A Fresh Assault on the Hazardous Workplace: Corporate Homicide Liability for Workplace Fatalities in Minnesota

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INTRODUCTION

Today, the words “corporate crime” conjure a picture of white-collar financial misdealings, of Ivan Boesky and Wall Street. But there is another trend in corporate criminal liability involving increasing numbers of corporations, corporate officers and corporate employees: violent corporate crime. Recently, corporations have been charged with and convicted of crimes of violence against workers arising from working

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conditions. Not prosecuted under federal or state regulatory law, these are manslaughter and murder violations under state criminal statutes. In 1985, an Illinois case caught the nation’s attention. Two officers and an employee of a small company named Film Recovery Systems were each convicted of murder and sentenced to twenty-five years in prison and a $10,000 fine for the cyanide poisoning death of an employee. While there have not yet been any corporate homicide prosecutions in Minnesota, the possibility exists because of the current state of Minnesota common law on corporate criminal liability and Minnesota homicide statutes.

There are several reasons for this trend toward corporate criminal liability for workplace fatalities. First, sensitivity and concern for workers’ exposure to workplace hazards are on the increase. In addition to the Occupational Safety and Health Act (OSHA), “Right-to-Know” legislation has recently been enacted on the federal level and in a number of states which requires employers to warn and educate employees about certain workplace hazards. The United States House of Representatives is now considering the Corporate Criminal Liability Act which would institute a system of fines when corporate managers fail to disclose to employees and the appropriate federal agencies any “serious concealed danger” which is subject to federal regulation.

2. See infra notes 159–210 and accompanying text.
3. The Occupational Safety and Health Act (OSHA) includes criminal penalties in addition to civil penalties. See 29 U.S.C. § 666 (1986). See also infra notes 124–35 and accompanying text.
5. CORPORATE CRIMINAL LIABILITY ACT OF 1987, H.R. REP. NO., 2664, 100th Cong., 1st Sess. (June 11, 1987). No parallel bill was filed in the Senate. The House bill defines “serious concealed danger” as “the normal or reasonably foreseeable use of, or the exposure of an individual to, such product or business practice as is likely to cause death or serious bodily injury to an individual (including a sperm, egg, or fetus in such individual) and the danger is not readily apparent to the average person.” Id. Two hearings were held on the bill. The first hearing was held November 19, 1987 by the House Judiciary Subcommittee on Criminal Justice. See Bill on Sanctions Should Bar Pre-Eemption of State Actions by Federal Law, Panel Told, 14 O.S.H. Rep. (BNA) at 979 (Nov. 25, 1987). The second hearing was held January 27, 1988 by the House Government Operations Subcommittee on Employment. See Statement of the Associated General Contractors of America (Jan. 27, 1988) (submitted to the Subcommittee on Employment of the Housing Committee on Government Operations, U.S. House
The second reason for the trend is the failure, or at least the perceived failure, of OSHA to be effective in enforcing workplace safety. Particularly under the Reagan Administration, OSHA faced funding restrictions which have constrained its investigatory abilities. One source states that OSHA safety inspections are down forty-percent since 1981. Only forty-four cases have been referred from the Department of Labor to the Department of Justice for possible criminal prosecution since OSHA's creation. The Department of Justice has obtained only two convictions under OSHA's criminal penalties since 1981.

A third reason for the trend towards corporate criminal accountability is the fact that as corporate criminal law has evolved it has eliminated the major historical obstacles to corporate criminal liability.

This article focuses on corporate criminal liability for homicide based on state criminal law, rather than federal or state regulatory schemes intended to address job site conditions; and on corporate homicide stemming from employee deaths due to work site conditions, rather than deaths due to products or conditions injurious to third parties. The article reviews the background of corporate homicide liability for workplace fatalities and some of the significant recent cases in this area; discusses possible preemption problems between state criminal remedies and OSHA; surveys the history of corporate criminal liability in Minnesota and the current Minnesota homicide statutes and concludes that prosecutions against corporations could take place in Minnesota although due to the inherent hurdles of bringing this type of case, large numbers of prosecutions are unlikely.


8. See Kahn, When Bad Management Becomes Criminal, INC., March 1987, at 47.


10. Id.

11. See, e.g., infra notes 40–69 and accompanying text.
I. Overview of Corporate Criminal Liability for Homicide

A. Corporate Criminal Liability

Generally, a corporation may be held liable for the crimes committed by its agents. This includes the acts of corporate officers and managers, as well as rank and file employees. The corporation is accountable based upon an extension of the doctrine of respondeat superior. Under this doctrine the acts of the agent will be imputed to the master/corporation if the agent: (1) commits a crime; (2) while acting within the scope of the agent’s employment; and (3) with the intent to benefit the corporation.

The phrase “acting within the scope of the agent’s employment” has been used broadly and includes actions the agent is not authorized to commit, but which were committed in connection with the agent’s job-related activities. In some cases, corporations have been found criminally liable even though the agent’s conduct was specifically prohibited by the corporation and the corporation took steps to prevent the criminal conduct.

“Intent to benefit the corporation” is also defined broadly. The justification for imputing the acts of agents to the corpo-
tion is that the fictional corporate entity must necessarily act through its employees and agents. "The power to delegate, then, is accompanied by a corresponding obligation to provide sufficient supervision and control to assure that activities conducted on behalf of the corporation and in the corporate name conform to the requirements of the law."\(^\text{19}\)

In addition to corporate liability, corporate officers, employees and agents may be held personally liable for their criminal conduct. The corporate entity will not shield a corporation's officers, employees and agents from personal liability for criminal acts; even when wrongful acts are committed in the course of employment or when ordered or encouraged by a supervisor.\(^\text{20}\) It is a generally accepted principal that a "servant or other agent is not relieved from criminal liability for conduct otherwise a crime because of a command by his principal."\(^\text{21}\) Individuals may be liable for the same offenses as the corporation: "corporate and individual liability are complementary, not mutually exclusive."\(^\text{22}\) In fact, there are cases where the individual employee has been found not-guilty yet the case against the corporation has proceeded.\(^\text{23}\)

In addition, indirect individual actors may be held liable for aiding and abetting a crime.\(^\text{24}\) Managerial-level employees may be charged with the criminal conduct of lower-level employees. Instructing another to commit a crime,\(^\text{25}\) aiding an-

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19. I BRICKEY, supra note 12, at 56.
20. Id. at § 5:02.
21. RESTATEMENT (SECOND) OF AGENCY § 359A (1957). Comment A explains that the ordinary defenses, "such as lack of knowledge and physical coercion to perform an act, are available, but there are no defenses peculiar to agents." Id.
22. See Note, supra note 12, at 1244.
24. See I BRICKEY, supra note 12, at §§ 5:05-09 (outlining origins of respondeat superior doctrine; vicarious criminal responsibility or the doctrine of parties to a crime; nuisance rationale for imputing criminal liability to corporations and to individual non-participants and the equitable basis for such liability. Brickey notes that "passive acquiescence or uncommunicated assent to an unlawful course of conduct may warrant a finding of encouragement of the conduct by implication"). See also Note, supra note 12, at 1261 (evaluating strict liability and specific intent as basis for imposing criminal liability on indirect corporate actors, urging energetic prosecution of indirect actors as principals to further the criminal justice goals of "deterrence and just deserts").
25. See United States v. Pellegrimo, 470 F.2d 1205, 1209 n.4 (2d Cir. 1972), cert.
other to commit a crime, and even silently acquiescing to criminal conduct may give rise to personal liability. If corporate officials commit or assist another in committing a crime, the law will not allow them to escape liability simply because they have used the company as the vehicle for their offending acts.

The rationale for corporate criminal liability incorporates essentially the same social aims as all criminal liability: deterrence, retribution and rehabilitation. Of these three, deterrence is the primary justification for imposing criminal sanctions on corporations and their agents. Sending a corporation to jail is impossible, thus, corporate deterrence should occur through fines and the social stigma associated with the criminal prosecution of the corporation and its agents. There is significant debate regarding the effectiveness of these sanctions. Can a fine be sufficient deterrent to a corporation that daily must assess the financial consequences

denied, 411 U.S. 918 (1973) (one wilfully causing interstate transportation is punishable as principal). See also Brickey, Primer, supra note 12, at 139-40.

26. See, e.g., United States v. Andreadis, 366 F.2d 423, 429-30 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967) (president of advertising agency reviewed and approved ads containing false weight reduction claims, company was not insulated from liability).

27. See, e.g., Moreland v. State, 165 Ga. 467, 139 S.E. 77, 79 (1927) (employer/passenger failed to protest when his chauffeur violated the speed limit, held liable for chauffeur’s collision with another car, killing a woman).

28. Id. at 105. See State v. McBride, 215 Minn. 123, 9 N.W.2d 416 (1943)(officer or agent of corporation cannot avoid responsibility for actions on grounds it was done in official capacity); see also infra notes 166-77 and accompanying text.


