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Corporate Criminal Liability for Injuries and Death*

Laws do not persuade just because they threaten.

—Seneca¹

I. INTRODUCTION

On November 10, 1988, three Milwaukee, Wisconsin tunnel workers were killed in an underground explosion when their electrical equipment came into contact with a significant amount of naturally occurring methane gas.² An investigation into the incident by the Milwaukee County District Attorney's office revealed that the company in charge of the project had been warned before starting tunneling operations that it might encounter the deadly gas.³ Moreover, three days before the explosion, company officials made notations indicating that the tunnel contained an extremely dangerous level of methane gas.⁴ Nevertheless, the company continued tunneling and took no action to alleviate the problem.⁵ The Milwaukee District Attorney determined that the company's failure to train its workers to deal with the danger and its use of improper electrical equipment warranted criminal charges, which resulted in a jury ultimately convicting the company of reckless homicide.⁶

This incident illustrates that corporate decisions can have deadly consequences,⁷ and reflects the increased willingness of district

* Patrick Hamilton. The author thanks Professor Fred Lovitch for comments on an earlier draft.

1. Lucius Annaeus Seneca, *Epistulae Morales ad Lucilium* (63-65 A.D.), quoted in DAVID S. SHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 260 (1983).

2. *America Undercover: Death on the Job* (HBO television broadcast, Nov. 1991) [hereinafter *America Undercover*] (videotape copy on file with *University of Kansas Law Review*). Methane gas is a colorless, odorless, flammable hydrocarbon which is a product of the decomposition of organic matter in marshes and mines. WEBSTER'S NEW NINTH COLLEGIATE DICTIONARY 747 (1989).

3. *America Undercover*, *supra* note 2.

4. *Id.*; see also *Illinois Company Fined \$750,000 in Fatal Tunnel Blast*, UNITED PRESS INT'L (Mar. 21, 1991) [hereinafter *Tunnel Blast*].

5. *America Undercover*, *supra* note 2.

6. *Id.* The S.A. Healy Company was fined \$15,000 after being convicted of homicide in Milwaukee County Circuit Court. *State of Wisconsin v. S.A. Healey Co.*, Case No. F-902661 (Dec. 1990) (court documents on file with *University of Kansas Law Review*). The Company was also fined \$750,000 by a federal judge after a jury convicted the company of willfully violating federal safety regulations. *Tunnel Blast*, *supra* note 4.

7. Donald J. Miester, Jr., Comment, *Criminal Liability for Corporations that Kill*, 64 TUL. L. REV. 919, 919 (1990).

attorneys to address the problem by bringing criminal charges against corporations for subjecting the public to unreasonable dangers.⁸ District attorneys in California,⁹ Wisconsin,¹⁰ Michigan,¹¹ Indiana,¹² New York,¹³ Texas,¹⁴ and Illinois¹⁵—concerned both with companies designing products with apparent disregard for human life¹⁶ and with the failure of federal agencies such as the Occupational Safety and Health Administration (OSHA) to control work place hazards—have begun to use state criminal laws in an effort to deter criminal corporate behavior.¹⁷

Imposing criminal liability upon corporate entities is by no means a new concept. In the 1909 landmark case of *New York Central & Hudson River R.R. v. United States*,¹⁸ the United States Supreme Court applied the tort concept of "respondeat superior" in a criminal context, and upheld the constitutionality of a statute that made a corporation criminally liable for the criminal acts of its agents acting within the scope of their employment.¹⁹ The Court

8. David J. Reilly, Comment, *Murder, Inc.: The Criminal Liability of Corporations for Homicide*, 18 SETON HALL L. REV. 378, 378 (1988); Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 753-54 (1987).

9. See generally *Granite Constr. Co. v. Superior Court*, 197 Cal. Rptr. 3 (Cal. Ct. App. 1983) (holding that corporations can be convicted of manslaughter).

