issue, concerns the interpretation of Sections 18<sup>44</sup> and 4(b)(4)<sup>45</sup> of the Act. In *Sabine*,<sup>46</sup> the Texas court found that these sections should be read together, because Congress intended to occupy entirely the field of workplace safety regulation. The court further ruled that state criminal prosecutions effectively establish new workplace safety standards, thus contravening Section 18.<sup>47</sup>

Both *People v Hegedus*<sup>48</sup> and *People v Chicago Magnet Wire Corp.*<sup>49</sup> refuted the "occupying the field" argument<sup>50</sup> by noting

153774) (two corporations and their two controlling officers convicted on five criminal charges including first and second degree assault and reckless endangerment because of the unsafe operation of a thermometer business).

<sup>43</sup> 756 S.W.2d 865 (Tex. Ct. App. 1988). *Contra State ex rel. Cornellier v. Black*, 425 N.W.2d 21 (Wis. App. 1988) (the state's "local interest" in protecting the public against crime required a finding of a "compelling congressional direction" as a prerequisite to preemption of state action and no such compelling direction was evident in the OSH Act); *People v. Pymm*, 151 A.D.2d 133, 546 N.Y.S.2d 871 (N.Y. App. Div. 1989) (the Appellate Division of the New York Supreme Court held that the state did not need the approval of OSHA officials to criminally prosecute defendants for conduct that was regulated by the OSH Act).

<sup>44</sup> 29 U.S.C. § 667 (1982), which provides,

(a) Assertion of state standards in absence of applicable federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for Development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

<sup>45</sup> 29 U.S.C. § 653(b)(4) (1982), which provides,

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 or employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

<sup>46</sup> *Sabine Consolidated, Inc. v. State*, 756 S.W.2d 865, 868 (Tex. Ct. App. 1988).

<sup>47</sup> *Id.*

<sup>48</sup> 443 N.W.2d at 127.

<sup>49</sup> 534 N.E.2d at 962.

<sup>50</sup> Note the difference in the interpretation of "fields." *Compare Sabine*, 756 S.W.2d at 868 (the Texas court considers the field to be the overall regulation of workplace safety) with *Chicago Magnet Wire*, 534 N.E.2d at 962 (the Supreme Court of Illinois considers it to be the more narrow field of criminal regulation of workplace safety).

that since the regulation of criminal conduct is a field “traditionally occupied by the States . . . [w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>51</sup> Neither court found such a purpose.<sup>52</sup> The *Chicago Magnet Wire* court proposed that the purpose of Section 18 was to provide a nationwide floor of protection.<sup>53</sup> In *Hegedus*, the Michigan court pointed out that Section 18(a) preserves the state’s jurisdiction over issues for which no federal standard exists, and allows states, under Section 18(b), to formulate their own standards for workplace safety and health, subject to OSHA approval.<sup>54</sup> “The act thus contemplates an active role by the states in all areas of regulation.”<sup>55</sup> The *Hegedus* court also cited *Chicago Magnet Wire* as indicating Congress’ intention that the OSH Act’s criminal penalties not be the only sanctions available for punishment of egregious conduct that results in serious injuries or death to workers.<sup>56</sup> Both *Hegedus* and *Chicago Magnet Wire* present thorough, well-reasoned arguments against the preemption of state workplace safety prosecutions by the OSH Act.

Recently, the United States Supreme Court declined to decide this preemption issue by dismissing the appeal of *Chicago Magnet Wire*,<sup>57</sup> thus clearing the way for more state criminal trials.<sup>58</sup> Since the U.S. Supreme Court refused to consider the preemption question and OSHA has not taken a formal position on the issue,<sup>59</sup> the permissibility of criminal workplace safety prosecutions must be decided separately by the courts of each state. It appears the “anti-

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<sup>51</sup> *Hegedus*, 443 N.W.2d at 131; *Chicago Magnet Wire*, 534 N.E.2d at 966 (both quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

<sup>52</sup> *Hegedus*, 443 N.W.2d at 138; *Chicago Magnet Wire*, 534 N.E.2d at 970.

<sup>53</sup> 534 N.E.2d at 967; see also Metz, *supra* note 2, at 19 (quoting Jay Magnuson, an Illinois prosecutor, “in my conversations in Washington D.C., with different committees in Congress, it is clear that [Congress was] quite willing to say: All we want is a floor [on health and safety standards. The states] can have their own state plans, as long as they meet the minimum federal standard.”).

<sup>54</sup> 443 N.W.2d at 136.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 137.

<sup>57</sup> *Asta v. Illinois*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 52, cert. denied, sub nom (1989).

