Reckless Endangerment of an Employee: A Proposal in the Wake of *Film Recovery Systems* to Make the Boss Responsible for His Crimes

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RECKLESS ENDANGERMENT OF AN EMPLOYEE: A PROPOSAL IN THE WAKE OF FILM RECOVERY SYSTEMS TO MAKE THE BOSS RESPONSIBLE FOR HIS CRIMES*

On February 10, 1983, Stefan Golab, a vat worker at a silver reclamation plant in Illinois, died of acute cyanide toxicity. Over two years later, an Illinois circuit court judge held three corporate decisionmakers guilty of murder. The court found the corporate president, plant manager, and plant foreman guilty—not for intentionally pulling the trigger of a gun, nor for negligently allowing an accidental death, but for knowingly creating and maintaining workplace conditions in which employees would probably die or be injured.

In *People v. Film Recovery Systems*, the court sought an effective means, within current enforcement structures, to prevent unjustifiable risks to employee health. It extended traditional criminal law principles to a corporation and its agents. For the first time, a court convicted individual corporate executives of murder for the daily operations of a manufacturing facility.

Public reactions to *Film Recovery Systems* have been mixed. Some observers have argued that the verdict is inappropriate and unjust, contending that management decisions should not result in murder convictions. Others have agreed with the

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* The author wishes to thank Jed Stone and Joseph Vining for their encouragement and helpful criticism of earlier versions of this Note.


2. Id. at 10.

3. Id. at 7-10.


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court's decision, contending that criminal sanctions are appropriate for such egregious acts of endangerment.\(^6\) This public reaction mirrors the tension in the courts between a traditional reluctance to review corporate management decisions, particularly through the application of the criminal law, and the need for a standardized judicial response to work-related employee deaths and injuries.

Since the *Film Recovery Systems* decision, prosecutors have begun to pursue more actively the application of criminal laws to individual corporate actors.\(^7\) The case itself offers proof that the three traditional mechanisms—the regulatory, civil, and criminal systems—have proved incapable of deterring culpable behavior, reforming culpable parties, or punishing culpable conduct. It exemplifies a search for some way to adapt current approaches to deter, reform, and punish the conduct of corporate decisionmakers to protect employee safety and health in the workplace. In short, the *Film Recovery Systems* decision highlights the need for a workable approach to employee endangerment.

This Note argues that the traditional regulatory, civil, and criminal mechanisms are both ineffective and inappropriate to deter or punish corporate decisionmakers for decisions that pose risks to the safety or health of employees in the workplace. The Note proposes a new criminal offense to prevent and punish culpable corporate decisionmaking that results in employee deaths or injuries. Part I explains the novel application of the traditional murder offense in *Film Recovery Systems* and demonstrates that the case fails to lay the foundation for a standardized response to employee endangerment. Part II analyzes the traditional responses of the regulatory and civil systems to work-related employee deaths. Because the regulatory and civil mechanisms have proved ineffective in dealing with employee-endan-

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6. See, e.g., Ranii, supra note 4, at 8, col. 3; Greenhouse, supra note 4, at A1, col. 6, A29, col. 2.

gering activities, prosecutors are looking to criminal law solutions. Part III reviews the traditional criminal law mechanisms available to prosecutors and shows why these are inadequate to deter and punish activities that endanger employees. Part IV suggests a statutory solution, the Reckless Endangerment of an Employee Offense, to respond more effectively to corporate decisions that wrongfully endanger the health and safety of employees.

I. People v. Film Recovery Systems

On February 10, 1983, Stefan Golab left his position in the vat tank area of the Film Recovery Systems plant. He walked into the lunchroom and began shaking violently. Shortly thereafter, the sixty-one year old Polish immigrant collapsed and died. The medical examiner established the cause of death as acute cyanide toxicity.

After a two month bench trial, Judge Ronald Banks found the then-bankrupt Film Recovery Systems, Inc., and Metallic Marketing Systems, Inc., its fifty percent shareholder, guilty of involuntary manslaughter and fourteen counts of reckless conduct. In addition, the court found three corporate officials, Stephan O'Neil, the former president of both corporations, Charles Kirschbaum, the plant manager, and Daniel Rodriguez, the plant foreman, guilty of murder and fourteen counts of reckless conduct. The verdict represented the first murder convic-

9. Gibson, supra note 8, at 6, col. 1.
10. Id.
12. Id. at 8.
13. Id. at 11. The court fined each corporate defendant $10,000 for involuntary manslaughter and $1,000 for each of the 14 counts of reckless conduct. Executives Get 25 Years, supra note 8, at A11, col. 6.
14. Film Recovery Systems, slip op. at 10; Executives Get 25 Years, supra note 8, at A11, col. 6. The court later sentenced the three corporate officials to 25 years in prison and fined each defendant $10,000 on the murder count. Id. at A11, col. 4. Each defendant also received 364 days in jail for each reckless conduct charge. These 14 jail terms
tion of individual corporate executives for corporate decisions leading to the work-related death of an employee.\textsuperscript{15}

The findings in \textit{Film Recovery Systems} are as shocking as its result is surprising. Judge Banks ruled that the death of Mr. Golab was not an accident, but rather the natural result of conditions that the defendants knew presented life-threatening risks to their employees.\textsuperscript{16} He accepted the medical examiner's conclusion that Mr. Golab died of acute cyanide toxicity resulting from critically dangerous levels of hydrogen cyanide gas in the plant's air.\textsuperscript{17} Judge Banks concluded that the plant conditions were "totally unsafe"\textsuperscript{18} and that the defendants failed to provide sufficient operating instructions or sufficient warnings.\textsuperscript{19}

were to be served concurrently. \textit{Id.} at A11, col. 5. The defendants have appealed the decision.

The Illinois murder statute applied by the court states:

A person who kills an individual without lawful justification commits murder if, in performing the act which causes death:

(1) He either intends to kill or to 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 . . . .


In 1987, Illinois amended the murder statute. It elevated the murder offense to first degree murder and replaced voluntary manslaughter with second degree murder. Act approved January 5, 1987, P.A. 84-1450, § 2, 1986 Ill. Legis. Serv. 343 (West) (codified at \textsc{ill. ann. stat.} ch. 38, para. 9-1(a)(1)-(2) (Smith-Hurd Supp. 1987)).

15. Greenhouse, \textit{supra} note 4, at A29, col. 3. Furthermore, this case represents the first time prosecutors have ever tried corporate executives on such murder charges. \textit{Id.}


17. \textit{Id.} at 5-6.

18. \textit{Id.} at 6. Prosecutors alleged that cyanide emissions levels were double those allowed under federal standards. Gibson, \textit{supra} note 8, at 6, col. 1. Judge Banks cited the symptoms of the officers conducting the investigation of the plant immediately following Golab's death—nausea, burning throats and eyes, difficult breathing, and other symptoms normally associated with hydrogen cyanide inhalation—as additional evidence of contaminated air. He also relied on the testimony of the workers, insurance inspectors, Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA) investigators, and other independent witnesses as supplementary evidence reinforcing his conclusion that the conditions in the plant caused Golab's death. \textit{Film Recovery Systems}, slip op. at 5-6.

Furthermore, prosecutors alleged emissions control equipment, designed to protect workers processing the remaining film and installed after authorities had shut down the plant, cut cyanide emissions to one-twentieth of the previous levels. Gibson, \textit{supra} note 8, at 6, col. 2.