30. See Radin, supra note 12, at 54-55; Fisse, supra note 12, at 1146.

31. See Comment, Corporate Liability, supra note 29, at 118; Note, supra note 7, at 221.

of its actions or will it merely be viewed as a cost of doing business? Proponents urge that negative public reaction to criminal charges or convictions may be a stronger deterrent than a purely economic penalty because of the ensuing long-term effects on the corporation's ability to turn a profit. The corporation will presumably try to regain its good public image by quickly eliminating the "dishonor" and preventing future stigmatization.

The questionable effectiveness of the deterrent value of general corporate criminal liability is another reason to hold corporate officers, employees and agents personally liable instead of the corporation. Individuals may be subject to both fines and imprisonment. Additionally, the deterrent value of a social stigma may be most effective against corporate officers and managers, who are frequently well-known in their communities. One prosecutor stated, "When human life can be reduced to the cost of doing business, something's got to give. And believe me, one company officer spending two days in jail is worth any fine you can impose [against the organization]. When you lock that cell door, word gets around an industry real fast." Rehabilitation and retribution may also be more effective when imposed on the individual actor rather than the corporate entity.

Another issue raised by criminal prosecutions of corporations is the fact that corporate criminal liability and its penalties necessarily impact the shareholders of the corporation. Authorities dispute whether the penalty actually deters corporate criminal actors or simply harms innocent shareholders. On the one hand, imposition of fines would prevent the unjust enrichment of shareholders profiting from corporate criminal conduct. On the other hand, shareholders are typically innocent, or at least less-culpable for corporate crimes because "[i]n most cases, the shareholders not only have not participated in the criminal conduct, but also lack the practical means

33. See Radin, supra note 12, at 56.
34. Note, supra note 7, at 222-23; but cf. Comment, Corporate Liability, supra note 29, at 119 (effectiveness of social stigma as deterrent is questionable).
35. Radin, supra note 12, at 56-59; Note, supra note 7, at 223.
36. Kahn, supra note 8, at 47 (quoting John Lynch, Environmental Crimes/OSHA Division, Los Angeles, California).
37. See, e.g., Comment, Corporate Liability, supra note 29, at 117.
of supervising the corporation's management."38

Despite the continuing debates on the effectiveness of the sanctions for corporate criminal liability, the concept that corporate entities may be held responsible for the criminal actions of their officers, agents, and employees is firmly implanted in the law.

B. Corporate Liability for Homicide

Imposing corporate criminal liability for workplace fatalities raises special problems. First, the fact situation must fit the standards for imputing criminal conduct of a corporate agent to the corporate entity. In the case of homicide, this may be significantly more difficult than in financial crimes or crimes of non-compliance with regulations. Was the corporate agent acting within the scope of his or her employment in committing the crime? Did the corporate agent commit the crime with the intent to benefit the corporation? Second, it must be determined whether a corporation is a "person" under state criminal statutes for the purposes of obtaining indictments and convictions against corporations. Finally, for degrees of homicide that require criminal or specific intent, it must be decided whether a corporation can form the necessary intent requisite to conviction. There are relatively few reported cases regarding corporate liability for homicide.39 All of the cases grapple

38. Radin, supra note 12, at 52. See also Fisse, supra note 12, at 1173–76; Comment, Corporate Liability, supra note 29, at 121–22 (holding innocent shareholders responsible is a perversion of criminal justice system).

For a discussion of some other implications of corporate criminal liability, including issues of corporate defenses, corporate indemnification and insurance, and privileges that may apply to internal investigations, see generally, Yohay & Dodge, Criminal Prosecutions For Occupational Injuries: An Issue of Growing Concern, 13 Employee REL. L.J. 197 (1987); Note, Organizational Papers And the Privilege Against Self-Incrimination, 99 Harv. L. Rev. 640 (1986); Note, Fifth Amendment Privilege For Producing Corporate Documents, 84 Mich. L. Rev. 1544 (1986).

with one or all of these issues.

1. Statutory Interpretation: Is a Corporation a Person?

A primary barrier to corporate criminal liability for homicide is the definition of homicide under state common law and criminal statutes. A number of states define homicide as the killing of one human being by another. In these states, the courts must then determine whether the term "another" applies to corporate entities or only to natural persons. In other states, corporate entities fall within the definition of "person" under criminal homicide statutes. Such a designation allows these states discretion as to whether corporations may be criminally liable for homicide.

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41. See Annotation, Corporations' Criminal Liability for Homicide, 45 A.L.R.4TH 1021, 1024 (1986)(discussion of state and federal cases in which the courts have addressed the issue of whether a corporation may be subject to criminal liability for homicide).

42. Id. at 1026-30. See also, Comment, Corporate Liability, supra note 29, at 100-05 (discussion of the law in New York, New Jersey, Kentucky and Oregon).
A case that exemplifies the broadening of homicide liability of the corporate entity is *People v. Ebasco Services, Inc.* In *Ebasco*, a New York court found that a corporation could commit homicide, though it could not be a victim of homicide. The defendants included two corporations and three individuals charged with criminally negligent homicide for the deaths of two workers at a construction site. The defendants' contracting company was hired to construct an extension for an electrical generating station. The project required that a cofferdam be constructed in the East River so that a portion of the facility could be installed. The cofferdam collapsed killing the two construction workers.

The *Ebasco* decision relied on portions of the New York homicide statute which allowed an interpretation that a corporation could be a person. One section provided, "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person." Under the statute the term "person" is defined as "a human being who has been born and is alive." The statute also stated that, "where appropriate, a public or private corporation" may be included under the statute. Consequently, the court held that the definition of the victim of a homicide as a human being did not preclude the corporation from being the perpetrator of the homicide. The court also found "no manifest impropriety" in including a corporate entity as a person under the general definitional statute and held that "although a corporation cannot be the victim of a homicide, it may commit that offense and be answerable therefor."

A contrary ruling was initially made by the Texas Court of

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44. *Id.* at 788, 354 N.Y.S.2d at 817.
45. *Id.* at 785, 354 N.Y.S. 2d at 809. The parties included the contractor, subcontractor, an officer of the subcontractor and two employee-supervisors of the contractor.
46. *Id.* at 786, 354 N.Y.S.2d at 810 (citing N.Y. Penal Law § 125.10 (McKinney 1967)).
47. *Id.* (citing N.Y. Penal Law § 125.05[1]).
48. *Id.* at 787, 354 N.Y.S. 2d at 811 (citing N.Y. Penal Law § 10.00(7)).
50. *Id.* at 787, 354 N.Y.S.2d at 811. However, the court found the indictments to be lacking and dismissed them. *See also*, Granite Constr. Co. v. Superior Court, 149 Cal. App. 3d 465, 467, 197 Cal. Rptr. 3 (1983) (relying on California statutory definition of "person" as including a corporation, allowing corporation to be charged with manslaughter in the deaths of seven construction workers).
Appeals in Vaughan & Sons, Inc. v. State, a case in which a corporation was charged with criminally negligent homicide when corporate employees caused the death of two individuals in a motor vehicle collision. The Texas statute, like the New York statute, defined a person to include a corporation. In Texas, a person commits criminally negligent homicide when they "cause . . . the death of an individual by criminal negligence." The Vaughan court acknowledged that a "superficial reading" of the statute could lead to the finding that a corporation could be liable for criminally negligent manslaughter, but phrased the question before it as "whether a legislative intent plainly appears which includes corporations within the criminal field of negligent homicide by the use of the term 'person'." The court found that, because the statute grouped


A superficial reading of the negligent homicide statute construed with the Penal Code Definitions of 'person' indicates that a corporation could be found guilty of the crime charged. But the actual question before the court is whether a legislative intent plainly appears which includes corporations within the criminal field of negligent homicide by the use of the term 'person' . . . . Therefore, without a stronger clearer indication from the legislature that the policy for holding corporations criminally responsible for homicide has changed, we decline to so hold. We should make haste slowly when it is in the direction of holding either an individual or a corporation criminally liable for a crime, especially one so serious as homicide, when it is committed by someone other than the person charged.

Id. at 678-79.

In reversing the Texas Court of Appeals, the Texas Criminal Court of Appeals noted:

An examination of decisional law from other states indicates that where there are corporate criminal responsibility statutes similar to our own Texas statutes, it appears to have been consistently held liable for specific intent crimes and offenses of criminal negligence . . . . Given the history of corporate criminal liability in Texas prior to the 1974 Penal Code, the various provisions of the 1974 Penal Code and other statutes enacted to bring about change, the clear statutory language, and the analogous case authority, we reject the reasoning of the court of appeals and conclude that a corporation may be criminally prosecuted for the misdemeanor code offense of criminally negligent homicide under V.T.C.A. Penal Code, § 1907 for corporations have been made subject thereto.

Id. at 812-14.

But see State v. Pacific Power Co., 266 Or. 502, 504, 360 P.2d 530, 532 (1961)(corporation held not a "person" under involuntary manslaughter statute where corporation's truck loaded with explosives and left unattended, exploded killing a bystander).