<sup>58</sup> See Wermiel, *Justices Let States Prosecute Executives For Job Hazards Covered by U.S. Law*, WALL ST. J., Oct. 3, 1989, § A at 4 (Supreme Court’s refusal to hear the appeal means that “states are likely to step up safety-related prosecutions.”).

<sup>59</sup> See Dockser, *supra* note 8, § B at 5.



preemption” forces have the most momentum in these state court decisions.<sup>60</sup>

In addition to the recent *Hegedus*, *Chicago Magnet Wire*, and *Pymm* decisions from the high courts of Michigan, Illinois, and New York<sup>61</sup> the Report of the House of Representatives’ Committee on Government Operations<sup>62</sup> is likely to carry significant weight in future court decisions. The report urges OSHA to take the official position “that the Federal OSH Act, as written, does not preempt the use of historic police powers by the States to prosecute employers for acts against their employees that constitute crimes under State law ”<sup>63</sup> This report further contends that, “[n]othing in the OSH Act or its legislative history suggests that Congress intended to shield employers from criminal liability in the workplace or to preempt enforcement of state criminal laws of general application, such as murder, manslaughter, and assault.”<sup>64</sup>

The Department of Justice, which is responsible for enforcing the criminal sanctions of the OSH Act, responded to the report with a letter to the chairman of the Committee.<sup>65</sup> Regarding the preemptive effect of the criminal penalties of the OSH Act on state criminal prosecutions of employers, the letter read, “it is our view that no such general preemption was intended by Congress . . . we see nothing in the OSH Act or its legislative history which indicates that Congress intended . . . to deprive employees of the protection provided by State criminal laws of general applicability ”<sup>66</sup>

In view of the holdings of *Hegedus* and *Chicago Magnet Wire*,<sup>67</sup> the recommendations of the Committee on Government Operations<sup>68</sup> and the Justice Department,<sup>69</sup> and the U.S. Supreme Court’s refusal to decide the issue,<sup>70</sup> it appears that state criminal prosecutions of

<sup>60</sup> See *supra* notes 42-43. The cases holding that OSH Act has preemptive effect were decided prior to the Michigan and Illinois Supreme Court’s rulings and before the issuance of the report of the House of Representatives’ Committee on Government Operations. The most recent decision on the preemption issue was the reversal of a New York Supreme Court decision, so that the law of that state now permits state criminal prosecutions. *People v. Pymm*, 546 N.Y.S.2d at 871.

<sup>61</sup> See *supra* note 42.

<sup>62</sup> H.R. REP. No. 100-1051, *supra* note 3, at 5.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 9.

<sup>65</sup> See *Chicago Magnet Wire*, 534 N.E.2d at 970.

<sup>66</sup> *Id.*

<sup>67</sup> See *supra* notes 42-56 and accompanying text.

<sup>68</sup> See *supra* notes 61-64 and accompanying text.

<sup>69</sup> See *supra* notes 65-66 and accompanying text.

<sup>70</sup> See *supra* notes 57-60 and accompanying text.

individual corporate actors, particularly employers, will continue to increase. Yet, even if these prosecutions are legally permissible, one must still consider their practical effectiveness and decide if they are indeed a justifiable means of protecting the state's interest in the safety of its citizens.<sup>71</sup>

## II. CORPORATE CRIMINAL PROSECUTIONS

The merits of criminal prosecutions of corporations and corporate actors have been the subject of much critical discussion.<sup>72</sup> The primary justification for these prosecutions is their deterrent effect on subsequent corporate decision making.<sup>73</sup> This deterrence is achieved through the use of two basic criminal penalties—fines and incarceration—and through social sanctions, such as loss of reputation among peers.<sup>74</sup> However, the effectiveness of these sanctions has been criticized, particularly as applied to the corporate entity.<sup>75</sup> An overview of the debate concerning criminal prosecutions in the corporate setting is necessary before examining the particular application of criminal sanctions in unsafe workplace prosecutions.<sup>76</sup>

### A. *The Corporation as Defendant*

Corporations, which lack a physical body to incarcerate, only recently became susceptible to criminal charges.<sup>77</sup> Corporations also lack a mind able to form the *mens rea* required to commit a crime.<sup>78</sup> However, in 1909 the U.S. Supreme Court held that a corporation could be criminally prosecuted in limited circum-

<sup>71</sup> See *infra* notes 72-166 and accompanying text.

<sup>72</sup> See, e.g., Note, *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

<sup>73</sup> See generally W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 1.5, at 22-29 (2d ed. 1986).

<sup>74</sup> Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 49-50 (1978).

<sup>75</sup> See *infra* notes 77-121 and accompanying text.

<sup>76</sup> See *infra* notes 122-66 and accompanying text.