19. \textit{Film Recovery Systems}, slip op. at 6-7. Regarding the failure to warn employees of the dangers, Judge Banks noted that the few warning signs posted in the plant were written exclusively in English and Spanish even though many employees, including Golab, were Polish immigrants who lacked any ability to speak, read, or write either language. \textit{Id.} The court therefore presumed many employees lacked any knowledge of the potential danger. \textit{Id.} at 7.
The court held the defendants to be "totally knowledgeable in the dangers which are associated with the use of cyanide." Labels on the drums of sodium cyanide delivered to the factory indicated that contact with cyanide could be fatal. Witnesses alleged that the defendants actively sought to conceal these dangers from plant employees. In addition, the court found that the executives knew employees became nauseated after working over the vats containing the cyanide solution. The court ruled that, in light of this knowledge, allowing the continued use of the cyanide solution without appropriate safety precautions was equivalent to acting with knowledge that a strong probability of death or bodily injury would result. Therefore, the court convicted the corporate agents of murder.

Prosecution of corporate agents under the murder statute was unprecedented. Although corporations and their agents are subject increasingly to criminal prosecutions, most such actions allege white-collar crimes—such as antitrust violations, tax eva-
sion, and mail fraud.\textsuperscript{26} Even where the wrongful activity might have given rise to felony indictments, prosecutors generally have charged corporations and their agents with misdemeanors only.\textsuperscript{27} Film Recovery Systems is unique in convicting white-collar employees of murder—a felony traditionally associated with violence or specific homicidal intent.

The novel application of the traditional law of homicide in Film Recovery Systems may be a product of frustration with the failure of regulatory attempts to protect against hazardous work environments. The case signals corporate managers that prosecutors and courts are beginning to look to the criminal law for a more effective way to provide workers with a safe environment and to inform them of any remaining dangers.\textsuperscript{28} Although it may

\textsuperscript{26} See, e.g., United States v. E.F. Hutton, No. CR 85-000-83 (M.D. Pa. May 2, 1985) (subsidiary of The E.F. Hutton Group, Inc. pleading guilty to 2000 criminal counts of participating in bank overdrafting schemes); see also Shenon, Senate to Study Handling by U.S. of Prosecution of Corporations, N.Y. Times, Sept. 13, 1985, at A1, col. 6 (reporting that, in United States v. General Electric, the corporation pleaded guilty to federal charges of making false statements regarding military contracts and three General Electric managers were indicted on felony charges and that in United States v. Eli Lilly, the corporation pleaded guilty to misdemeanor charges of failing to disclose deaths linked to the arthritis drug Oraflex and one executive pleaded no contest to similar charges); Engelberg, U.S. Aide Says GTE Case is Part of Crackdown, N.Y. Times, Sept. 12, 1985, at D8, col. 1 (reporting that GTE Government Systems Corporation pleaded guilty to illegally conspiring to obtain Department of Defense documents and that two individuals were charged with theft and espionage while a third was charged with conspiracy).

\textsuperscript{27} See, e.g., Shenon, Dispute over Intent in Drug Case Divided F.D.A. and Justice Dept., N.Y. Times, Sept. 19, 1985, at A1, cols. 4-5 (Justice Department charging SmithKline Beckman and three individuals with misdemeanors—14 counts of failing to notify the FDA and 20 counts of falsely labeling the drug Selacryn—despite FDA recommendations for felony charges for failing to disclose adverse drug reactions). Congressional concern regarding the prosecutorial discretion of the Justice Department prompted the Senate Judiciary and other congressional committees to study the Department’s handling of corporate crime. Id. at A28, col. 1; see Sterngold, The Undoing of Robert Fomon, N.Y. Times, Sept. 29, 1985, § 3, at F1, cols. 2-3.

\textsuperscript{28} Richard M. Daley, Cook County State’s Attorney, suggested that the convictions are a statement to employees and employers that “the criminal justice system can and will step in to protect the rights of every worker to a safe environment and to be informed of any hazards that might exist in the workplace.” Ranii, supra note 4, at 8, col. 3; see also Stone, supra note 7, at 14A, col. 1.

not lead to a landslide of indictments, Reckless Endangerment of an Employee has opened the door for prosecutors to respond to industrial casualties and deaths with traditional criminal homicide actions.

Film Recovery Systems is an exceptional case. It involved a small corporation where the subsequently convicted officials had continuous interaction with the activities in the plant, employed and exploited illegal aliens, and, most importantly, knew of and concealed gross dangers. Whether the criminal homicide standards will apply or should apply to cases involving officials who have limited contact with the risk-creating activity and have otherwise clean hands or to cases involving more subtle dangers remain open questions. Until these questions are answered, the extreme facts of Film Recovery Systems and the likely inability of corporate executives to identify with those convicted in Illinois may minimize the deterrent effect of the case in all but the most egregious instances of employee endangerment.

adopted after the plant closed, the disclosure statute did not apply to the Film Recovery Systems defendants. Violations of right-to-know statutes and criminal statutes are independent offenses. Although violation of a right-to-know statute may be evidence in a homicide case, compliance with a right-to-know statute should not be a legal defense to charges stemming from the work-related death of an employee. See supra note 19.

29. Several experts have suggested that few indictments will follow the Film Recovery Systems verdict. Joseph E. Hadley, Jr., a corporate lawyer specializing in health and safety issues, viewed the unusual facts of the case as limiting the threat of criminal actions to egregious situations. Greenhouse, supra note 4, at A29, col. 2. Where the job is inherently dangerous—some construction jobs, for example—prosecutors may hesitate to prosecute individuals "unless the danger has been allowed to grow out of control." Greenhouse, supra note 5, at D2, col. 2. One of the Film Recovery Systems prosecutors, Jay C. Magnuson, suggested that problems in proving causation, arising because of the diffusion of responsibility in the modern corporation, may limit the number of criminal convictions attainable. Professor Shelvin Singer cited additional difficulties in prosecuting offenders because prosecutors with limited resources must combat well-funded corporate defense attorneys. Ranii, supra note 4, at 8, col. 4; see infra notes 114-18 and accompanying text.

30. Ronald J. Allen, criminal law professor at Northwestern University Law School, suggested that the psychological impact of the case is important: "It will sensitize prosecutors to the possibility of bringing this type of action." He predicted that the number of cases will increase with time. Greenhouse, supra note 4, at A29, col. 4.

31. Ranii, supra note 4, at 8, col. 4.

32. Prosecutors also alleged that the company hired illegal aliens because the corporate managers suspected that the employees would not complain to authorities. Gibson, supra note 8, at 6, col. 2. This allegation suggests knowledge of the dangers to employees and may have colored the perception of the trier of fact regarding the defendants' culpability.

33. See supra notes 19-24 and accompanying text.

34. Greenhouse, supra note 5, at D2, col. 3.

35. Oil, Chemical and Atomic Workers Union job-safety specialist, Sylvia Krekel, predicted the limited deterrent effect of the decision on corporate agents. She said, "Most businessmen regard themselves in a lot different light from [Film Recovery Sys-
II. Regulatory and Civil Responses to Employee Endangerment: The Trend Toward Criminalization

The tension created between the demand for risk taking and the desire to protect the lives and health of employees involved in dangerous activities has led to the passage of workers' compensation statutes and the adoption of a variety of regulations seeking to ensure safety in the workplace. Although the regulatory approach has decreased many risks significantly, the courts must continue to handle the consequences of the remaining risks.

Civil remedies supplement extensive regulation of the workplace. The civil law approach has not prevented employee-endangering activities. Despite burgeoning civil judgments against corporate defendants, corporate decisionmakers assessing the need for precautionary measures too often find that the cost-efficient solution is also the most dangerous for their employees.

A. The Regulatory Approach

Regulatory initiatives approach employee endangerment with two goals—compensation and deterrence. Workers' compensation statutes address the compensatory objective. The deterrence objective relies principally on the Occupational Safety and Health Act. Neither goal has been met.

1. Compensation—State workers' compensation statutes establish an insurance program to compensate individuals for work-related injuries. Typically, the programs guarantee benefits to an employee for personal injuries "arising out of and in the course of employment." These benefits normally include both wage-based compensation or death benefits and hospital and
medical expenses. Issues of fault and negligence are irrelevant because entitlement to benefits arises from the mere fact of injury. There is a trade-off, however, between certainty of recovery and the amount of benefits. Employees receiving workers' compensation benefits must generally relinquish common law claims for recovery. Thus, assured but limited workers' compensation benefits often replace uncertain but open-ended tort recoveries.