52. See Vaughan, 649 S.W.2d at 677 (citing Tex. Penal Code Ann. § 1.07 (a)(27) (Vernon 1974)).

53. Id. at 677-78 (citing Tex. Penal Code Ann. § 19.07 (a)).

54. Id. at 678.
homicide and criminally negligent homicide together in one section of the statute, and in Texas, corporations could not be liable for specific intent crimes, the intent of the legislature was not clear. The court, therefore, dismissed the indictments. On appeal, however, the Court of Criminal Appeals of Texas overturned the decision. The appellate court based its decision on the standards for determining legislative intent, using reasoning similar to that of the *Ebasco* court.

2. Intent

Historically, courts have been willing to hold corporations liable for negligent homicide but have never held a corporation liable for homicide that requires specific criminal intent. One rationale for this is that a corporation is an artificial being and "has no hands with which to strike." How can this artificial being form the requisite criminal intent?

The earliest cases finding corporate criminal liability for homicide concerned corporate violations of statutes and regulations where no intent was required, that the violation occurred was enough. For example, in *United States v. Van*

55. *Id.* at 678–79. *See also generally* Annotation, *supra* note 43, at 1026–30. Previously, Kentucky, New York, Oregon, Pennsylvania and Texas refused to permit the prosecution of a corporation for homicide on the basis that the common law and statutory definitions of the crime applied only to human beings or natural persons. Recently, however, Kentucky and New York joined California, Pennsylvania and New Jersey in permitting the prosecution of a corporation for homicide. These jurisdictions now hold that a corporation is included as a "person" within the common law and statutory definition of homicide.


57. "Since no definition of 'person' as applied to the actual committing of the homicide has been included by the Legislature in the homicide article, the court must look to the broader definition of 'person' contained in the overall definitional article of the Penal Law." *Vaughan*, 737 S.W.2d 805, 811 (Tx. Crim. App. 1987)(quoting *People v. Ebasco Services, Inc.*, 77 Misc. 2d 784, 787, 354 N.Y.S. 2d 807, 811 (N.Y. Sup. Ct. 1974)).

Both the *Vaughan* and *Ebasco* courts rejected the statutory construction argument which would prohibit corporate criminal liability for homicide due to inability to form intent. The courts held instead that since corporations are subject to criminal codes generally, they may be held liable under them, even for homicide. *Vaughan*, 737 S.W.2d at 814; *Ebasco*, 77 Misc. 2d at 788, 354 N.Y.S. 2d at 812.


Schaick \(^{60}\) the court upheld the indictments of a steamship company and its officers and directors for furnishing defective life preservers in violation of a federal statute requiring adequate life preservers on all steamships. Nine hundred people drowned when a company ship caught fire and the life preservers failed. The corporation moved to quash the indictment on the grounds that the corporation could not be charged or convicted of the crime of manslaughter. The court held that because the statute made the owner liable for death through a violation of the law, the corporation could not be exempt from liability simply because it was a corporation. The applicable statute did not require malice or intent in order for liability to apply.\(^{61}\)

Corporations have been held responsible for crimes other than homicide which require specific and criminal intent.\(^{62}\) Although a corporate entity cannot have a "culpable mental state" per se,\(^{63}\) courts have imputed the intent of the individual officer, employee or agent to the corporation.\(^{64}\)

In addition, vicarious liability requires that an agency relationship exist between the corporation and the agent. The

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\(^{60}\) 134 F. 592 (S.D.N.Y. 1904).

\(^{61}\) Id. at 608. See also Comment, Corporate Criminal Liability for Homicide: The Controversy Flames Anew, 17 CAL. W.L. REV. 465, 470-71 (1981) (discussion of Van Schaick which notes that courts are more willing to charge a corporation with criminal liability if the crime involves negligence, rather than specific criminal intent).

\(^{62}\) See, e.g., New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909) (common carrier corporation held liable for acts of freight traffic manager who had authority to establish transportation rates when manager authorized illegal rebates, because there is "no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents, acting within the authority conferred upon them"); United States v. Carter, 311 F.2d 934, 941-42 (6th Cir. 1963), cert. denied sub nom., Felice v. United States, 373 U.S. 915 (1963) (brewery held liable for crime committed by officer of company in making an unlawful payment of money to president and general manager of union because "a corporation, through the conduct of its agents and employees, may be convicted of a crime, including a crime involving knowledge and wilfulness").

For a full discussion of the history and development of corporate liability for crimes requiring specific intent, see generally Fisse, supra note 12, at 1183-213. The discussion concludes that "[a]lthough few corporations operate under policies of noncompliance, all can be placed on notice that they are expected, as a matter of specific reactive policy, to respond to an actus reus by formulating and implementing a satisfactory program of preventative or corrective reaction." Id. at 1213 (footnote omitted).

\(^{63}\) See I BRICKEY, supra note 12, at §§ 4:01-4:05, at 81-109; Comment, supra note 60, at 467.

\(^{64}\) See I BRICKEY, supra note 12, at §§ 4:01-4:05, at 81-109.
agent must be acting within the scope of his or her employment with intent to benefit the corporation.65 The first reported case affirming vicarious corporate liability for a crime involving specific intent is New York Central & Hudson River Railroad v. United States.66 In New York Central, the railroad company was indicted for granting illegal rebates. The Supreme Court wrote:

Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.67

The court continued:

Applying the principal governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.68

Courts now generally accept that the intent of individual corporate actors may be imputed to corporations.69 One commentator writes:

[Although crimes against persons are not traditionally viewed as being linked to the profit motive in the same way as crimes against property, the courts will no longer overlook the substantial indirect economic benefit that may accrue to the corporation through crimes against the person. To get these indirect economic benefits, for example, the corporate management may shortcut expensive safety precautions, respond forcibly to strikes, or engage in criminal anticompetitive behavior. If any such risk-taking is a corporate action, the corporation becomes a proper criminal defendant.70

In crimes of violence, however, meeting the standards for imputing an agent’s conduct to the corporation is more diffi-

65. Id. at § 4:01, at 82.
67. Id. at 492–93 (quoting BISHOPS NEW CRIMINAL LAW § 417 (8th ed. 1892)).
68. Id. at 494.
69. FLETCHER, supra note 14, § 4944, at 675.
70. Id.
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cult than in regulatory or financial crimes. For example, in People v. Rochester Railway & Light Co., the corporation was indicted for homicide. The court found that, within limits, a corporation could be convicted of crimes requiring an element of intent. The court also stated, however, that crimes which require "personal, malicious intent and acts so ultra vires that a corporation manifestly could not commit them," would limit imputation of criminal intent to the corporate entity. In this type of case, therefore, it is more likely to have individual corporate actors indicted than the corporate entity itself.

In recent years potential corporate liability has arisen out of three basic scenarios: deaths to third parties from products manufactured by the corporation; deaths to third parties due to conditions created by corporations or corporate actions; and deaths to corporate employees due to work site conditions.

Perhaps the best known corporate homicide prosecution for the design and manufacture of a product was against the Ford Motor Company. Ford was prosecuted for the design and manufacture of the Ford Pinto, a product which caused the death of three teenagers. Ford was charged with three counts of reckless homicide when the teenagers died in a fire allegedly caused by a defective gas tank in the Pinto. The state claimed that Ford knowingly manufactured the defective tank, and had failed to warn Pinto owners of the danger and to remedy the problem. The jury acquitted Ford on all three counts.

Corporations have also been subject to homicide liability

71. 195 N.Y. 102, 88 N.E. 22 (1909).
72. 195 N.Y. at 103, 88 N.E. at 23 (citing Wharton's Crim. Law § 91 (9th ed. 1885); see Morawetz, Private Corp. § 732 (2d. ed. 1886).
75. Id.
76. See Stoner, Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior, 38 Sw. L.J. 1275, 1285, n.108 (1985). The comment discusses corporate criminal liability for homicide, including the Ford Pinto case. It also includes a discussion on new developments in the law since the Pinto case, by focusing...
when the corporation creates conditions or takes actions which cause death to third parties. Several cases deal with corporate agents driving corporate vehicles in a manner which causes the death of bystanders. In *Commonwealth v. Fortner LP Gas Co.*, the corporation was charged with manslaughter for the death of a child. The child was killed by a company-owned vehicle, with grossly defective brakes driven by an employee.

Corporate homicide charges have also been brought when corporations create other types of conditions which cause death. For instance, in *State v. Six Flags Corp.*, a grand jury in New Jersey indicted Six Flags Corporation for aggravated manslaughter after eight people were killed at a corporate-operated amusement park. Two officers of the company also were charged with manslaughter. The deaths occurred after a youth accidentally started a fire by touching a cigarette lighter to a foam rubber padded wall inside the amusement park’s haunted house. The wall was covered with a highly flammable type of foam rubber. The grand jury believed the use of that type of foam rubber indicated the corporation’s reckless disregard for human life. Charges against the two individual de-

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78. *Id.* at 1285.