<sup>77</sup> See Radin, *Corporate Criminal Liability for Employee-endangering Activities*, 18 COLUM. J.L. & SOC. PROBS. 39, 45-46 (1983); see generally Coffee, "No Soul to Damn: No Body to Kick" An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981).

<sup>78</sup> See 1 U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *WORKING PAPERS* 184 (1970); G. WILLIAMS, *CRIMINAL LAW* § 279, at 856 (2d ed. 1961); Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 6-7 (1928).

stances.<sup>79</sup> Currently, a corporation may be prosecuted for homicide in some jurisdictions<sup>80</sup> and held criminally liable for a variety of culpable conduct, ranging from price-fixing to manslaughter.<sup>81</sup>

Although the *mens rea* element of a crime is now imputed to the corporation through its agent, the historic dilemma created by the lack of a corporate body that could be jailed remains problematic. Incarceration, one of the major deterrent forces available to prosecutors,<sup>82</sup> cannot be applied against a corporation.<sup>83</sup> The absence of incarceration as an available sanction obviously weakens the overall deterrent effect of criminal liability and puts the burden of deterrence on financial penalties and social stigma.<sup>84</sup>

The indirect sanction of social stigma is premised on the belief that a corporation will be "shamed" into improving its conduct or will alter its behavior to protect its public image.<sup>85</sup> Although this premise is theoretically sound, its application is mostly ineffective. Generally, only larger corporations have public images of enough economic significance that fear of their damage will deter criminal conduct.<sup>86</sup> The fact that most corporations are not large greatly diminishes the practical effectiveness of social stigma as a deterrent.<sup>87</sup>

Financial penalties must carry the burden of making criminal sanctions against corporations effective, but fines have failed.<sup>88</sup> The failure can be attributed to the following three reasons: low fines,<sup>89</sup> the "deterrence trap,"<sup>90</sup> and "overspill."<sup>91</sup>

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<sup>79</sup> See *New York Cent. R.R. v. United States*, 212 U.S. 481 (1909).

<sup>80</sup> See Comment, *Corporate Criminal Liability for Homicide: Has the Fiction Been Extended Too Far?*, 4 J.L. & Com. 95, 100-04 (1984) (the jurisdictions that allow prosecution of a corporation for homicide include New York, New Jersey, and Kentucky).

<sup>81</sup> *Id.*

<sup>82</sup> See *infra* note 85.

<sup>83</sup> See *supra* note 77.

<sup>84</sup> See generally Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1142; Note, *supra* note 72.

<sup>85</sup> See Comment, *supra* note 74, at 50; Geis, *Criminal Penalties for Corporate Crimes*, 8 CRIM. L. BULL. 377 (1972) (Geis concludes that criminal sanctions involving incarceration are probably the most effective deterrent).

<sup>86</sup> The public image of concern is the image with consumers, who could allocate their money away from the corporate bad actor. Small manufacturers generally do not expend significant assets to foster consumer identification with their products. It is the large corporation, which has an economically significant reputation with consumers, that is adversely affected by a social stigma. See Maakestad, *A Historical Survey of Corporate Homicide in the United States*, 69 ILL. B.J. 772, 773 (1981).

<sup>87</sup> See *infra* note 141.

<sup>88</sup> See Geis, *supra* note 85, at 381.

<sup>89</sup> See *infra* notes 92-100 and accompanying text.

<sup>90</sup> See *infra* notes 101-05 and accompanying text.

<sup>91</sup> See *infra* notes 106-07 and accompanying text.

Statutory fines have "exceedingly low" maximum limits,<sup>92</sup> and even these low limits are seldom recommended by prosecutors and rarely imposed by judges.<sup>93</sup> Indeed, many corporations view such fines as license fees or an expected cost of doing business.<sup>94</sup> A now famous example of the insignificance of corporate criminal fines was calculated by Professor Geis using the amount levied against General Electric in the 1961 settlement of price fixing charges against the corporation.<sup>95</sup> He determined that the \$437,500 fine affected G.E. to the extent that a \$3 parking fine would affect a man with an annual income of \$175,000.<sup>96</sup>

Economic theory suggests that fines will have a deterrent effect only if the "expected punishment cost" of the proscribed action exceeds the expected benefit.<sup>97</sup> Unfortunately, fines are rarely high enough to create a sufficient expected punishment cost.<sup>98</sup> Two widely recognized causes of low fines are the "deterrence-trap"<sup>99</sup> and "overspill."<sup>100</sup>

The "deterrence-trap" argument begins with the economic principle that the expected punishment cost must exceed the expected gain from the criminal behavior.<sup>101</sup> This "cost" is the fine, or penalty, discounted by the risk of apprehension and conviction.<sup>102</sup> Professor Coffee gave the following example: "if the expected gain were \$1 million and the risk of apprehension were 25%, the penalty would have to be raised to \$4 million in order to make the expected punishment cost equal the expected gain."<sup>103</sup> Obviously, a large

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<sup>92</sup> See Radin, *supra* note 77, at 56; see, e.g., *supra* notes 29-31 and accompanying text.