Workers' compensation statutes do not provide a solution to employee endangerment. From a compensatory perspective, the statutes arguably are successful. Still, many commentators note that recovery schedules are sorely inadequate, compensating employees for their medical expenses, but not for their full disability losses. Furthermore, workers' compensation functions as a program of insurance, not as one of prevention or deterrence. Indeed, the statutes may serve to encourage employee endangerment. Because the employer's premiums are generally set industrywide and are not based on the individual firm's safety record, the current program provides no incentive for individual employers to maintain safe workplaces. Instead, it provides a perverse incentive, allowing firms to cut back on worker protections to minimize operating costs without an accompanying increase in potential liability. Even when merit ratings reduce the premiums for firms with good safety records, the premium reduction is normally so insignificant that it provides little incentive to improve working conditions.

In addition, workers' compensation focuses on injuries from accidents and fails to address long-term health hazards adequately. Therefore, employers who operate workplaces containing carcinogens, asbestos, or other substances whose dangerousness increases with long-term exposure have little, if any, incentive to minimize the dangers. The overall result is a com-

41. Id. at 1-2.
42. Id. at 1.
43. Note, Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?, 52 BROOKLYN L. REV. 183, 192 (1986). Workers' compensation may not be the exclusive remedy where an employer has committed an intentional tort or, in a relatively new and not widespread exception, where the employer's conduct was willful, wanton, or reckless. Id. at 193 (citing Mandolis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978)). Thus, where the employer's conduct is proved blameworthy, employees might receive both workers' compensation and tort recoveries. Id.
44. Id. at 192, 194-95.
45. Id. at 194; Viscusi, Reforming OSHA Regulation of Workplace Risks, in REGULATORY REFORM 234, 240 (L. Weiss & M. Klass eds. 1986).
47. Viscusi, supra note 45, at 240-41.
pensatory system that allows employees to recoup their medical expenses as well as a portion of their long-term disability losses, but permits employers to continue to imperil the health and welfare of their work forces.

2. Deterrence— In order to prevent employee endangerment, Congress enacted the Occupational Safety and Health Act in 1970. The purpose of the Act was “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.” It requires each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees” and to comply with regulations promulgated by OSHA.

The drafters recognized that market competition may preclude worker protection. That is, competition between firms encourages employers to cut costs, and in doing so, discourages employers from providing a safe environment. Government intervention, therefore, is necessary to force individual employers to internalize their costs industrywide.

To be effective, the drafters knew OSHA would have to create incentives for employers to provide safe workplaces. Regulatory

49. Id. § 651(b).
50. Id. § 654(a). The Act grants the Secretary of Labor the authority to promulgate these regulations. Id. § 655.
51. [P]rofit-maximizing incentives of individual firms can provide inadequate motivation even in highly competitive markets to vindicate certain values of broad social import . . . . Indeed, most regulation dealing with these issues (e.g., the FDA, OSHA, and EPA variety) assumes that competition is workable and that under its pressure individual firms will not willingly incur the additional costs necessary to protect society from the undesirable by-products of economic activity.


52. At an American Enterprise Forum discussing OSHA regulation, Mark J. Green, the former director of Congress Watch, stated:

The problem was not that these manufacturers were bad people; the problem was that companies were afraid to be at a cost disadvantage if they did something special. The result is that the manufacturers wait for a government regulation insisting on safety so that all manufacturers suffer the same cost, and then the benefit can be distributed massively throughout society.

safety incentives serve to supplement those of the market. Compliance, however, is likely only where the expected costs of honoring OSHA regulations are less than or equal to the expected costs of punishment. The expected costs of punishment are a function of the probability of inspection, the expected number of violations detected, and the average penalty per violation. Because each of these figures is low, compliance is unlikely to occur.

Insufficient penalties are an important factor in OSHA's ineffectiveness in dealing with employee endangerment. Fines for violations often pale in comparison to the costs of compliance. To be effective, efforts to deter particular activities must include sanctions proportional to anticipated compliance costs. Furthermore, current practices make ineffective sanctions even more impotent. Under the Reagan administration, average pen-

53. Viscusi, supra note 45, at 237. One theory suggests that the market responds to risky employment by compensating at higher wages those employees willing to accept riskier jobs. Id. That is, workers demand a wage premium for diminished safety. Id. at 240. This compensating wage differential theory assumes that workers are aware of and respond rationally to risk. Id. at 239. Inadequate information and irrational responses to uncertainties, however, combined with the relatively weak bargaining power of many employees and the externalities discussed above, prevent the market from adequately deterring employee endangerment. Id. at 242-45.

For a more comprehensive discussion of wage differentials due to job risks, see Olson, An Analysis of Wage Differentials Received by Workers on Dangerous Jobs, 16 J. HUM. RESOURCES 167 (1981) (empirical study confirming that workers are compensated for the risk of experiencing a nonfatal or fatal accident and finding that union employees were paid higher premiurns), and Smith, Compensating Wage Differential and Public Policy: A Review, 32 INDUS. & LAB. REL. REV. 339 (1979) (providing a survey and bibliography of research on wage differentials related to dangerousness).

54. Professor Viscusi suggests that compliance will occur where:

\[
\text{Expected costs of compliance} = \text{Probability of violations} \times \text{Average penalty per violation}
\]

Viscusi, supra note 45, at 259.

55. By 1983, the probability of inspection was less than 1:200 annually; fewer than two violations were found on the average inspection; and the average penalty imposed was $60. Thus, the cost per worker of violating the Act was $0.57. Viscusi considers this "too modest to create truly effective financial incentives for safety." Id. Sometimes, fines should not be set to prohibit an activity absolutely; a violation might be desirable where a compelling economic benefit would result. Comment, Criminal Sentences for Corporations: Alternative Fining Mechanisms, 73 CALIF. L. REV. 443, 444-45 (1985).

56. Because OSHA's approach to safety regulation takes the form of specific, technology-based prohibitions, rather than minimum performance standards, low fines are entirely appropriate in some areas. Low fines for minor violations seem to counteract the stiffness and inefficiencies of the specific prohibitions approach. The best alternative might be to rely on a performance approach, forcing firms to achieve a given level of safety but allowing them to decide how best to reach that level. Viscusi, supra note 45, at 248.
alties for violations have decreased;\textsuperscript{57} some penalties are further diminished up to thirty percent if, once the violations are detected, the firm demonstrates a serious effort to comply.\textsuperscript{58}

In addition to regulatory fines, the Act provides criminal penalties for some violations. Section 666(e) establishes criminal liability for willful violations of the statute that cause an employee's death.\textsuperscript{59} This section does not, however, effectively deter employee endangerment.

Theoretical limitations preclude section 666(e) from protecting employees. First, only employee deaths trigger the section; the Act does not authorize intervention even when lives are endangered. Nor does the language reach injuries, regardless of their severity. Second, employers must violate the statute willfully. Aside from problems of proof in determining willfulness, a technical gap in the regulations could allow an employer who knew he was endangering his employees to go unpunished. Finally, the Act sets the maximum fine at a level that often bears no relationship to the economic benefits of the violation. Larger fines might deter otherwise profitable violations. Therefore, given the present fines and level of enforcement, employers may, in fact, be maximizing profits by choosing, with virtual impunity, to endanger their employees' lives.\textsuperscript{60}

Practical difficulties further undermine the effectiveness of section 666(e). Of primary concern is the limited use of the provision. In the first twelve years of OSHA, prosecutors pursued only twelve section 666(e) cases.\textsuperscript{61} Where prosecutors obtained convictions, the court imposed minimal sentences and never ordered incarceration.\textsuperscript{62} Individual actors were convicted in only two cases; both convictions followed guilty or nolo contendere

\textsuperscript{57} Id. at 253-55. In 1985, OSHA fines totalled $16 million less than in 1980. At the same time, workplace deaths increased 21% from 1983 to a total of 3750 in 1985 and work-related injuries and illnesses rose 13.5% to 5.5 million. Stone, supra note 7, at 14A, cols. 2-3.