10. See *supra* notes 2-6 and accompanying text.

11. See generally *People v. General Dynamics Land Sys., Inc.*, 438 N.W.2d 359 (Mich. Ct. App. 1989) (holding that a corporation is sufficiently a "person" to be a perpetrator of manslaughter).

12. *State v. Ford Motor Co.*, No. 5324 (Ind. Super. Ct., filed Sept. 3, 1978) (cited in Anderson, *supra* note 9, at 369 n.13); see *infra* notes 26-35 and accompanying text.

13. See *People v. Pymm Thermometer Corp.*, 563 N.E.2d 1 (N.Y. 1990); *infra* notes 69-70 and accompanying text.

14. See *Sabine Consol., Inc. v. State*, 806 S.W.2d 553 (Tex. 1991); *infra* notes 71-72 and accompanying text.

15. See *People v. O'Neil*, 550 N.E.2d 1090 (Ill. App. Ct. 1990); *infra* notes 153-62 and accompanying text.

16. See Douglas S. Anderson, Comment, *Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions*, 8 PEPP. L. REV. 367, 369-70 (1981). "Each year, 36 million consumers are injured, and 28,000 are killed in consumer-product-associated accidents." Robert S. Adler & R. David Pittle, *Time to Strengthen Consumer Protection*, CHRISTIAN SCI. MONITOR, May 8, 1989, at 18. See generally Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1 (1984).

17. See Jay C. Magnuson & Gareth C. Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913, 931 (1987); Patrick J. Schott, Comment, *Corporate Criminal Liability for Work-Site Deaths: Old Law Used a New Way*, 71 MARQ. L. REV. 793, 795 (1989).

18. 212 U.S. 481 (1909).

19. *Id.* at 494.

found no valid reason "why [a] corporation which profits [from a] transaction, and can only act through its agents and officers, [cannot] be punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act."²⁰

In 1970, Kansas enacted legislation providing that "[a] corporation is criminally responsible for acts committed by its agents when acting within the scope of their authority."²¹ Other sections of the Kansas criminal code have further empowered Kansas prosecutors to deter corporate criminal behavior.²² Kansas law enforcement officials, however, have made little or no use of their ability to prosecute corporate acts that endanger the health and safety of Kansans.²³ The reason for the lack of corporate criminal prosecutions in Kansas is unclear. A significant factor may be that reckless acts will not satisfy the mens rea requirement for crimes that produce injury and death under the Kansas criminal code. As a result, prosecutors are faced with having to prove a corporation intended any harm its acts may have caused. While it is one thing to say that a corporation knew that its actions were likely to cause injury or death, it is quite different to say the corporation "intended" such harm. This distinction is about to end, however, as recently enacted amendments to the Kansas Criminal Code specifically provide that the mens rea element for battery, aggravated battery, and second degree murder can be met by reckless conduct.²⁴

Limits in statutory provisions, however, may not be the entire explanation for the lack of corporate prosecutions in Kansas. Perhaps Kansas district attorneys have been unaware of their ability to prosecute corporations, have been unwilling to do so, or believe that congressional grants of power to federal agencies pre-empt local law enforcement action in this regard.²⁵ Whatever the reason, it seems likely that a corporation facing only civil penalties for its wrongful acts—and not risking potential criminal prosecution and the imposition of severe fines—will be more likely to weigh the cost of taking safety precautions against the cost of civil claims that may arise.

20. *Id.* at 495.