79. *Id.*

80. *See also* Commonwealth v. Penn Valley Resorts, Inc., 343 Pa. Super. 387, 494 A.2d 1139 (1985)(actions of “high managerial agent” of corporation can lead to criminal corporate liability for involuntary manslaughter when he served alcohol to intoxicated minor who was killed in auto accident).


82. *See generally* Stoner, *supra* note 75 at 1285. Stoner notes that the indictment makes only the second such case in the state’s history and cautions that even if a conviction resulted, the efficacy of corporate criminal liability is questionable.

83. *Id.*
fendants were later dismissed when they were admitted into a pretrial intervention program; the corporation was later acquitted.84

Most recently, corporate homicide liability has been imposed for work site-caused fatalities; this is at a time when an estimated 10,700 men and women die each year at work or die due to work-related injuries,85 and the number of workplace fatalities and injuries is on the rise.86 Although OSHA fines for regulatory violations have increased,87 there appears to be a gap between the ability of OSHA officials to protect workers on the job and the needs of workers for protection. This need is highlighted by egregious situations like that in the Film Recovery Systems case.88 The gap between regulatory protection and workers' needs becomes apparent when a comparison is made between the penalties assessed against companies and corporate agents for homicide with the penalties assessed by OSHA. In the Film Recovery Systems case, for example, three individual defendants were sentenced to twenty-five years in prison and each assessed fines of $10,000.89 In contrast, the company received citations for twenty OSHA violations and a fine of $4,844, which was later cut in half.90 Given this apparent ineffectiveness of OSHA to address workplace fatalities, local prosecutors in several parts of the country have stepped in to close the gap with criminal proceedings.

II. THE CURRENT WAVE OF CORPORATE HOMICIDE CASES

A. The Film Recovery Systems Case

The current wave of cases involving corporate homicide for workplace fatalities began with the 1985 Film Recovery Systems case,91 the first case convicting and sentencing corporate

85. See The National Safe Workplace Institute, supra note 9, at 1.
86. Id. (quoting John B. Moran former Director of Safety Research, National Institute of Occupational Safety and Health, in his testimony before the Committee on Labor and Human Resources, 101 Cong., 2d Sess. (1988)).
88. See infra notes 90–96 and accompanying text.
89. The National Safe Workplace Institute, supra note 9, at 2.
90. Id. at 2, 21.
officers and employees for murder. The case arose from the cyanide-poisoning death of an undocumented immigrant employee for which the corporation itself, a former president of the company, two officers, the plant manager and a plant foreman were indicted. 92

Film Recovery Systems, Incorporated, was in the business of recovering silver from used x-ray and photographic film. Vats of cyanide were used as part of the recovery process. 93 On February 10, 1983, one employee collapsed and died from cyanide poisoning. On investigation, the following evidence was gathered and produced at trial: the company failed to provide employees proper safety equipment; no emission-control devices were installed over the cyanide vats; there was no monitoring of the level of cyanide gas in the plant; workers and visitors regularly complained of work-related health problems such as feeling nauseous and dizzy; the defendants knew that cyanide was used in the plant and could be fatal; the company systematically hired non-English speaking and undocumented immigrants, perhaps to reduce the likelihood of complaints regarding working conditions; and the defendants may have concealed the extent of the danger from employees. 94 In fact, one witness reported seeing company officials remove the skull and crossbones labels from cyanide containers. 95 The former president, plant manager and plant foreman were each convicted of murder and fourteen counts of reckless conduct; the corporation was convicted of fourteen counts of reckless conduct. 96

This flagrant disregard for the health and safety of the employees led to the murder indictments and convictions, and brought the trial judge to compare the actions of the company to those of a terrorist who "leaves a time bomb ticking in a public place." 97

92. Verdict May Spur Industrial Probes, Nat'l L.J. July 1, 1985, at 3, col. 2. See also National Safe Workplace Institute, supra, note 9, at 2.
93. See Brickey, supra note 40, at 770.
94. See id. at 768–75; Kahn, supra note 8, at 47.
95. Brickey, supra note 40, at 773–74.
96. See Nat'l L.J., supra note 91, at 3, col. 2 to 8, col. 3. For additional discussion of this case, see also S. Hills, Corporate Violence: Injury and Death for Profit, Chp. 8 (S. Hills ed. 1987); Gibson, A Worker's Death Spurs Murder Trial, Nat'l L.J., May 20, 1985, at 6, col. 1; Kahn, supra note 8, at 47; Note, supra note 7, at 218–19; Brickey, Workplace, supra note 40.
97. Kahn, supra note 8, at 47 (quoting trial judge Ronald J.P. Banks).
B. Post-Film Recovery Systems Cases

The Film Recovery Systems case generated national press attention and sparked a critical review by the legal community of the handling of corporate homicide liability. Since 1985, corporate homicide charges for workplace fatalities have increased. However, at present, there are still only a handful of reported corporate homicide cases involving workplace fatalities. In no case has a corporation been convicted of murder, and in only the Film Recovery Systems case have the charges against corporate agents included murder. In only three cases have corporate officers or employees been sentenced to prison. In all of the cases, aggravating circumstances surrounding the fatality have been present.

98. See, e.g., Brickey, supra note 40; Kahn, supra note 8, at 46; Miller, Murder in the Workplace, BENCH & BAR OF MINN., March 1986, at 24; Postell, Trends: A Criminal Lack of Safety in the Workplace, TRIAL, July 1986, at 121; Yohay & Dodge, supra note 38, at 37; A Death At Work Can Put The Boss In Jail, BUS. WK., March 2, 1987, at 37 [hereinafter Death at Work]; Special Report, supra note 6, at 1132; Note, supra note 7; Middleton, supra note 6, at 1, col. 1.


100. For a discussion of each case, see The National Safe Workplace Institute, supra note 9.
Some of the most recent corporate homicide cases arising from job site fatalities illustrate the types of circumstances that are giving rise to criminal charges. Note the aggravating circumstance in each case: supervisory or managerial level individuals are aware of the danger or safety violation and that they fail to act on that knowledge.

A construction worker was killed in Los Angeles in July 1986 when the unshored trench he was working in collapsed.\(^{101}\) The employee's supervisor was charged with one felony count of involuntary manslaughter, plus several misdemeanor counts. The supervisor allegedly knew that the walls of the trench had fallen previously and that the shoring equipment used was inadequate.\(^{102}\)

In another Los Angeles case, a building owner and unlicensed contractor were also charged with involuntary manslaughter in the death of one construction worker and serious injury of another.\(^{103}\) The accident happened when a reinforced brick wall fell on the workers. The district attorney stated that the building owner “ignored at least four separate warnings” regarding the safety of the wall including one made just minutes before the accident.\(^{104}\) Other safety violations were also charged.

The corporation and corporate agents were charged with second degree manslaughter and criminally negligent homicide in a New York case where an employee died in a warehouse fire.\(^{105}\) The company stored cloth at the warehouse and bales blocked the emergency exits and fire escapes. When the fire began the employee was unable to escape. Many safety and building code violations were cited, lack of a sprinkler system or fire control equipment.\(^{106}\) The court noted that the individual defendants were responsible for the unsafe condition of the warehouse.\(^{107}\)

The president of a California drilling company pleaded no contest to involuntary manslaughter when an employee became trapped in an elevator shaft and suffocated.\(^{108}\) The


\(^{102}\) Id.

\(^{103}\) Id.

\(^{104}\) Id.


\(^{106}\) Id. at 330-31, 470 N.Y.S.2d at 161-62.

\(^{107}\) Id. at 336, 470 N.Y.S.2d at 165.

\(^{108}\) Kahn, supra note 8, at 50 (discussing People v. Maggio).
In another trench cave-in, in Texas, two construction workers were killed due to improper shoring. The two employees were working at the bottom of a 27-foot deep trench when the walls gave way. The officials of the company were charged with criminally negligent homicide. The employer plead no contest and the president was sentenced to six months in prison. Homicide charges were also brought after a separate trench cave-in accident in the Austin area.

A corporate officer in Wisconsin was charged with homicide by reckless conduct in the death of an employee in an explosion and fire at a fireworks plant. The officer was also the day-to-day manager of the plant. The complaint alleged that the officer knew the company was operating without a permit, in a building that did not meet state and local safety requirements. The complaint alleged that the officer had been convicted of six violations of safety ordinances for conditions at a near-by plant, only three weeks before. Moreover, the complaint alleged that the officer had been warned of the dangerous conditions in the plant before the explosion and that other safety violations existed, such as lack of safe means of escape and mishandling of explosive materials.