<sup>93</sup> Coffee, *supra* note 77, at 406.

<sup>94</sup> See Note, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 287 (1961).

<sup>95</sup> Geis, *supra* note 85, at 381. The indictment covered almost \$7 billion worth of fixed prices. See Note, *supra* note 94, at 287.

<sup>96</sup> Geis, *supra* note 85, at 381. The fine amounted to 0.1% of G.E.'s total profit and 0.3% of its net profit for the year. Coffee, *supra* note 77, at 405 n.60.

<sup>97</sup> See generally R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* § 7.2, at 357-62 (2d ed. 1977).

<sup>98</sup> See *supra* notes 92-96 and accompanying text.

<sup>99</sup> See *infra* notes 101-05 and accompanying text.

<sup>100</sup> See *infra* notes 106-07 and accompanying text.

<sup>101</sup> Koprowicz, *Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?*, 52 BROOKLYN L. REV. 183, 208 (1986) (citing Coffee, *supra* note 77, at 407-08).

<sup>102</sup> *Id.*

<sup>103</sup> Coffee, *supra* note 77, at 389.

corporation with vast assets must fear a significant fine or it will not be deterred. The amount of the fine must be enormous to compensate for the low the risk of apprehension.<sup>104</sup> Hence comes the "trap"—an adequate punishment cost cannot be set because it will exceed the assets of the corporation. When the fine is larger than the assets of the corporation the corporation will not be deterred, since it does not expect that a court will force the company to cease operations, causing loss of employment for many workers, simply because it cannot pay a fine.<sup>105</sup>

The "overspill" problem also is concerned with the imposition of a severe fine, or any fine, on the corporation. The concern, however, is not that an amount cannot be determined, rather it is that the cost of any fine against the corporation is passed through the entity to innocent or less culpable members of society, including shareholders, creditors, employees, and consumers.<sup>106</sup> Equity fines have been suggested as a means to keep the cost within the corporation, but such fines have not yet proven successful.<sup>107</sup>

The general ineffectiveness of criminal sanctions against the corporate entity has not resulted in an abandonment of these prosecutions. It does encourage the search for more effective means of deterring criminal conduct in the corporate setting.

### *B. The Corporate Individual as Defendant*

The deterrent effect of criminal stigmatization and financial sanctions on corporate misconduct is weak. These weaknesses often are offered as justifications for the need to deter individuals acting within the corporation.<sup>108</sup> Individuals are more likely to be deterred by

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<sup>104</sup> This is so because "most corporate crimes seem highly concealable because victims of many corporate crimes do not necessarily know of their injury," and because of the terribly thin enforcement and inspection staffs of most regulatory agencies. *Id.* at 390.

<sup>105</sup> See generally Coffee, *supra* note 77; Note, *supra* note 94. But see Note, *supra* note 72, at 1365-68.

<sup>106</sup> See Radin, *supra* note 77, at 53. When a severe fine is imposed on a corporation, the cost is likely to be passed on to several groups. Shareholders suffer a loss on their investment. Creditors face increased risk of forfeiture on their loans. Employees may lose their jobs. Consumers may be forced to pay higher prices for the products of the corporation.

<sup>107</sup> *Id.* at 54. Equity fines are enforced by ordering the guilty corporation to issue to a fund equity shares with value equivalent to a specified cash fine. The victims of the corporate misconduct are the beneficiaries of this independently administered fund. Since the corporation's capital is not drained, the short-term burden is lessened and creditors and employees are affected less. *Id.*

<sup>108</sup> Koprowicz, *supra* note 101, at 223.

prosecutions because they can be incarcerated and have more to fear from criminal stigmatization than the corporation.<sup>109</sup>

The vulnerability of corporate actors to criminal prosecutions has been a contested issue.<sup>110</sup> The development of corporate criminal liability presented the question of whether individual corporate actors, previously liable,<sup>111</sup> would remain subject to criminal prosecution. The U.S. Supreme Court, in *United States v. Dotterweich*,<sup>112</sup> held that such prosecutions were allowed. In *United States v. Park*,<sup>113</sup> the Court set the modern standard for the criminal liability of corporate officers: where corporate officers are in positions of authority such that the acts constituting an offense are under their direct supervision, they can be held liable for that offense. The *Park* standard<sup>114</sup> established that indirect actors, as well as direct actors, are subject to criminal prosecution for corporate actions.