\textsuperscript{58} Viscusi, supra note 45, at 256. Penalty reductions for post-detection compliance efforts diminish the threat of random inspection and, with it, the likelihood of compliance. Id. at 257.

\textsuperscript{59} 29 U.S.C. § 666(e) (1982).


\textsuperscript{61} Note, A Proposal to Restructure Sanctions Under the Occupational Safety and Health Act: The Limitations of Punishment and Culpability, 91 Yale L.J. 1446, 1448 & n.17 (1982).

\textsuperscript{62} Id. at 1449.
pleas and merely resulted in probation. Individual corporate agents escaped conviction in the remaining ten cases. The fact that so few criminal cases have been brought does not indicate that few willful violations lead to employee deaths. Instead, the dearth of cases indicates that the Occupational Safety and Health Act prefers to handle these cases on a civil rather than a criminal basis.

Several reasons for this preference exist. The delays and heavy burdens of proof in criminal trials discourage section 666(e) actions. Furthermore, OSHA lawyers cannot prosecute criminal cases on their own; they must recruit a United States Attorney to bring the case. Budgetary constraints of both OSHA and the Justice Department reduce the likelihood of a section 666(e) prosecution. Thus, the limited threat of prosecution and conviction under section 666(e) undermines any deterrent effect on corporations and corporate officials; employee endangerment remains.

These failings of the regulatory system motivated the criminal law approach used in Film Recovery Systems. Ironically, however, the presence of unenforced federal regulations may prevent states from applying criminal law sanctions to corporations that endanger the health and safety of their employees. Some courts have found that OSHA preempts the states' application of criminal statutes to dangerous workplace conditions. Although preemption has been attacked as contrary to the legislative intent behind the Act, some have suggested that federal action is necessary to explicitly rebut preemption arguments and empower the states to act.

63. Id. at 1449-50.
64. Id. at 1450.
65. Id.
66. Id. at 1451.
67. Id.
68. E.g., People v. Chicago Magnet Wire Corp., 157 Ill. App. 3d 797, 801, 510 N.E.2d 1173, 1176 (Ill. App. Ct. 1987) (finding that OSHA preempts state criminal law when corporations expose their employees to hazardous conditions).
70. See House Bill, supra note 60 (statements of Elizabeth Holtzman, District Attorney for Kings County, New York, and Ira Reiner, District Attorney for Los Angeles, California).
B. The Civil Law Approach

In addition to the regulatory approach, an employee or his estate can initiate a civil action against a corporation for acts of negligence. Civil actions for personal injury or wrongful death aim to compensate the victims of unreasonable corporate conduct. In addition, civil remedies against the corporation can provide some measure of deterrence; the potential liability for damages may cause a corporation to avoid employee-endangering activities.

Corporate cost-benefit analysis, however, limits the effectiveness of this deterrent. Thus, where the expected benefits—profit maximization or other corporate goals—outweigh the potential costs of lawsuits, corporate management may conclude that the provision of fewer employee safeguards is a desirable course of conduct. To the extent that the expected costs of civil liability are low, especially where they can be passed on to the consumer, deterrence is undermined.

The civil law approach is inadequate for several other reasons as well. First, the inefficiencies of litigation give both plaintiffs and defendants the incentive to settle disputes out of court. Plaintiffs seek to settle to avoid the inconveniences of litigation and to be compensated sooner. Corporate defendants seek quick settlements to minimize costs of litigation, to avoid the

72. Id. § 4-25-26.
73. Cost-benefit analysis of civil liability parallels that of regulatory liability. See supra notes 53-58 and accompanying text.
74. The expected cost of civil liability is a function of both the present value of the damages awarded and the probability of their assessment.
75. Modern American corporate theory presumes that the price mechanism will phase out companies with extensive civil liabilities. Because the price of a product in a competitive market equals the costs of production, A. Polinsky, An Introduction to Law and Economics 96 (1983), firms with higher costs of production will be at a competitive disadvantage. Their economic profit, the difference between total revenue and total costs, will be less than zero; that is, the opportunity costs of continuing in that business exceed the returns to the owners, and those owners rationally may choose to engage in another business. See W. Nicholson, Intermediate Microeconomics and Its Application 183 (4th ed. 1987).
76. Civil cases in many metropolitan areas may be delayed more than five years. Hustedler & Nejelski, A.B.A. Action Commission Challenges Litigation Cost and Delay, 66 A.B.A. J. 965, 966 (1980).
77. Litigation costs go beyond attorneys' fees and court costs and may include frozen assets and many employee hours to gather information, give depositions, and testify at trial. Janofsky, A.B.A. Attacks Delay and the High Cost of Litigation, 65 A.B.A. J. 1323, 1323 (1979).
risk of exorbitant judgments, and to avoid bad publicity. Second, civil law reaches the corporation, not the individual decisionmaker. Even if the individual corporate actor is named as a defendant, she is likely to be indemnified for her expenses. Furthermore, corporations merely include potential judgments in their cost-benefit analyses. Thus, although the civil law does serve a valuable compensatory function, it fails to deter many cases of employee endangerment. As a result of this failure, prosecutors increasingly are relying on the criminal law to control corporate decisionmaking.

III. The Traditional Criminal Law Approach: Inherently Inadequate to Address Employee Endangerment

The imposition of criminal responsibility on the corporation to punish and deter undesirable conduct, like the imposition of traditional regulatory and civil liability, has been largely unsuccessful. After years of debate regarding whether a corporation could be found guilty of a crime that required a specific criminal intent, the courts have resolved the issue in favor of extending

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80. Generally, corporations may indemnify corporate agents if they acted in good faith, in the best interest of the corporation, and, in some states, had no reasonable cause to believe their actions were illegal. See, e.g., CAL. CORP. CODE § 317 (Deering Supp. 1987); DEL. CODE ANN. tit. 8, § 145 (Supp. 1986); ILL. REV. STAT. ch. 32, para. 8.75 (1985). Indemnification undermines the effectiveness of fines to individuals. Comment, supra note 7, at 1445-46 & n.206. Despite the promise of indemnification, an employee may feel somewhat constrained by potential liability. When an employer repeatedly indemnifies an employee, the employer may ultimately consider the employee too costly and replace him.

81. As in the regulatory context, where corporations estimate the likelihood and amount of sanctions, the threat of civil liability forces corporations to consider the frequency and amount of civil judgments. See supra note 54. Corporations may, however, insure themselves against some civil liability. Where insurance protects the corporation, potential judgments are irrelevant to the corporation's cost-benefit analysis.

82. Because criminal liability has not yet fully developed to deter employee endangerment, the courts rely on punitive or exemplary damages in the civil context. This approach inappropriately places the individual plaintiff in the role of prosecutor. The criminal justice system, not the tort system, should operate to protect the public from socially unacceptable threats. Cf. Lewin, Punitive Costs: Insurance Issue, N.Y. Times, Dec. 11, 1984, at D2, col. 3.
criminal liability to corporate entities. The requisite mental state can be imputed to a corporation from the actions or the mental state of its agents.

The threat of criminal liability, however, is still not an effective deterrent. Most actions proceed against the party least likely to be deterred by the threat of a criminal conviction, the corporate entity, and not the individual decisionmaker. Low prosecution, as well as conviction, rates and sentences that are readily incorporated into the corporation’s cost-benefit analysis characterize corporate criminal justice and contribute to inadequate deterrence. Because the system of criminal law is unable to punish or deter corporations effectively, and because it seldom reaches the corporation’s decisionmakers, it fails to prevent corporate decisions that endanger employees.