Despite the small volume of cases, the trend is clear. Local prosecutors in Los Angeles County, Milwaukee County, and Travis County, Texas (Austin) have instituted investigatory teams that are routinely sent to the scene of every traumatic
occupational death.\textsuperscript{115} A Los Angeles County Assistant District Attorney explained that this "roll-out" procedure was necessary in order to secure the evidence necessary for criminal prosecution.\textsuperscript{116} In essence, they are treating every occupational death as a potential homicide.\textsuperscript{117} One authority on corporate criminal liability stated that this area of the law "[i]nvolves crimes [committed] during the ordinary course of doing business, where the motive is primarily greed or desperation, and the beneficiary, if there is one, is the company, not the individual. In that regard, a lot of these cases are no different from such common street crimes as assault."\textsuperscript{118}

The effect of this current prosecutorial wave remains to be seen. Most commentators believe that criminal prosecution will be used only in the most flagrant situations,\textsuperscript{119} and that criminal liability will not become the preferred method to sanction corporations for employee safety problems.\textsuperscript{120} A Milwaukee County prosecutor stated that he is targeting companies and people "such as those in Film Recovery who know they are creating a danger" and who are bent on "rapacious exploitation of people in the workplace."\textsuperscript{121} Several commentators believe the trend will be felt most heavily by small and moderate-sized companies.\textsuperscript{122} This is due to larger companies generally being able to afford safety programs and training. Larger companies are also protected by their pure bulk. The simple fact of size can help limit the exposure of individual corporations and corporate actors. One prosecutor stated that "the longer the chain of command, the less likelihood that you are going to be able to successfully prosecute."\textsuperscript{123} At a minimum, the current activity and accompanying press coverage have helped sensitize prosecutors to the option of bringing

\begin{footnotesize}
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\item \textsuperscript{115} Special Report, supra, note 6, at 1132 (investigatory teams described as "roll out" units); Middleton, supra note 6, at 1; Yohay & Dodge, supra note 38, at 197.
\item \textsuperscript{116} See Special Report, supra note 6, at 1132.
\item \textsuperscript{117} See id; Yohay & Dodge, supra note 38, at 197.
\item \textsuperscript{118} Kahn, supra note 8, at 46 (quoting William Maakestad, Associate Professor, Western Illinois University).
\item \textsuperscript{119} See, e.g., id. at 47; A Murder Verdict Jolts Business, BUSINESS Wk., July 1, 1985, at 24, 25.
\item \textsuperscript{120} A Murder Verdict Jolts Business, BUSINESS Wk., July 1, 1985, at 25.
\item \textsuperscript{121} Special Report, supra note 6, at 1133.
\item \textsuperscript{122} Kahn, supra note 8, at 46.
\item \textsuperscript{123} Industrial Probes, supra note 92, at 8, col. 4.
\end{itemize}
\end{footnotesize}
criminal homicide charges.124

C. Possible OSHA Preemption of Criminal Homicide Prosecution for Jobsite Fatalities

OSHA is a highly specialized regulatory scheme through which Congress declared its policy 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."125 OSHA requires employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . ."126 OSHA achieves the end of a safe work environment through the use of a complex framework of specific safety standards and regulations. OSHA provides for state involvement through a process which allows a state to file for federal approval of OSHA state enforcement plans.127

Violations of the OSHA standards may give rise to civil or criminal penalties.128 The civil penalties range up to one thousand dollars for serious violations and up to ten thousand dollars for willful or repeated violations.129 The criminal penalties include criminal fines130 and a maximum of six months imprisonment in cases of willful violations that cause

124. Id. at 8, col. 3.
125. 29 U.S.C. § 651(b).
126. Id. at § 654 (a)(1).
127. See id. at § 667 (b). Minnesota has an OSHA approved state enforcement plan. MINN. STAT. § 182.65-182.675 (1988).
128. See id. at § 666 (a)-(e). Section 666 (a) assesses a maximum $10,000.00 civil penalty for each "wilful or repeated" violation of §§ 654-655. Section 666 (b) provides that an employer shall be fined a civil penalty up to $1,000.00 for each citation of a "serious" nature under §§ 654-655. Section 666 (c) makes the $1,000 per citation optional if the violation of §§ 654 or 655 is not "serious". Section 666 (d) provides optional additional penalties of $1,000.00 per day for failure to correct a violation for which a citation has been issued. Section 666 (e) mandates that an employer convicted of a § 655 violation which resulted in the death of an employee shall be fined a maximum of $10,000 or be imprisoned up to six months, or both. A second conviction under § 666 (e) doubles the maximum first penalty.

See also Howell, Construction Site Accidents—How OSHA Affects Their Litigation, TRIAL, Mar. 1985, p. 20; Levin, Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act, 14 AM. CRIM. L. REV. 717, 735-36 (1977) (although the evidence could have supported murder charges in some OSHA cases, OSHA's lesser sanctions have resulted in only parole and/or fines).
129. 29 U.S.C. at § 666(a)-(b). See supra note 127 and accompanying text.
130. Id. The maximum fine is $250,000 for individuals and $500,000 for corporations, 18 U.S.C. § 3623 (a)-(b). See supra note 127 and accompanying text.
an employee death. The OSHA requirements, however, are designed to promote compliance in order to prevent accidents, rather than to establish a system of punishment once an accident has occurred.

There is a difference of opinion among the states regarding OSHA preemption, although the trend appears to be in favor of preemption. Courts in Illinois, Texas, and Michigan have ruled that OSHA preempts a state from pursuing common law criminal prosecutions for workplace safety matters. A court in Wisconsin, however, has allowed criminal prosecutions to go forward despite OSHA. Since this question remains open, it is a primary defense for corporations charged with homicide to argue that OSHA preempts state criminal proceedings.

The strongest argument against preemption is found within a section of the OSHA statute itself. Section 653(b)(4) reads in part:

Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

131. 29 U.S.C. § 666(e). See also supra note 127 and accompanying text.
137. 29 U.S.C. at § 653(b)(4). Courts vary in their application of the statute, however. See, e.g., Hatcher v. Bullard Co., 39 Conn. Supp. 250, 477 A.2d 1035, 1037 (1984)(although OSHA violations occurred and although they may have been willful or wanton, the court refused to allow the plaintiff’s negligence suit and declared her only remedy for the crane–operating death of plaintiff’s husband was worker’s compensation); Wendland v. Ridgefield Const. Services, 184 Conn. 173, 175, 439 A.2d 954, 957 (1981)(a jury may not be instructed that violation of OSHA regulations
In *State ex rel. Cornellier v. Black*,\(^{138}\) for example, the defendant argued that OSHA preempted the state's charge. Wisconsin charged homicide by reckless conduct since the death of an employee occurred during an explosion and fire at the fireworks plant. The accident occurred because of a safety code violation.\(^ {139}\) Specifically, the defendant argued that OSHA represents Congress' judgment that

the best means to provide for and enforce worker health and safety is through a federally-administered program, and that to achieve that goal Congress preempted the field, leaving to the states only certain specified and limited areas of legislative and regulatory concern. [Therefore,] to permit the state to proceed with a criminal prosecution for employer action (or inaction) covered by the act would frustrate the intent of Congress. . . .\(^ {140}\)

The court, however, disagreed, and held that OSHA does not preempt state criminal prosecutions.\(^ {141}\) In reaching this conclusion the Wisconsin Court of Appeals relied upon the United States Supreme Court's decision in *Hillsborough County v. Automated Medical Laboratories*.\(^ {142}\)

In *Hillsborough*, the Supreme Court stated that, under the supremacy clause,\(^ {143}\) federal law may supersede state law in a number of ways.\(^ {144}\) For instance, in the absence of express language, Congress' intent to preempt state law will be inferred in certain circumstances:

Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state

\(^{138}\) Id. at __, 425 N.W.2d at 22-25. In *Cornellier*, an employee plugged a fan into an outlet, it generated sparks which caused an explosion and fire, which killed another employee. The defendant, Cornellier, the day-to-day manager of the business, argued that OSHA preempted the state's charge of homicide by reckless conduct, and further filed a petition for a writ of habeas corpus, challenging the sufficiency of the criminal complaint to state probable cause. *Id.* at __, 425 N.W.2d at 21-22.

\(^ {139}\) Id. at __, 425 N.W.2d at 21.

\(^ {140}\) Id.

\(^ {141}\) Id.

\(^ {142}\) 471 U.S. 707 (1985).

\(^ {143}\) U.S. CONST. art. IV, cl. 2.

\(^ {144}\) 471 U.S. at 713.
regulation. Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."\(^\text{145}\)

The Wisconsin Court of Appeals stated,

The party claiming preemption must demonstrate a congressional purpose to supercede the historic police power of the state. . . . But even when Congress may be said to have manifested an intent to preempt state legislation in a particular field, a state is not automatically stripped of all authority to act in that area.\(^\text{146}\)

The court further noted, "A state will not be deprived of jurisdiction over matters of exceptional local interest unless there is a compelling congressional direction to desist from enforcing local law,"\(^\text{147}\) and that "few interests are as deeply rooted in local feeling and responsibility as the concern for protecting the public against crime."\(^\text{148}\) The court found that Congress' preemptive intent, in section 653(b)(4) of OSHA, was not "clear and manifest"\(^\text{149}\) and held that federal OSHA action and state enforcement of criminal laws are not conflicting.\(^\text{150}\)

The OSHA preemption issue was resolved differently in *People v. Chicago Magnet Wire Corp.*\(^\text{151}\) This case arose when five

\(^{145}\) *Id.*

\(^{146}\) *144 Wis. 2d at", 425 N.W.2d at 24.