Although individual corporate actors are subject to criminal prosecutions, some commentators believe that such prosecutions are an improper means of deterrence.<sup>115</sup> The arguments against prosecuting the individual actor are typically based on the following factors: the moral neutrality of the conduct,<sup>116</sup> difficulty in identifying the responsible individuals,<sup>117</sup> indemnification of the individual by the corporation,<sup>118</sup> the infrequent imposition of imprisonment as a sanction against executives acting within their corporate role,<sup>119</sup> and constitutionally protected procedural rights of the individual.<sup>120</sup>

<sup>109</sup> See *infra* notes 163-64 and accompanying text.

<sup>110</sup> For a brief discussion of the history of the individual corporate officer or manager as a defendant, see Von Ebers, *The Application of Criminal Homicide Statutes to Work-Related Deaths: Mens Rea and Deterrence*, 1986 U. ILL. L.F. 980, 980-81. For a more in-depth review, see Note, *supra* note 72, at 1259-75.

<sup>111</sup> See Von Ebers, *supra* note 110, at 980.

<sup>112</sup> 320 U.S. 277 (1943).

<sup>113</sup> 421 U.S. 658 (1975) (president of a large national food store chain was convicted of causing the adulteration of food).

<sup>114</sup> [T]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instances, or promptly to correct, the violation complained of, and that he failed to do so.

*United States v. Park*, 421 U.S. at 658, 673-74 (1975).

<sup>115</sup> See Radin, *supra* note 77, at 57-59; see generally Mukatis and Brinkman, *Managerial Liability for Health, Safety and Environmental Crime: A Review and Suggested Approach to the Problem*, 25 AM. BUS. L.J. 323 (1987).

<sup>116</sup> See *infra* notes 125-35 and accompanying text.

<sup>117</sup> See *infra* notes 136-44 and accompanying text.

<sup>118</sup> See *infra* note 145 and accompanying text.

<sup>119</sup> See *infra* notes 146-51 and accompanying text.

<sup>120</sup> See *infra* notes 152-57 and accompanying text.

The importance and relative strength of these factors vary according to the particular type of criminal charge.<sup>121</sup> Since this Comment is concerned with prosecutions for criminal conduct causing deaths or injuries in the workplace, the factors underlying the propriety of individual prosecutions for corporate misconduct are discussed in the context of unsafe workplaces.

### III. CRIMINAL PROSECUTIONS FOR WORKPLACE SAFETY CRIMES

While recognizing the existence of arguments against criminal prosecutions of individual corporate actors,<sup>122</sup> this section exposes the invalidity of the reasons advanced in opposition to individual prosecutions for workplace safety crimes<sup>123</sup> and shows why these prosecutions are proper deterrents to individual corporate actors.<sup>124</sup>

#### A. *Arguments Against the Prosecution of Individuals for Workplace Safety Crimes*

##### 1. *Moral Neutrality*

Moral neutrality is based on the lack of any clear correlation between what is commercially acceptable and what is legally, or socially, acceptable behavior.<sup>125</sup> "[W]hen [businessmen] violate the law, they do not conceive of themselves as criminals . . . businessmen fight whenever words that tend to break down this rationalization are used."<sup>126</sup> Some activities, such as price-fixing and bribery of foreign officials, are well-established and acceptable in the conventional businessperson's "moral code."<sup>127</sup> Additionally, the problem is not limited to the perspective of corporate managers and officers.

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<sup>121</sup> For example, moral blameworthiness is clearer when an employer creates extremely hazardous working conditions that cause the death of an employee than when a corporate accountant embezzles funds.

<sup>122</sup> See Radin, *supra* note 77, at 51-59. These arguments include the morally neutral nature of the offense, the problem of identifying the culpable actors, indemnification, the hesitancy of judges to impose incarceration in these cases, and constitutional concerns.

<sup>123</sup> See *infra* notes 125-57 and accompanying text.

<sup>124</sup> See *infra* notes 158-66 and accompanying text.

<sup>125</sup> Comment, *supra* note 74, at 41. There is no clear code of ethics for businessmen, but increased emphasis on business ethics both in universities and the business community soon may provide a more certain direction.

<sup>126</sup> Geis, *supra* note 85, at 383 (citing SUTHERLAND, WHITE COLLAR CRIME 225, 222 (1949)).

<sup>127</sup> See Comment, *supra* note 74, at 41 (such activities are not considered sufficiently outrageous to warrant harsh criminal sanctions).