A. The Criminal Law Approach

In addition to agency initiated regulatory actions and victim initiated civil actions, federal and state prosecutors increasingly are pursuing criminal actions for culpable corporate decision-making. Statutes impose criminal responsibility for corporate conduct on both the corporate entity and its officers. When employee deaths are involved, state prosecutors can pursue indictments for an appropriate degree of criminal homicide, charg-
Reckless Endangerment of an Employee

Negligent homicide applies where an actor failed to perceive risks and such failure represented a gross deviation from the standard a reasonable person would observe, given the actor's situation. Guilt flows from a finding that a corporation or an individual actor was negligent in failing to perceive a job-related risk that results in an employee's death. If blameworthiness exceeds this standard of negligence, prosecutors can resort to more serious charges—manslaughter and murder.

Actions causing an employee's death may constitute manslaughter if they are committed recklessly. Reckless conduct occurs when the actor "consciously disregards a substantial and unjustifiable risk." Thus, corporate and individual responsibility for manslaughter arises when corporate decisionmakers ig-


88. Id. § 210.4 & comment 1; see also id. § 2.02.

89. Employee endangerment will often arise from a conscious decision to subject employees to risks or not to provide additional safety measures to minimize risks. Attributing the creation of risk to conscious decisionmaking processes means that intent is satisfied so prosecutors can look to manslaughter and murder statutes in addition to negligent homicide statutes.

90. MODEL PENAL CODE § 210.3(1)(a) (1980); see also ILL. ANN. STAT. ch. 38, para. 9-3 (Smith-Hurd Supp. 1987).


A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.

Id.; see also ILL. REV. STAT. ch. 38, para. 4-6 (1985). Because recklessness incorporates the notion of justifiability, some conscious decisions may not be blameworthy. The criminal law, therefore, recognizes conflicting social goals—the desire for progress and the obligation to protect human life. The balance between the benefits of a corporation's contribution to society and the harm to employees determines both the blameworthiness and the criminality of the act. Spurgeon & Fagan, supra note 86, at 418-19 & n.10. When the act's social utility is high, the risks are evident to both employer and employee, and the activity cannot feasibly be made safer, corporate decisionmakers may choose to pursue an activity in which employee deaths are statistically certain. That decision will most likely be exempt from criminal prosecution. See Greenhouse, supra note 5, at D2, col. 1.

The example of social justification most often quoted in the law school classroom is that of building construction. Statistics show that at least one death is likely to occur in the construction of a skyscraper; yet as long as all reasonable safety measures are taken, the social utility of the end-product justifies the risk, and no criminal liability arises. For a discussion of the difficulties of defining blameworthy conduct that incorporates the ideas of social utility, see Spurgeon & Fagan, supra note 86, at 416-20.
nore a significant and unjustifiable workplace hazard and that hazard causes the death of an employee.

The corporation and its employees can be charged with murder if the actor commits the homicide intentionally or "recklessly under circumstances manifesting an extreme indifference to the value of human life." When an actor intends to kill or do great bodily harm to another, or knows with certainty that his acts will cause death or serious injury, the actor, absent a lawful justification such as self-defense, has clearly committed murder. Likewise, when another's death flows from an actor's conduct and the actor knows that his acts "create[d] a strong probability of death or great bodily harm to another," he may be guilty of murder.

The distinction between manslaughter and murder in cases of corporate or agent responsibility turns on the degree of recklessness. According to the Model Penal Code, one acts recklessly when one chooses to disregard a significant risk that cannot be justified by the nature and purpose of the actor's conduct. Proof of recklessness is sufficient to sustain a charge of manslaughter. For murder, however, the state must also prove that, given the circumstances, the defendant's recklessness manifested an extreme indifference to the value of human life.

B. Inadequacies of the Criminal Law Approach

Although the criminal law now treats corporations as persons, some aspects of the criminal law do not relate well to corporate structures and functions. Relying on traditional crimi-
nal mechanisms—negligent homicide, manslaughter, and murder—to punish and deter employee endangerment will not be effective in practice. Problems in assessing culpability and enforcing these provisions, coupled with an inability to perceive corporate officials as homicidal agents, undermine the potential of the traditional criminal law to achieve these goals.

1. The decisionmaking stage: the problem of moral neutrality—The traditional criminal homicide provisions cannot be applied effectively to corporate crime. They fail to give adequate notice to corporations and their decisionmakers that their actions fall within the scope of these statutory prohibitions and fail to set adequate guidelines to govern corporate behavior. The nature of the corporation further complicates efforts to apply these laws to corporate actors. Conflicting legal mandates for corporate decisionmakers' duties,98 diffused responsibility for decisionmaking,99 and perception problems100 frustrate attempts to hold corporate decisionmakers responsible for criminal homicide.

a. Corporate purpose: conflicting goals and the duty of moral neutrality—The purpose of the corporation and the responsibilities that state law imposes on the corporation and corporate decisionmakers create conflicting duties. Microeconomic theory assumes that, as fiduciaries for the corporation's owners, the corporation and all corporate decisionmakers will act rationally to maximize profits.101 Unfortunately, corporate profit maximization may conflict with other societal goals, such as protecting the environment, providing jobs, and assuring the health and safety of employees.102 Whether, and under what circumstances, the corporation and its decisionmakers lawfully can or

98. See infra notes 101-03 and accompanying text.
99. See infra notes 104-05 and accompanying text.
100. See infra notes 106-13 and accompanying text.

Some critics of the profit-maximization theory claim, however, that it ignores corporate decisionmakers' other duties and motivations. They propose other explanations for corporate behavior such as satisficing behavior, sales maximization, and long-run profit maximization. For a discussion of these hypotheses, see R. LIPSEY & P. STEINER, supra, at 353-56.

102. See supra note 52 (stating that the profit motive is so strong that decisionmakers are reluctant to adopt any voluntary safety measures; instead, they wait for regulations that require compliance).
ethically should pursue these societal goals despite a conflict with profit maximization remains unclear.  

b. Corporate structure: individual anonymity breeds neutrality— Even if corporate officials are allowed to consider social goals, the structure of the corporation obscures moral blame. The organizational bureaucracy and the competition within and between corporations tend to shape the moral perspective of decisionmakers and to diminish social responsibility. As the chain of command lengthens, decisionmakers become more anonymous and less accountable. Corporate officials may thus adopt policies or procedures that create or contribute to life-endangering situations without viewing themselves as engaging in blameworthy conduct. Far removed from the consequences of their decisions, corporate officials may never feel or be held responsible.

c. Corporate decisionmakers: self-perceived as morally neutral, rational actors, not criminals— The fiduciary obligations of corporate decisionmakers to shareholders and the peculiarities of organizational behavior lead many executives to view themselves as morally neutral actors. The result is an unwillingness or an inability to accept their decisions as blameworthy. Even when they may admit blame, corporate officials do not see themselves in the same light as street criminals, particularly those responsible for murder or manslaughter.

In addition, the criminalization of morally neutral behavior has strengthened this perception. Legislators increasingly have relied on the criminal law to shape corporate behavior. They have created a long list of technical violations that carry criminal penalties. This overcriminalization of essentially morally

103. Spurgeon & Fagan, supra note 86, at 412-14; see also Note, supra note 43, at 184 (describing the conflict between duties to shareholders and obligations to employees).
104. Spurgeon & Fagan, supra note 86, at 413; Note, supra note 83, at 967 n.5.
106. Id.
107. Id.
108. Indeed, most corporate managers will not identify with the Film Recovery Systems defendants. See supra note 35. These corporate decisionmakers often fail to see their life-endangering conduct as blameworthy. Spurgeon & Fagan, supra note 86, at 414; see also Spiegel, The Liability of Corporate Officers, 71 A.B.A. J., Nov. 1985, at 48, 50 (noting the differences between street crime and corporate crime and the more complicated causal relationships in the latter).
110. Professor Orland notes that
The corporate community properly dismisses as “technical” corporate convictions for violating statutes dealing with neutral conduct, such as failing to keep
neutral conduct "demeans the seriousness of criminal convictions in the eyes of corporate executives, prosecutors and judges," and undermines the deterrent effect intended by the initial criminalization.