\(^{147}\) *Cornellier*, 144 Wis. 2d at", 425 N.W.2d at 24 (citing Farmer v. Carpenters, 430 U.S. 290, 296-67 (1977)). The defendant in *Cornellier* argued that by the terms of OSHA, it was Congress' intent to "preempt the entire field of injury or death in the workplace." *Id.* Both the court and the state agreed that the federal OSHA plan preempts "states from enacting and enforcing their own occupational and health standards in the absence of prior federal approval. . . ." *Id.* The court, however, disagreed that it was congressional intent to preempt homicide prosecutions. *Id.* The court further noted that there was no conflict between the Wisconsin Penal Code and OSHA.

[Compliance with federal safety and health regulations is consistent . . . with the discharge of the state's duty to protect the lives of employees and all other citizens, through enforcement of its criminal laws. Wisconsin is not attempting to impose a penalty for violations of any safety regulations. It is only attempting to impose the sanctions of the criminal code upon one who allegedly caused the death of another person by reckless conduct. And the fact that conduct may in some respects violate OSHA safety regulations does not abridge the state's historic power to prosecute crimes.]

*Id.*

\(^{148}\) *Id.*

\(^{149}\) *Id.*

\(^{150}\) *Id. at", 425 N.W.2d at 25.

\(^{151}\) 157 Ill. App. 3d 797, 510 N.E.2d 1173 (1987), rev'd, 126 Ill.2d 356, __ N.E.2d
corporate officials were charged with aggravated battery and reckless conduct for exposing employees to hazardous substances and unsafe working conditions.\textsuperscript{152} The lower court dismissed the indictments on the grounds that OSHA preempted the application of Illinois criminal law to the defendant's conduct.\textsuperscript{153} The state appealed.\textsuperscript{154} The court phrased the preemption question on appeal as "whether state criminal prosecutions based on conditions in the workplace are preempted by [OSHA]."\textsuperscript{155}

In \textit{Chicago Magnet Wire}, the Illinois Appellate court overlooked Congress' statement of intent in Section 653(b)(4) and found that the determinative factor in the preemption issue was the type of conduct the state was seeking to regulate.\textsuperscript{156} Since OSHA and the state were trying to regulate the same conduct, the Illinois court held that OSHA does not permit the State to prosecute conduct or conditions in the workplace under state criminal laws in so far as the conduct or conditions are regulated by OSHA."\textsuperscript{157} The court held, however, that

\begin{quote}
[\textit{t\textbar}he State would not be foreclosed from applying its criminal laws in the workplace if the prosecution charged the defendants with crimes not involving working conditions. The conduct the state seeks to regulate here, however, \ldots\ \textit{i\textbar}s conduct related to working conditions now regulated by OSHA. We therefore believe that the trial court properly
\end{quote}

\[\text{(1989). As this article was going to press, the Supreme Court of Illinois reversed the Illinois court of Appeals and held that OSHA does not preempt state criminal prosecutions for job related injuries or death. See Richards, Corporate Officials Ordered to Face Criminal Trial for Worker Injuries, Wall St. J., Feb. 3, 1989, at B5.}\]

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 798–99, 510 N.E.2d at 1173–74.
\item \textsuperscript{153} \textit{Id.} at 799, 510 N.E.2d at 1174.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} at 797, 510 N.E.2d at 1173. The corporate individuals were charged with exposing the employees to federally regulated substances which were highly dangerous. \textit{Id.} at 800, 510 N.E.2d at 1174.
\item \textsuperscript{156} \textit{Id.} at 801, 510 N.E.2d at 1174. The court added, \\
\begin{quote}
[\textit{t\textbar}he State has expressed valid and legitimate concerns about the consequences of preemption on its ability to control the activities of employers. But Congress has evidenced an intent that criminal sanctions should not be imposed for activities involving workplace health and safety. \ldots\ \textit{T\textbar}he view that employers may be held criminally liable for workplace injuries or illness, regardless of their compliance with OSHA standards, would lead to inconsistent prosecutions of regulatory violations throughout the states, a result that Congress sought to preclude in enacting OSHA. \\
\end{quote}
\item \textit{Id.} at 802, 510 N.E.2d at 1175.
\item \textsuperscript{157} \textit{Id.}
\end{itemize}
found that the prosecutions were preempted. 158

In light of Congress' statement of intent to allow employees to retain their state common law and statutory rights, the Illinois Appellate Court's rationale for preemption is weak. That the court failed to apply the precedential tests for implying Congressional preemptive intent further weakens its position.

A bill was introduced for consideration by the United States Senate in which Congress' intent that OSHA would not preempt local criminal prosecutions would be clarified. 159 In addition, the United States Department of Justice recently wrote a letter to the House Committee on Government Operations stating that there is "nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by state criminal laws of general applicability." 160 However, at least for the time being, preemption will remain a defense for corporations and individual corporate actors charged with criminal conduct in workplace fatalities and injuries.161

III. CORPORATE CRIMINAL LIABILITY FOR HOMICIDE IN MINNESOTA: COULD IT HAPPEN HERE?

The current wave of corporate criminal indictments for workplace fatalities has not yet hit Minnesota. There are no reported state prosecutions of corporate criminals for on-the-job deaths. Because of Minnesota case law on corporate criminal liability and state homicide statutes, however, the door is open for officials to pursue corporate homicide prosecutions.

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158. Id. at 802, 510 N.E.2d at 1176. The Supreme Court of Illinois will hear the case on appeal, 116 Ill.2d 564, 515 N.E.2d 115 (1987). The case may well be appealed to the United States Supreme Court. The result of this case may determine whether the murder convictions of the Film Recovery System agents will stand.

159. S. Rep. No. 2518, 100th Cong. 2d Sess. (1988). Hearings were held and several state and local prosecutors urged that if OSHA will not prosecute criminal violations, states must be allowed to. See Amendment Of Law to Remove Preemption As Barrier to State's Actions Urged at Hearing, 17 O.S.H. Rep. (BNA) 1395 (Feb. 10, 1988).


161. For additional discussion of preemption and OSHA, see Brickey, supra note 40, at 782–83, n. 163.
A. Review of Corporate Criminal Liability in Minnesota

Minnesota case law allows corporate entities to be held criminally liable. The first case to discuss the issue, *State v. Minneapolis Milk Co.*, was decided in 1913. The decision did not question whether a corporation could be criminally liable, but rather whether a corporation could be criminally liable under one particular Minnesota statute. Six corporations and a number of individuals were indicted under a state statute for conspiring to raise the price of milk and cream. The statute provided for a civil penalty, forfeiture of the corporate charter, and criminal penalties. The court ruled, based on the statutory language, that the criminal provisions could not be enforced against a corporation.

The next year, in *State v. People's Ice Co.*, the Minnesota Supreme Court endorsed the notion of holding corporations vicariously liable for the acts of corporate employees and agents. The court stated, “The acts of the agents and representatives upon whom the company devolves the duty of dealing with the public in its behalf, committed in the performance of such duties, are properly deemed to be the acts of the company.” The court continued and reasoned that “[i]f the company can absolve itself from liability for their acts by showing that such acts were contrary to the general rules and instructions of the company, it would greatly increase the facility

162. The Minnesota Attorney General’s Office has been following the development of this issue across the country. According to an Assistant Attorney General, criminal prosecutions by Minnesota’s OSHA division will occur in the future. They are currently exploring the means and mechanisms for pursuing such prosecutions. Telephone Interview with Nancy Teppink, Assistant Attorney General, in St. Paul, Minnesota (January 25, 1989).

163. See infra notes 165–99 and accompanying text. See also 4B DUNNELL MINN. DIGEST 2D Corporations § 13.00 (3d ed. 1987).

164. 124 Minn. 34, 144 N.W. 417 (1913).

165. Id. at 36, 144 N.W. 417.

166. Id. at 37, 144 N.W. 418.

167. Id. at 38, 144 N.W. at 418 (the criminal penalties were in a different section from the civil).

168. Id. at 39, 144 N.W. at 419.

169. 124 Minn. 307, 144 N.W. 962 (1914)(corporation was held liable for employer giving short weight on the sale of ice to customers, despite their contrary orders to give full weight).