Judges and juries often are reluctant to convict someone for criminal conduct for the benefit of his corporation.<sup>128</sup> For example, many judges refuse to consider price-fixing to be immoral conduct if it is not accompanied by threats or coercion.<sup>129</sup> Similarly, juries in joint trials frequently acquit individual defendants while convicting the corporation.<sup>130</sup> Professor Herbert Packer suggests that such acquittals result from corporate criminal behavior failing "to excite the necessary sense of indignation and outrage that it takes for criminal sanctions to be unsparingly applied."<sup>131</sup>

Since the criminal behavior leading to unsafe workplace prosecutions rarely will fail to be reprehensible,<sup>132</sup> the issue of moral neutrality will be problematic only in exceptional cases.<sup>133</sup> Generally, criminal prosecutions for worksite crimes are instituted by the state only in egregious situations.<sup>134</sup> When the reprehensible conduct involved in these cases is presented in court, the jury will feel that the individual has violated a public trust that white-collar workers owe, a violation that requires severe punishment.<sup>135</sup>

## 2. Identifying Culpable Individuals

Prosecutors admit that a difficult problem in bringing a criminal indictment in the corporate setting is determining who is responsible.<sup>136</sup> Large corporations often are able to shield the identity of

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<sup>128</sup> *Id.* at 42.

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g., *Pevely Dairy Co. v. United States*, 178 F.2d 363, 370-71 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) ("the verdict of not guilty as to the individual defendants certainly stripped the verdict of guilty as to the corporation defendants of all semblance of logic or reason."); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929) ("how an intelligent jury could have acquitted any of the defendants we cannot conceive").

<sup>131</sup> H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 359 (1968). Packer did not reject the use of the criminal sanction in the "common regulatory sphere." However, he did suggest that the sanction would have to be expanded in scope if a better correlation between punishment and crime is to be realized. *Id.* at 362, *reprinted in* Comment, *supra* note 74, at 42 n.14.

<sup>132</sup> All should agree that it is morally deplorable for an employer to endanger the life or health of an employee with such scienter as is typically required by criminal statutes.

<sup>133</sup> Local prosecutors generally get information about the unsafe worksite only after the conditions have caused an employee to be seriously injured or killed.

<sup>134</sup> Comment, *supra* note 74, at 44 (this is due to criminal sanction's ancillary position to other sanctions such as civil penalties).

<sup>135</sup> *Id.* at 43; Geis, *supra* note 85, at 381.

<sup>136</sup> See Koprowicz, *supra* note 101, at 223-24.



culpable actors.<sup>137</sup> The corporate hierarchy obscures the identity of the real actors and presents a paradoxical inverse relationship between knowledge and authority.<sup>138</sup> The managers who usually work most intimately with the workplace are in a worse position to effectuate change in workplace policy than are policy-making corporate officers who may seldom or never visit the worksite.<sup>139</sup> In smaller corporations, this problem of identification is much less likely to be problematic because the controlling personnel are more frequently in the workplace and their knowledge of the hazardous conditions is demonstrated more easily.<sup>140</sup>

Since most corporations are not large,<sup>141</sup> prosecutors usually should be able to identify the responsible actors. Additionally, the employees of larger corporations are more likely to have safe worksites due to the influence of organized labor and the corporation's desire to protect its public image.<sup>142</sup> Finally, regardless of the size of the corporate entity, the individual still must be proven to have either directly committed the offense charged or have been in a position of authority such that the acts constituting the offense were under his direct supervision.<sup>143</sup> These factors combine to ensure protection of the individual from unfair prosecution<sup>144</sup> and suggest that prosecutors generally will not be prevented from finding the culpable individuals in the corporate setting.

### 3. *Indemnification*

The ability of corporations to indemnify their employees for criminal fines is often cited as a reason that such penalties are

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<sup>137</sup> MODEL PENAL CODE § 2.07, comments at 150 (Tent. Draft No. 4, 1955) ("It may be true that the complexities of organization characteristic of large corporate enterprise at times present real problems of identifying the guilty individual and establishing his criminal liability.").

<sup>138</sup> See Koprowicz, *supra* note 101, at 224.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Of 4,536,000 reporting business units for social security purposes, 3,929,000 employed 20 or fewer persons, while 505,000 more units had 20 to 99 employees. Only 101,000 businesses employed 100 or more employees. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 694 (1983).

<sup>142</sup> An attorney from the Los Angeles County D.A.'s OSHA unit noted that another deterrent for larger corporations is having to tell the Securities and Exchange Commission about a criminal action against them. See Metz, *supra* note 2, at 17.

<sup>143</sup> *United States v. Park*, 421 U.S. 658 (1975).

<sup>144</sup> *But see* Dunmire, *A Misguided Approach to Worker Safety*, 3 CRIM. JUST. 11, 13 (1988) (individual employees might be threatened with criminal indictment to get information from them about the corporation or its officers).

ineffective.<sup>145</sup> The logic is quite simple: if the individual does not fear the punishment for a crime, he will not be deterred from committing that crime. This reasoning is sound and demonstrates that incarceration should be imposed on individual corporate criminals.