Corporate decisionmakers may rationalize risk to an employee as necessary to corporate operations. Thus, as long as corporate actors have not violated any of the laws specifically regulating their decisionmaking, they still see themselves as having clean hands. Corporate practices, therefore, pose several barriers to the successful application of traditional criminal homicide laws. The fiduciary duty of corporate decisionmakers, their anonymity in the corporate structure, and their perceptions of their role obscure accountability and make application of the laws of criminal homicide to situations of employee endangerment difficult.

2. The enforcement stage: the problems of corporate and individual liability for corporate crime—Ill-suited enforcement mechanisms frustrate the criminal justice system's efforts to deter employee endangerment. Faced with criminal corporate behavior, the criminal justice system underprosecutes, underconvicts, and undersanctions.

a. Underprosecution of corporate crime—The prosecution of corporate executives under current law for the death of an employee from hazardous activities or conditions is unlikely. Serious corporate crime has always been underprosecuted.

Ex-proscribed records for stockyards (7 U.S.C. § 221: three-year maximum penalty) or for dealing in fluid milk without the requisite permit (7 U.S.C. § 63: one-year maximum penalty). But the corporate community also dismisses as "technical" convictions involving truly culpable conduct such as willful tax evasion and conspiracy to defraud the United States.

Id. at 519 n.97.

111. Id. at 519.

112. Moral blame associated with a criminal conviction can be an effective deterrent, but the overcriminalization of corporate behavior diminishes the blameworthiness associated with a criminal conviction, and, as a result, the effectiveness of the criminal law as a deterrent. See Spurgeon & Fagan, supra note 86, at 414.

113. When corporate managers believe they are paying higher wages to compensate employees for taking greater risks, see supra note 53, these rationalizations seem more reasonable.

114. Orland, supra note 109, at 519. Corporate crime is often underprosecuted because it is too time-consuming and too costly. Where a serious crime is alleged, corporations will spend substantial sums to defend the charges. In the Pinto case, State v. Ford Motor Co., No. 11-431 (Pulaski County, Ind. Cir. Ct. filed Sept. 13, 1978, renumbered on transfer, May 3, 1979), Ford spent well in excess of one million dollars in defending charges of reckless homicide and criminal recklessness that carried maximum penalties of $30,000. P. DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 136 (1984); Spurgeon & Fagan, supra note 86, at 426. In contrast, the prosecution had a mere $20,000 budget for the case. Tiny Winamac, Ind., Disrupted by Frenzy of Ford Motor
cept in cases where the facts present clearly culpable conduct, as in *Film Recovery Systems*, prosecutors are unlikely to pursue such serious criminal charges as murder or manslaughter.

In addition, the prosecution of individual decisionmakers is unlikely because corporations tend to shield their executives through plea bargaining. The corporation may agree to plead guilty or nolo contendere if the state dismisses the charges against the individual actors.

b. Underconviction of corporate crime—Once the decision has been made to prosecute corporations and individuals, conviction is far from assured. Although individual liability is desirable as a deterrent, successful prosecution of individual actors is particularly difficult. Prosecutors must overcome a variety of procedural, substantive, and psychological barriers.

First, prosecutors must be able to identify the responsible parties and prove causation. The diffusion of decisionmaking authority in the corporate structure, however, makes the identification of responsible actors most difficult. Even where the actor can be identified, the state must prove beyond a reasonable doubt that the actor had the requisite knowledge or intent and that the actor's decision to act caused the harm to the employee.

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115. Spurgeon & Fagan, supra note 86, at 429. For example, in United States v. Hughey Construction Corp., No. CR-81-16D (W.D. Okla., information filed Jan. 23, 1981, superseding information filed Feb. 27, 1981, guilty plea entered Feb. 27, 1981, sentence imposed Feb. 27, 1981), an insufficiently supported five-foot deep trench caved in, killing an employee. Criminal charges were brought on two counts against the corporate employer and two of its executives. A plea agreement, however, resulted in a guilty plea by the corporation and the dropping of charges against the two individuals. The corporation was fined $7,500 on each of the two counts.


117. See supra notes 104-05 and accompanying text.

118. In People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 660 (1980), the court adopted an unduly narrow interpretation of causation. "The court said, in effect, that there must be a forceful demonstration that the corporate actor's acts or omissions were the cause of a crime, and not merely the creation of a dangerous workplace condition." Note, supra note 43, at 225. Another writer proposed a better standard: "Individuals with knowledge of criminal conduct should be culpable if they are in a position to deter the conduct but fail to act." Comment, supra note 7, at 1441.
Second, prosecutors must be able to obtain jurisdiction over the potential defendants. This prerequisite is easily met for the corporation; it is subject to criminal prosecution wherever it does business. Executives of a corporation located in one state, however, may require the forum state to request extradition of the executive to face trial. In some instances states may protect their businesspersons and refuse extradition. Thus, individual actors may be beyond the jurisdictional reach of the state trial court.

Finally, even when these procedural and substantive barriers are overcome, prosecutors face a far more serious hurdle—persuading the jury that the corporate executives on trial should be held responsible for murder or manslaughter. Like the corporate executives’ self-perceptions, the public perception of corporate executives is fundamentally inconsistent with that of murder and manslaughter defendants. To find a plant manager or vice president guilty of murder or manslaughter would probably require a juror to redefine her notion of culpability for that crime. Especially in cases where the individual defendant had no direct interaction with the endangering activities, the jury is likely to conclude that the decisionmaking was too remote and the defendant is not guilty. Thus, a gap in jurors’

119. Spurgeon & Fagan, supra note 86, at 429. The drafters of the Model Penal Code retained corporate criminal responsibility, in part because they recognized that the guilty individual may not be within the jurisdiction of the state. Model Penal Code § 2.07 comment 2(c) (1985).


122. Because Film Recovery Systems was a bench trial, it does not support the proposition that a jury is willing to convict corporate actors for murder or manslaughter.

123. Juries hesitate to convict corporations and their officers of crimes. Note, supra note 61, at 1451; see also Model Penal Code § 2.07 comment 2(c) (1985).

124. Jury sympathy for defendants charged with crimes committed in the course of their employment, combined with the remoteness of the injury and the diffusion of responsibility, may make conviction difficult. Note, supra note 61, at 1456 & n.53. Jury concerns about sentencing “respectable people” may also account for some acquittals. Cf. P. Diperma, supra note 114, at 190.

These sentiments may explain why juries often acquit corporate agents yet convict the corporation. This result is inconsistent with the theory that a corporation acts through its agents. One commentator concluded:

This phenomenon perhaps reflects an intuitive feeling by jurors that individuals acting within the pressures of a bureaucratic and sometimes highly diffuse corporate structure are often unwitting or even unwilling participants in an illegal
perceptual maps is likely to frustrate attempts to prosecute culpable conduct by corporate decisionmakers.

c. Ineffective sanctions for corporate crime—Convicted corporations are seldom adequately punished; verdicts are often more symbolic than effective. Because the corporation is a legal fiction that cannot be imprisoned, courts rely on fines as criminal sanctions against the corporation.\textsuperscript{125} Like regulatory fines, criminal fines are neither large enough nor certain enough to achieve their purposes.\textsuperscript{126} Courts tend to overlook other options—dissolving a corporation,\textsuperscript{127} placing it on probation,\textsuperscript{128} or revoking its operating licenses\textsuperscript{129}—as substitutes for or supplements to these fines. The result is a system of sanctions that is, at best, ineffective.