170. Id. at 313, 144 N.W. at 965 (citing New York Cent. & Hudson River RR. v. United States, 212 U.S. 481 (1909)).
with which a principal, through his servants, could evade the law." 171 Because the main issue involved a statutory violation, the court did not confront the issue of intent. 172

Minnesota courts have been very clear that the corporate entity may not shield individuals from personal liability for criminal conduct. In an early statement on the subject, the Minnesota Supreme Court said, in State v. McBride, 173

[i]t is the universal rule that an officer or agent of a corporation cannot avoid responsibility for his act on the ground that it was done in his official capacity, nor can he assert that acts in corporate form are not his acts merely because they are carried on by him through the instrumentality of the corporation which he controls and dominates and which he has employed for that purpose. 174

In McBride, the president and an employee of the corporation were convicted of selling liquor without a license in violation of a city ordinance. In his defense, the president stressed that he should not be liable because he was not present when the employee made the sale. 175 The court stated that the corporate officer "overlooks the fact that he employed [the employee] and controlled and supervised his activities." 176 The court noted that there "was substantial reason" for believing the president was "attempting to use a corporate legal entity as a shield of protection for himself in his unlawful activity of selling liquor." 177 Finding that the president had aided and abetted the unlawful liquor sales, the court sustained the conviction. 178

As recently as 1982, two corporate officers/defendants argued that "they could not be held criminally liable because the corporation had issued the checks" which gave rise to the pros-
ecution. In *State v. Williams*, the court followed *McBride* and held again that the corporate entity would not shield the officers from criminal liability.

The Minnesota Supreme Court's decision in *State v. Christy Pontiac-GMC*, overcomes the two remaining barriers to corporate criminal liability for homicide: whether under Minnesota law a corporation is a person, and whether a corporation can be held criminally liable for a specific intent crime. The *Christy* case involved a corporation charged with theft by swindle after a middle-level management employee forged cash rebate applications. The corporation argued that a corporation could not be held criminally liable for theft by swindle because it is a specific intent crime. Minnesota defines theft by swindle as "whoever" falsely makes or alters a writing with intent to defraud. Justice Simonett, writing for the Minnesota Supreme Court, stated that "whoever" refers to persons, and the term "persons" as defined in the statute may include corporations.

Because "[t]he legislature had not expressly excluded corporations from criminal liability," the court reasoned the legislature's "intent to be that corporations are to be considered persons within the meaning of the code in the absence of any clear indication to the contrary." The defendant argued that, because the statute allowed for imprisonment for this violation and a corporation could not be imprisoned, the legislative intent must have been for the statute to apply only to natural persons. The court was not persuaded and noted that the crime allowed punishment that may include imprisonment or a fine. The court, therefore, overcame the statutory interpretation question and held that a corporation was a person

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179. *State v. Williams*, 324 N.W.2d 154, 157 (Minn. 1982) (the defendants were the sole owners, operators and officers of the corporation, the corporation issued a check drawn on an account with insufficient funds, the defendants were held personally liable).
180. 324 N.W.2d 154.
181. *Id.* at 156.
182. 354 N.W.2d 17 (Minn. 1984).
183. *Id.* at 18.
185. *Minn. Stat.* § 645.44, subd. 7 (1982) (this is the same definition of person that applies to the Minnesota homicide statute).
186. *Christy*, 354 N.W.2d at 19.
187. *Id.*
for the purposes of criminal violation of the statute.\textsuperscript{188}

The defendant in \textit{Christy} also argued the issue of whether a corporation could be held liable for a crime requiring specific intent. Christy claimed that the corporation, as an “artificial person” could not “entertain a mental state, let alone have the specific intent required for theft or forgery.”\textsuperscript{189} The court responded:

There was a time when the law, in its logic, declared that a legal fiction could not be a person for purposes of criminal liability, at least with respect to offenses involving specific intent, but that time is gone. If a corporation can be liable in civil tort for both actual and punitive damages for libel, assault and battery, or fraud, it would seem it may also be criminally liable for conduct requiring specific intent. . . . Particularly apt candidates for corporate criminality are types of crime, like theft by swindle and forgery, which often occur in a business setting.\textsuperscript{190}

The court went on to consider the evidentiary basis necessary to hold a corporation liable for a specific intent crime committed by its agent. For a corporation to be vicariously liable for a crime, the crime “must not be a personal aberration of an employee acting on his own; the criminal activity must, in some sense, reflect corporate policy so that it is fair to say that the activity was the activity of the corporation.”\textsuperscript{191}

The court set out a three stage analysis of the proof necessary to convict a corporation of a specific intent crime committed by its agent. First, the agent must have been acting within the scope of his or her employment, “having the authority to act for the corporation with respect to the particular corporate business which was conducted criminally.”\textsuperscript{192} Second, the agent must have been acting in furtherance of the corporation’s business interests.\textsuperscript{193} Thirdly, the court imposed one additional requirement over those used for imputing criminal liability for crimes not requiring specific intent: the illegal acts must have been “authorized, tolerated, or ratified by corporate

\begin{itemize}
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Id. at 19–20.
\item \textsuperscript{192} Id. at 20.
\item \textsuperscript{193} Id.
\end{itemize}
The court pointed out that the burden of proof for corporate liability is different than the burden for vicarious liability for a civil tort. The last stage goes beyond what would be required in a civil suit.

What must be shown is that from all the facts and circumstances, those in positions of managerial authority or responsibility acted or failed to act in such a manner that the criminal activity reflects corporate policy, and it can be said, therefore, that the criminal act was authorized or tolerated or ratified by the corporation.

Based on this analysis, the court upheld the criminal conviction of the corporation.

Through this case law, Minnesota courts have already addressed and resolved many issues of corporate criminal liability. A corporation may be vicariously liable for the criminal acts of its agents. Individual corporate agents and employees may also be personally liable for their criminal conduct because the corporate entity will not shield them. Moreover, Minnesota statutes allow corporations to be treated as "persons" for the purpose of criminal liability. By simply applying the precedents of McBride and Christy, Minnesota could easily validate corporate liability for unintentional homicides. Minnesota Courts, however, have gone further and possibly laid the framework to allow corporate liability for degrees of homicide requiring criminal intent.

B. Minnesota Homicide Statutes

The Minnesota Criminal Code has a five-tiered system for homicide prosecution, ranging from unintentional killing by culpable negligence to premeditated intentional killing. At least two of Minnesota's homicide degrees have the ready potential for use in charging corporations with criminal responsi-

194. Id.
195. Id.
196. Id. at 21.
197. See supra note 186 and accompanying text.
bility in work-related deaths. 199

The Minnesota Criminal Code does not specifically include corporations as possible criminal perpetrators, but instead includes a general definition of "person" in the "Interpretation of Statutes" section of Minnesota Statutes. Minnesota Statute § 645.44 subdivision 7 states: "'person' may extend and be applied to bodies politic and corporate. . . ." 200 The criminal code does not supplement or restrict this definition, thus, the criminal code grants to a court the discretion to consider a corporation a person in a given situation.

199. Corporations could be held liable under Minnesota's second degree Manslaughter statute, MINN. STAT. § 609.205, and Minnesota's third degree murder statute, § 609.195. The other Minnesota Statutes would probably not be applicable to corporate liability for homicide. First degree manslaughter, MINN. STAT. § 609.20 applies to killings where the actor (1) intentionally causes death in the heat of passion, (2) causes death while committing or attempting to commit a misdemeanor or gross misdemeanor offense, (3) intentionally causes death because the actor is coerced by another, or (4) proximately causes death without intent by directly or indirectly selling a controlled substance. These situations would not generally apply to work site safety hazards that result in death.

Second degree murder, MINN. STAT. § 609.19, applies when the actor (1) intentionally causes the death of another but without premeditation, or (2) unintentionally causes death while committing or attempting to commit a felony offense. The latter situation would clearly not apply to the corporate entity. Second degree murder in the former circumstance requires intent to kill a particular person, or another via transferred intent, so it is unlikely that the workplace fatality would give rise to this charge.

In order for the corporation to be vicariously liable under Minnesota's second degree murder statute, the actor's conduct would have to be both within the scope of his or her employment and done to benefit the corporation. Using the Christy standards, the corporation would have had to authorize or condone the action. It is highly unlikely that intentional killing of a particular person would be within anyone's scope of employment, or that a corporate entity would ratify such action. Corporate criminal liability for second degree murder is, therefore, remote. The individual actor, however, may well be personally liable. That was the result in the Film Recovery Systems case where three corporate agents were convicted of murder, but the corporation itself was convicted of involuntary manslaughter.

First degree murder is defined in MINN. STAT. § 609.185 as (1) intentionally causing the "death of a human being with premeditation" (2) causing death while committing criminal sexual conduct, (3) causing death while committing one or more specified felonies, or (4) causing death to a peace officer.

Like second degree murder, the statute requires the intent to kill a particular individual. In addition, it adds the premeditation element. Premeditation is defined as: "to consider, plan or prepare for, or determine, to commit, the referred to prior to its commission." MINN. STAT. § 609.18 (1988). Again, because corporate criminal liability requires the imputing of the criminal acts of an agent, acting within the scope of his or her employment and to benefit the corporation, it is highly unlikely that a corporation could be convicted of first degree murder.