#### 4. *Infrequent Imposition of Imprisonment*

Imprisonment, probably the most effective deterrent,<sup>146</sup> is an available sanction in nearly all statutes that provide criminal penalties for corporate individuals.<sup>147</sup> This sanction is rarely imposed on the individual corporate offender.<sup>148</sup> The OSH Act contains limited penal provisions, which have never been used to incarcerate anyone convicted of criminally unsafe conduct in the workplace.<sup>149</sup>

This gaping hole in the protection of the workplace is the essential reason that state criminal prosecutions are instigated.<sup>150</sup> These prosecutions are brought to punish individuals for particularly blameworthy behavior.<sup>151</sup> In such instances, the normal reluctance to impose criminal sanctions should not exist. Indeed, it is obvious that prosecutions for workplace safety-related conduct will evoke substantially greater feelings of reprehensibility from judges and juries than actions involving other corporate crimes with less obvious and sympathetic victims.

#### 5. *Constitutional Concerns*

The individual rights of the corporate actor as a criminal defendant are a source of some controversy. Three rights of particular concern are the fifth amendment privilege against self incrimination, the fourth amendment prohibition of unreasonable search and seizure, and the sixth amendment right to counsel and its inherent attorney-client privilege.<sup>152</sup> These privileges and protections are not

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<sup>145</sup> See generally Comment, *supra* note 74, at 49.

<sup>146</sup> *Id.* at 50. One General Electric executive who was involved in the 1961 heavy electrical equipment price-fixing case later stated, "[t]hey would never get me to do it again I would starve before I would do it again." Geis, *supra* note 85, at 379.

<sup>147</sup> See Comment, *supra* note 74, at 50.

<sup>148</sup> See *supra* notes 128-31 and accompanying text.

<sup>149</sup> See H.R. REP. NO. 100-1051, *supra* note 3, at 4.

<sup>150</sup> See Metz, *supra* note 2, at 13.

<sup>151</sup> See Radin, *supra* note 77, at 68.

<sup>152</sup> See generally Dunmire, *supra* note 144, at 44-45; Note, *supra* note 72, at 1276-93 (this Note provides an excellent discussion of constitutional concerns in corporate criminal prosecutions). The fourth amendment concerns are generally addressed in regard to the subpoena and inspection requirements of OSHA. The fifth amendment controversy involves

extended to corporations and corporate employees to the same degree that individuals enjoy them in ordinary criminal cases.<sup>153</sup> The disputes involving the sufficiency of the protections remaining in corporate criminal cases generally involve the production of documentary evidence.<sup>154</sup>

The volume of documentary evidence is characteristically much greater in corporate cases.<sup>155</sup> It is the reliable nature of this documentary evidence that justifies the lesser procedural protection afforded corporate individuals during their criminal cases.<sup>156</sup> Since the documents involved in workplace safety cases are generally factual records of safety measures taken by the company or injuries suffered by employees,<sup>157</sup> the documentary evidence has significant probative value and offers little chance of unfairly prejudicing the individual defendant.

### *B. Arguments Supporting the Prosecution of Individuals for Workplace Safety Crimes*

The criminal provisions of the OSH Act and the current enforcement efforts of OSHA provide no deterrent to employers violating

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the use of safety and health records maintained by the regulated party in accordance with the OSH Act. The attorney-client privilege dispute pertains to what types of communication are protected.

<sup>153</sup> There is no fifth amendment privilege associated with corporate documents. See *United States v. John Doe*, 465 U.S. 605 (1984); see also *Craig v. Bulmash*, 777 P.2d 1120 (Cal. 1989) (presents a thorough discussion of the issue, concluding that records required to be kept under California's OSH Act are not protected by the fifth amendment). In *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977), the Supreme Court held that a corporation "by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." This holding limits the fourth amendment protections that a corporation would enjoy concerning inspections by OSHA. See *Dunmire*, *supra* note 144, at 45, citing *G.M. Leasing*, 429 U.S. at 338. Similarly, the attorney-client privilege enjoyed by a corporation is limited. "The privilege is waived whenever there is a voluntary disclosure of otherwise privileged information. Disclosure made to corporate agents for a purpose other than the seeking of legal advice, for example, to correct an unsafe condition, may constitute waiver of the privilege." *Dunmire*, *supra* note 144, at 45.

<sup>154</sup> See Note, *supra* note 72, at 1276.

<sup>155</sup> *Id.*

<sup>156</sup> "Business documents, unlike extracted confessions or compelled testimony, are notably reliable: both the regularity of recordkeeping and the exigencies of commercial life ensure accuracy, and state compulsion, imposed only after the content of the documents becomes fixed, will not distort the evidence." *Id.* at 1238.