Convictions of individual actors for many corporate crimes are highly unlikely because corporations tend to shield\textsuperscript{130} or indemnify\textsuperscript{131} their officers. Criminal homicide charges against an individual transaction, and that a criminal conviction is too harsh a sanction for business misconduct that is not of a highly immoral or detestable character.

Note, supra note 83, at 968.

125. Comment, supra note 55, at 443; Comment, Probation for Corporations Under the Sentencing Reform Act, 26 SANTA CLARA L. REV. 785, 789 (1986). The overriding purpose of these fines is deterrence. Comment, supra note 55, at 446. The inability to imprison a corporation for corporate misconduct was at the heart of the debate over whether corporations could be held responsible for certain crimes. Although that issue has been resolved, debate continues over the best ways to sanction corporations for criminal behavior. See supra note 84.


127. Comment, supra note 125, at 789.

128. Probation has been used on a very limited basis. Two factors may explain this. First, probation requires a continuing relationship between the court and the corporation. Success depends on the court’s ability to supervise the convicted corporation. This constant monitoring is not only a heavy burden for the judicial system, but it is highly inefficient. On a large scale, these problems may be cost prohibitive. Comment, supra note 55, at 445 & n.10. Second, until 1984, some question existed as to the propriety of placing corporations on probation. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (codified at 18 U.S.C. § 3551 (Supp. III 1985)) answered this question. Comment, supra note 125 (analyzing the application of the Act and guidelines for corporate probation); see also Note, Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing, 89 YALE L.J. 353 (1979).

129. Many jurisdictions require some types of corporations to apply for and maintain general operating licenses or licenses to handle specific materials. Abuse of health and safety or other regulations could justify revoking these licenses. Many courts, however, have been reluctant to invoke these sanctions.

130. See supra notes 115-16 and accompanying text.

131. See supra note 80 and accompanying text. Although indemnification is an important consideration in assessing the effectiveness of individual liability for many
individual corporate actor, however, may serve as a more effective deterrent. The impact of a criminal conviction of corporate officers upon those similarly situated will likely be very significant. The imprisoned official must bear the burden of his punishment alone; he cannot shift it to shareholders, customers, or other employees. Without criminal accountability, the consequences of corporate decisionmaking are often remote, borne externally by the employee; with criminal accountability, however, each decisionmaker must internalize those consequences. The possibilities of conviction—and the stigma and loss of freedom that may follow—may deter corporate decisionmakers, particularly white-collar executives, from socially unacceptable behavior. Thus, real threats of individual punishment may deter employee endangerment.

Unfortunately, as the likelihood of detection, prosecution, and conviction diminishes, such deterrence is lost. Therefore, the structural bias against the conviction of individual executives undermines a potentially powerful deterrent device. The result is a system in which neither corporations nor corporate decisionmakers feel compelled by the criminal law to consider employee health and safety.

IV. PROPOSED ENDANGERMENT OFFENSE

The current judicial and legislative approaches have proven ineffective in handling cases of employee endangerment. Regulation discourages some risks, the civil law serves a compensatory function, but two purposes of the criminal law—retribution and deterrence—are not well served. To discourage employee-endangering activities requires a new approach—one that reflects the traditional views of culpability and criminality and puts both corporate actors and the public on no-
tice of the criminal responsibilities of corporate decisionmakers. Such an approach will provide a more effective deterrent against decisions that expose workers to socially unacceptable risks.

A. Previous Proposals

Numerous proposals have sought to impose criminal liability on corporate actors for employee endangerment. In 1977, the United States Senate considered section 403(c) of the Proposed Federal Criminal Code. The proposed offense addressed the

136. A person responsible for supervising particular activities on behalf of an organization who, by his reckless failure to supervise adequately those activities, permits or contributes to the commission of an offense by the organization is criminally liable for the offense, except that if the offense committed by the organization is a felony the person is liable under this subsection only for a Class A misdemeanor.


The 96th Congress reintroduced an endangerment offense. Section 1617 of the Criminal Code Reform Act of 1979 provided:

(a) OFFENSE. — A person is guilty of an offense if he engages in conduct that he knows places another person in imminent danger of death or serious bodily injury, and —

(1) his conduct in the circumstances manifests an extreme indifference to human life; or

(2) his conduct in the circumstances manifests an unjustified disregard for human life.


This provision was considerably broader than § 403(c) of the 1977 Proposed Code. It encompassed all endangerment and did not limit its focus to culpable supervisory activities. It, therefore, mirrored many of the mistakes of state reckless endangerment offenses. See, e.g., MODEL PENAL CODE § 211.2 (1980), providing:

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

These provisions, like those of traditional criminal homicide laws, falter in application because of the lack of notice, the inability of corporate managers, judges, and jurors to perceive these statutes as applicable, and the other problems discussed supra notes 97-132 and accompanying text.

Legislators have recognized the need for specificity in endangerment provisions and have responded with offenses focused on particular activities. For example, the public welfare provision at 42 U.S.C.A. § 6928(e) (West Supp. 1986) provides:

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste . . . who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or impris-
issue of “reckless supervision”—oversight recklessness in execution and permitting or contributing to the commission of a criminal offense as its result. The proposal, however, contained several flaws.

First, it required the commission of an offense by the supervisor’s organization as a condition precedent to individual criminal liability.137 This requirement would have precluded an individual indictment unless the corporation or other entity had been adjudicated guilty.138 Only after an employee was injured or died and the corporation was found guilty of murder or manslaughter could the statute be applied to the supervisor.139 The uncertainty in proving the predicate offense would weaken the deterrent effect on individual decisionmakers. Thus, the Senate approach was ineffective.

Second, the proposal lacked an appropriate degree of proportionality. When the conditions precedent had been met and the corporation had been found guilty of a felony, the supervisor could be charged with no more than a misdemeanor.140 Consequently, the statute, designed to address the very serious issue of employee endangerment, failed to allow an appropriately serious sanction.

Third, the proposal was overly broad,141 holding liable anyone who “permits or contributes to the commission of an offense.”142 Based on reckless supervision, the proposal did not require knowledge of the endangerment as an element of the crime. It
failed to differentiate between a chief executive officer who knowingly permitted or contributed to dangers to employees and an officer who, as a poor supervisor, was not aware of the danger to employees and so unknowingly permitted endangering activities. This proposal, therefore, would punish equally those decisionmakers who engage in culpable conduct and those who are merely reckless administrators. In doing so, it overreaches.

In response to the inadequacies of the Senate proposal, one commentator proposed alternative statutory language. This proposal appropriately removed the condition precedent provision of the Senate proposal and focused on supervisory personnel in a position to create, permit, or prevent a dangerous condition. This second proposal allowed efficient delegation of authority without criminal liability, except in those instances where the supervisor knew that, in doing so, he contributed to a "substantial and unjustifiable risk." In addition, it incorporated social utility analysis, forcing the consideration of such factors as the nature of the job, risk of injury, feasibility of precautions, and attention to safety. If the activity creating the risk was socially useful, necessary to achieve desired ends, and pursued with the most care possible, no liability would result. Finally, the proposal contained a defense for affirmative efforts to prevent the continuation of the risk before death or injury was imminent.

Although this second proposal incorporated the purposes and refined the provisions of section 403(c), it failed to address several of the inadequacies of both the current system and the Senate proposal.

143. The broad scope of this coverage may explain why the reckless supervision offense would have been only a misdemeanor. The crime may have been intended to force managers to be good supervisors. Still, criminal liability for poor administrative skills seems excessive and beyond notions of criminal culpability.