CORPORATE HOMICIDE

Corporations could be held liable for Manslaughter in the second degree. Manslaughter in the second degree is defined in Minnesota as: "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another. . . ." 201

Case law describes culpable negligence as "more than . . . ordinary negligence. It is more than gross negligence. It is gross negligence coupled with the element of recklessness." 202 Another case defines culpable negligence as "intentional conduct . . . which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others." 203

Manslaughter in the second degree is the type of homicide with which a corporation is most likely to be charged in a work site fatality situation. All of the reported corporate criminal homicide cases across the country have been brought under parallel criminal statutes. 204 The facts of the trench cave-in case from Los Angeles 205 may well fit into Minnesota's second degree manslaughter definition. In the Los Angeles case, for instance, a construction worker was killed when the walls of an unshored trench collapsed. Culpable negligence could be found because of evidence that the supervisor knew of earlier cave-ins in that trench and knew that the shoring equipment was inadequate. 206 Knowledge of workplace dangers illustrates the second degree manslaughter element of conscious-

201. MINN. STAT. § 609.20, subd. 1 (1987).
204. See supra notes 39-67 and 87-96 and accompanying text.
ness, of deliberate disregard for the safety of the workers. Similar factual situations could meet Minnesota's culpable negligence standard, and lead to holding a supervisor personally liable. In the Los Angeles case, the supervisor was an employee of the corporation and was acting within the scope of his job duties in overseeing the work. If there was evidence that the supervisor was acting to benefit the company, for instance, to save the company money or to keep the project on schedule by not addressing the safety problem, then the criteria for imputing the supervisor's conduct to the corporation would be met.

The facts of State ex rel. Cornellier\textsuperscript{207} could also fit into Minnesota's definition of second degree manslaughter. In Cornellier, an employee was killed in a fireworks plant explosion and fire.\textsuperscript{208} Cornellier was an officer and employee of the company and was acting within the scope of his job duties as manager of the plant. Culpable negligence could be found because of the history of prior citations and warnings about hazardous conditions in the plant.\textsuperscript{209} These prior citations and warnings lay the ground to find the officer personally liable because of his conscious disregard for the employee's safety. If it could be shown that Cornellier was acting to benefit the corporation by not remedying the safety hazards, then Cornellier's conduct could be imputed to the corporation and the corporate entity could be charged as well.

Theoretically, the other type of homicide for which a corporation could be charged is third degree murder. Minnesota defines murder in the third degree as follows:

Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years.\textsuperscript{210}

Third degree murder is generally applied to extremely reckless conduct.\textsuperscript{211} A depraved mind is said to be evidenced by

\begin{footnotes}
\item [207.\textsuperscript{207}] 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988).
\item [208.\textsuperscript{208}] 144 Wis. 2d at 756, 425 N.W.2d at 22.
\item [209.\textsuperscript{209}] 144 Wis. 2d at 757, 425 N.W.2d at 25.
\item [210.\textsuperscript{210}] MINN. STAT. § 609.185 (1985 & Supp. 1988).
\item [211.\textsuperscript{211}] See McCarr, supra note 198, at § 1523.
\end{footnotes}
extremely reckless conduct.\textsuperscript{212} It is more negligence than culpable negligence, or negligence "so great as to satisfy the jury that the accused had a wicked mind in the sense that he was indifferent to the safety of others, reckless and careless whether or not he caused the death of a human being."\textsuperscript{213} The extremely reckless conduct need not be directed at one particular person: third degree murder is intended "to cover cases where the reckless, mischievous, or wanton acts of the accused were committed without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or another."\textsuperscript{214}

The facts of the Film Recovery System\textsuperscript{215} case are the only reported facts of a work site fatality in which the actions of a corporation might rise to the level of third degree murder. The fundamental business of the company required the use of cyanide as part of their process. Company officials were well versed in the dangers associated with cyanide. Numerous safety hazards at the workplace were cited, involving the facility itself (such as lack of a proper ventilation system and systems for monitoring the level of cyanide gas in the air) and failure to provide employees with proper safety equipment and training. Company officials appeared to have deliberately hired primarily illegal aliens who did not speak English and so would be unlikely to protest the working conditions. Company officials also allegedly took deliberate steps to conceal hazards.

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} State v. Weltz, 155 Minn. 143, 145, 193 N.W. 42 (1923) ("to establish the charge of murder, the act causing the death of another, and the circumstances attending it, may be prima facie evidence that the doer of the act was a man of depraved mind").

\textsuperscript{214} State v. Lowe, 66 Minn. 296, 298, 68 N.W. 1094, 1095 (1896) ("it is necessary that a reckless act is committed without special design upon a particular person or persons with whose murder the accused is charged").

The Minnesota Criminal Jury Instruction guide articulates third degree murder as:

Defendant's . . . intentional act which caused . . . death . . . [and] was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death, and may be without specific design on the particular person whose death occurred, but it is committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.

\textbf{MINNESOTA JURY INSTRUCTION GUIDE, supra} note 199, at § 11.18.

\textsuperscript{215} \textit{See supra} notes 90–96, and accompanying text.
from the employees. The dangers of cyanide, particularly without proper safety precautions, could be found to be "eminently dangerous." No particular person was the target of the company's actions, but rather the pattern of conduct of the company could be found to constitute reckless disregard of someone's life.

Using the Christy analysis, in order for the agent's conduct to be imputed to the corporation, the agent must be acting within the general scope of his or her employment. One could argue that the safety hazards at Film Recovery Systems were created out of the policies of the company concerning facility and workplace conditions which are certainly areas within the scope of employment of the employees and officers charged. Also, the conduct could easily be construed to have been done for the benefit of the corporation, for instance, in order to keep costs down. Finally, one could argue that the pervasive pattern of safety hazards to which workers were exposed were either authorized, tolerated or ratified by corporate management. Indeed, it appears that individuals at the highest levels of the company had knowledge of the hazardous working conditions involved and tolerated them, if not affirmatively created them.

Note, however, that conduct as flagrant and reckless as that of Film Recovery Systems was not imputed to the corporate entity. While three agents of the company were convicted of murder, the corporation itself was charged and convicted only of reckless conduct.

**Conclusion**

Pursuing corporate criminal liability for work site fatalities is a needed check on corporations and employers. Prosecutors have entered this territory as one way of filling a perceived gap in work site safety protection. In each area of the country where there has been a prosecution of a corporation for homicide, it has required an egregious case to bring the issue of serious work site safety violations to the prosecutor's attention. Only then have the local prosecutors stepped in to help protect workers from jobsite hazards. As long as OSHA is perceived to be ineffective in its enforcement efforts and grievous situations such as that in the Film Recovery Systems case con-
Corporate criminal homicide prosecutions should be seen and used as supplementary to regulatory schemes for workplace safety: as a "second line of defense" against the exposure of employees to unacceptable hazards in the workplace. Used in this way, corporate criminal homicide liability is not inconsistent or in conflict with OSHA or other regulatory schemes. In addition, criminal penalties are not the most efficient or effective means of promoting or enforcing workplace safety standards, and should not come to replace vigorous enforcement of OSHA and other workplace safety regulations.

For addressing grave situations like that of the Film Recovery Systems, however, perhaps the punitive/deterrent approach of the criminal laws are more appropriate and effective that the preventive/safety-standards approach of OSHA. Criminal liability for homicide also imposes harsher penalties on corporations than those offered by the civil and criminal penalties available under OSHA and state OSHA programs. Criminal liability, therefore, may be seen by corporations as true punishment, rather than merely a cost of doing business. The specter of criminal liability quickly and dramatically communicates to corporate decision-makers that safety abuses, if not addressed by OSHA, will be addressed by local authorities.

Because of the inherent problems in making the case of corporate liability for homicide, it is not likely that we see a flood of corporate criminal indictments, in Minnesota or in any other state. First, the corporation must be covered by the state statute on homicide as a potential criminal actor. Then the criteria for imputing the conduct of agents to the corporation must be met. For crimes involving specific intent, in Minnesota the Christy element of corporate ratification would also need to be found. These are difficult standards to meet.

All of the corporate homicide cases to date have involved the imputation of the acts of corporate agents where there was strong evidence of the agent’s knowledge of significant hazards in the workplace. In these cases, the issue was not general knowledge of typical hazards that are part of the work (for instance, the generally dangerous nature of construction work or employment in a fireworks plant). In each case, the agent had knowledge of the particular hazard that resulted in the em-
ployer's death. Also in each case the agent, with some element of consciousness, disregarded that hazard and the fatality resulted. These are not cases of simple negligence: these are cases of corporate agents consciously exposing employees to known hazardous conditions. Under these circumstances, bringing criminal sanctions against corporations is sound social policy.

Corporate criminal prosecution and conviction for homicide for workplace fatalities could happen in Minnesota. And, theoretically, at least, corporate criminal liability may extend to homicides requiring criminal intent as well. Even though corporate criminal liability for homicide is still an extraordinary means of addressing hazardous worksite conditions resulting in fatalities, the seriousness of the sanctions and repercussions emphasize the need for responsible safety programs and for properly trained employees who will respond appropriately to known hazards. By being willing and able to respond to on-the-job safety hazards, a corporation should be able to safeguard itself from homicide liability.