<sup>157</sup> One commentator suggests that the increasing number of prosecutions will cause recordkeeping to be reduced to minimum legal requirements. Detailed records are essential to epidemiology, making the connection between chemical exposure and disease, in the safety and health field. *Dunmire*, *supra* note 144, at 44.

the statute.<sup>158</sup> Without an adequate deterrent, operators will continue to create unreasonably dangerous but highly profitable conditions in the workplace.<sup>159</sup> The state must take action to protect its citizens from dangerous working conditions, since federal attempts at ensuring a safe workplace have failed.<sup>160</sup>

The most effective means of deterrence available to the state is the criminal law, particularly prosecutions against individual corporate actors that lead to jail terms.<sup>161</sup> A tough sanction is needed to compensate for the lack of moral pressure on the decisionmaker.<sup>162</sup> The possibility of incarceration will have a greater deterrent effect than mere fines.

Incarceration not only involves the loss of personal liberty but also entails a great stigma of wrongdoing.<sup>163</sup> The corporate offender is particularly vulnerable to reform by the threat of "demeaning social sanctions" because he usually is a respected member of the community and has greater concern for his reputation.<sup>164</sup>

State criminal prosecutions against the individual also have the advantage of directly relating the culpability of the actor to the penalty for his crime.<sup>165</sup> For example, a person acting with intent or knowledge will be prosecuted under the particular state criminal statute with that mental state as an element. Thus, intentional actors will be punished more severely than reckless or negligent ones. By imposing harsher penalties on those whose conduct is more reprehensible, the courts can create more significant deterrents to future crime.<sup>166</sup>

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<sup>158</sup> H.R. REP. NO. 100-1051, *supra* note 3, at 4. A company official who willfully and recklessly violates the OSH Act has a greater chance of winning a state lottery than being criminally charged by OSHA.

<sup>159</sup> Von Ebers, *supra* note 110, at 995. The narrow cost-benefit analysis will continue to be applied and profits in the face of low risk will continue to win. *See also* Commonwealth v. Godin, 371 N.E.2d 438, 443 (Mass. 1977), *cert. denied*, 436 U.S. 917 (1978) "The state is the offended party where a death is caused by recklessness. To [not recognize] the purpose of criminal law [would] create a class of persons—[corporate actors]—as to whom a license to kill by wanton and reckless conduct is given."

<sup>160</sup> *See supra* notes 25-37 and accompanying text.

<sup>161</sup> *See Geis, supra* note 85, at 377.

<sup>162</sup> Von Ebers, *supra* note 110, at 995. The logic here is that since the acts are morally neutral, although harmful, there is need for some other kind of deterrence.

<sup>163</sup> *See Geis, supra* note 85, at 380.

<sup>164</sup> *Id.*

<sup>165</sup> *See* Von Ebers, *supra* note 110, at 995.

<sup>166</sup> *See* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV 107, 109 (1962).

## CONCLUSION

Although the purpose of the OSH Act of 1970 was to provide "every working man and woman safe and healthful working conditions,"<sup>167</sup> it has failed, as evidenced by the number of industrial accidents that continue to harm American workers. The states have begun protecting their citizens by bringing criminal charges against corporations and individuals who have acted with criminal *mens rea* in the workplace. The corporate actors have responded to these prosecutions with claims that they are preempted by the OSH Act.

It seems clear that Congress did not intend to preempt state prosecutions when establishing OSHA, since the OSH Act's criminal provisions are very limited and fail to address standards of culpable conduct.<sup>168</sup> The beneficial deterrent effect of state criminal prosecutions far outweighs any concerns supporting the use of the OSH Act as a preemptive shield. Recent state court decisions are adopting this view and should continue to do so. OSHA should take the official position that the OSH Act does not preempt the use of the historic police powers of the state to prosecute corporate actors for acts that constitute crimes under state law.<sup>169</sup>

The state prosecutions are a proper means for deterring criminally unsafe conduct in the workplace and for creating healthful working conditions.<sup>170</sup> The prosecutions have the most deterrent effect when individuals are indicted, since they can be incarcerated, and they are most likely to be deterred by the social stigma associated with a criminal conviction.<sup>171</sup>

*S. Douglas Jones*

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<sup>167</sup> 29 U.S.C. § 651(b) (1982). See also *supra* notes 19-37 and accompanying text.

<sup>168</sup> See *supra* notes 44-66 and accompanying text.

<sup>169</sup> H.R. REP. No. 100-1051, *supra* note 3, at 5; see also *supra* note 11.

<sup>170</sup> See *supra* notes 108-66 and accompanying text.

<sup>171</sup> See *supra* notes 158-66 and accompanying text.