144. A person responsible for supervising particular activities on behalf of an organization who, in failing to supervise adequately those activities, knowingly permits or contributes to the creation of a substantial and unjustifiable risk of serious physical injury or death to another and such injury or death occurs is guilty of a class E felony. It is an affirmative defense to this section that the person affirmatively took steps to prevent the continued existence of the risk before death or injury was imminent.

Recent Development, supra note 137, at 681.

145. Id.
146. Id. at 682.
147. Id. at 682-83.
148. Id. at 683. By incorporating the justifiability of the risk created, the proposal did not outlaw all endangering activities; instead, it allowed corporate decisionmakers and the courts to account for other social concerns.

149. Id.
ate proposal. First, it retained death or injury as a prerequisite—no crime would be committed under the proposal until a death or serious physical injury occurred in fact. The affirmative defense in the statute did not resolve this problem; it did not encourage those who had knowledge of a dangerous situation but had no power to alleviate the danger to come forward. Even if such individuals did bring the endangerment to the attention of public authorities, the authorities could take no action until at least one employee died or was seriously injured. This proposal, like the Senate proposal, could not prevent death or injury before it occurred.

Second, this alternative to an overly broad Senate proposal was itself overly broad. Although purporting to address employee endangerment, the proposal was much broader on its face. Nowhere did the proposal limit its application to risks created in the workplace; the statutory language addressed all risk-creating activities. Thus, the proposal was as much a public welfare provision as it was an employee endangerment provision. By failing to narrow its applicability, the drafter failed to focus the attention of corporate decisionmakers on risks created in the workplace and let stand many of the problems of notice and perceptions that currently exist.

Third, the proposal was ambiguous as to whether it proscribed the creation of a substantial and unjustifiable risk or proscribed the existence of such a risk. By its terms, the proposal applied to an individual who “knowingly permits or contributes to the creation of a substantial and unjustifiable risk.” If interpreted literally, the proposal reached only those decisionmakers responsible for adopting the risk-creating policy or procedure. Thus, while the statute encouraged the risk-creator to take affirmative steps to prevent the continued existence of a risk, it was devoid of any incentive for others to do so.

In summary, despite vast improvements, this second proposal, like the current system and that proposed by the Senate in section 403(c), failed to provide sufficient preventive and curative measures for the endangerment of employees.

As an alternative to the above proposals, the following statutory language is proposed:

150. See supra note 144.
151. Recent Development, supra note 137, at 681.
152. Should courts find that OSHA preempts state criminal statutes in the area of workplace safety, explicit federal action will be required to empower state criminal actions to ensure safety in the workplace. See supra notes 68-70.
1. An organization, and any officer, manager, supervisor, or similarly situated person responsible for adopting any policies or supervising any activities on behalf of that organization, commits reckless endangerment of an employee when the organization or the individual:
   (a) knowingly permits or contributes to the existence of conditions or activities that place an employee, or similarly situated person, in imminent danger of death or serious bodily injury, and
   (b) this conduct under the circumstances manifests an unjustified disregard for human life.

2. It shall be an affirmative defense that the accused:
   (a) made affirmative efforts to prevent or to discontinue the creation or persistence of the hazardous condition before the danger of death or injury was imminent or as soon as the danger was known, and
   (b) notified endangered employees of the endangering condition or activity.

3. Reckless endangerment shall be punishable by a fine of not more than $250,000 or imprisonment for not more than ten years, or both, if the defendant is an individual. A defendant that is an organization shall be subject to a fine of not more than $1,000,000.

4. Proof of regulatory violations relating to the hazardous condition shall be presumptive evidence of knowledge for purposes of § 1(a).

Comments

1. Purpose— Under the Reckless Endangerment of an Employee statute, organizational decisionmakers are criminally responsible for enacting policies or supervising activities that they know pose significant risks of death or severe bodily injury to their employees. Criminal responsibility is imposed on those actors within the corporation that have the authority to adopt, allow, or alleviate endangering activities or conditions.

The statute accounts for the peculiarities of the corporate or organizational context and is therefore preferable to the blind
extension of the laws of criminal homicide to an entirely inappropriate context. It attempts to resolve the conflict between the fiduciary duty of corporate decisionmakers to investors and the duty of corporations to society in favor of overriding social goals and imposes liability on executives to maintain these goals. The language focuses explicitly on decisionmakers and provides clear notice of the duty not to endanger employees.

The duty, accompanied by the threat of punishment, is designed to introduce a new variable in the rationalistic calculus of corporate or organizational decisionmaking. In addition, jurors may be more likely to hold executives liable for crimes when the statute explicitly makes them liable. The specific focus of the statute circumvents the problem of preexisting perceptions of the characteristics of criminals and the responsibilities of corporate decisionmakers. The statute, therefore, seeks to reflect and to help mold the expectations and duties of corporate officers in their own minds and in the minds of shareholders, judges, prosecutors, and jurors. The specificity of the statute is designed to encourage more frequent prosecution and conviction of culpable corporate conduct, thereby increasing deterrence and protecting employee health and safety.

2. Endangerment—Unlike previous proposals, the statute does not require that death or serious bodily injury occur in fact. The statute imposes liability for the act of endangerment itself, not for its consequences. Thus, it reacts earlier to risks to employees. The adoption or implementation of a policy that creates or allows a significant danger to the employee creates criminal liability. Criminal responsibility, however, is limited by the requirement that the danger be imminent.153

3. Knowingly permits or contributes—The provision requires that the actor "knowingly permits or contributes to" the dangerous situation. The requirement ensures that liability is limited to those corporate managers or other decisionmakers who are in a position to create or alleviate the risk to employees. Thus, those individuals with authority to prevent or cure the dangerous situation are under a legal obligation to do so; those who merely know a dangerous situation exists are not liable for failing to correct it.

153. The statute requires an imminent danger of death or serious bodily injury, not the danger of imminent death or serious bodily injury. In doing so, it imposes criminal responsibility on those corporate decisionmakers who choose to expose their employees to long-term dangers such as exposure to radiation or asbestos. See Radin, supra note 115, at 72.
This requirement is consistent with the delegation required for the efficient operation of any organizational structure. Holding corporate executives or any organizational decisionmakers criminally liable for decisions made by their subordinates or peers without their knowledge is both unrealistic and unjust. Where a decisionmaker has delegated his authority to another in good faith, he will not be held liable for this offense; however, where he has delegated his authority to another and in doing so has knowingly permitted or contributed to employee endangerment, he is as accountable as the delegatee for the statutory offense of Reckless Endangerment of an Employee.

4. Unjustified disregard—The statute does not outlaw all endangering activities; it allows the fact finder to balance the risk with social utility. For those situations when the end is sufficiently desirable or necessary, no protection is feasible, no safer means to attain that end is possible, and the employee is made aware of the risks she faces, the decision to proceed with the activity will not subject corporations or their agents to criminal liability. When the prosecutor can prove that the end is not sufficiently compelling, protection of the employee from the risk is feasible, safer means to attain the same end are available, or the employee is not made aware of the risk, liability will follow.

5. Affirmative defense—The affirmative defense serves two purposes. First, it allows the individual decisionmaker to remove himself from the reach of the law. In this manner, the application of the statute is limited to culpable parties. Second, an affirmative defense encourages decisionmakers to correct situations that may place employees in danger.

Conclusion

Film Recovery Systems opened the door for courts to apply murder and manslaughter statutes to corporate executives. Although the decision shocked many, it did so not because the actions failed to warrant a criminal conviction, but because it held corporate decisionmakers liable for murder. This approach, however, is inadequate. Judicial application of the traditional crimes of murder and manslaughter to situations of employee endangerment cannot effectively redress employee endangerment.

Society as a whole must address the issue of responsibility for employee endangerment. Any potential solution must provide a sound and consistent approach within the criminal law; it must provide notice, predictability, and effective sanctions. The above
proposal meets these criteria. In that proposal, state legislatures have a more appropriate and effective alternative—a new offense: Reckless Endangerment of an Employee.

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