21. Act of July 1, 1970, ch. 180, 1969 Kan. Sess. Laws (codified at KAN. STAT. ANN. § 21-3206(1) (1988)).

22. See *infra* notes 96-109 and accompanying text.

23. See *infra* notes 124-91 and accompanying text.

24. See *infra* part IV.B.2.

25. See *infra* notes 143-71 and accompanying text.

A case in point is Ford Motor Company and its Pinto. During the 1970s, Ford marketed the Pinto knowing full-well that the car's gas tank was likely to rupture and explode in a rear-end collision.²⁶ Ford "crash-tested the Pinto eight times before it was released, and it failed every single test."²⁷ Ford nevertheless unleashed the car on the American public, refusing to rectify the defect, apparently having "concluded that the cost of settling the suits brought by burned victims and survivors of the dead would be less expensive than installing an eleven-dollar fuel bladder in each car."²⁸ Before releasing the car the company estimated that 180 people would be killed because of the defect and that another 180 would suffer injuries.²⁹ Yet, the public was never warned.³⁰ As a result, as many as 500 people burned to death³¹ before the federal government forced Ford to address the problem.³² Ford's failure to timely recall the defective automobile prompted an Indiana prosecutor to charge the company with three counts of reckless homicide after three teenagers lost their lives in a Pinto explosion.³³ Although Ford faced only a \$30,000 criminal fine, it spent over one million dollars defending itself—apparently concerned that the negative publicity surrounding a conviction would prove even more costly.³⁴ Ford was ultimately acquitted.³⁵

As the Pinto example shows, corporations sometimes make profit-motivated decisions that endanger personal health and safety.³⁶

26. Miester, *supra* note 7, at 928.

27. *Id.*

28. *Id.*

29. *Id.* n.51.

30. John E. Stoner, *Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?*, 38 Sw. L.J. 1275, 1281 (1985); see Miester, *supra* note 7, at 921.

31. Stoner, *supra* note 30, at 1282 n.69; STUART L. HILLS, *CORPORATE VIOLENCE* 14 (1987).

32. Anderson, *supra* note 16, at 368; HILLS, *supra* note 31, at 11.

33. Anderson, *supra* note 16, at 368.

34. Stoner, *supra* note 30, at 1281 n.61.

35. Anderson, *supra* note 16, at 370.

36. For other examples of questionable corporate behavior, see Anderson, *supra* note 16, at 407 n.252 (Firestone continuing to sell 24 million tires despite an "epidemic" of auto accidents that killed 41 people and a warning five years earlier by the company's director of development that the tire was defective); *id.* at 406-07 n.251 (Occidental Chemical Company's dumping of pesticides in violation of California law and its refusal to warn residents of the area because of concerns about civil claims from property owners); *Id.* at 406 n.250 (Hooker Chemical Company's failure to warn nearby residents that toxic chemicals from the company's dumping ground at Love Canal were leaking into the area); *Id.* at 410 n.269 (A.H. Robins Company's refusal to stop marketing a poorly designed birth-control device while at the same time suppressing evidence that the product had numerous dangerous

Yet, corporations unquestionably have contributed a great deal to modern society.³⁷ As the dominant business form in the United States,³⁸ corporations account for over 90 percent of America's business receipts,³⁹ provide millions of jobs, and allow individuals to invest funds without the fear of incurring personal liability beyond their monetary contribution.⁴⁰ In short, corporations "form[] the backbone of the most successful economic system in history."⁴¹ Yet risks are incurred in reaping these benefits. Although no one seriously expects companies to make perfect products, and while it is universally agreed that some work-related deaths are going to occur in a modern industrial society,⁴² when human life is reduced to the cost of doing business, the net benefits corporate America bestows upon society are greatly reduced.⁴³

Recent efforts by state law enforcement officials to prosecute corporations for acts that threaten or adversely affect the lives of workers and consumers⁴⁴ indicates a growing awareness that injuries and deaths resulting from marketing knowingly defective products and from willful violations of health, safety, and environmental laws are no different than injuries and deaths produced by violent street crimes.⁴⁵ Criminal conduct is criminal conduct whether on the street corner or in the boardroom.

This Comment examines the recently enhanced ability of Kansas law enforcement officials to prosecute corporate acts that injure or kill Kansans. The Comment advocates that Kansas district attorneys use their prosecutorial powers to protect the health and safety of Kansans from the actions of corporate decision makers.⁴⁶ The Comment first, in Part II, provides a brief discussion of the

side effects that ultimately killed at least eighteen women); Miester, *supra* note 7, at 932 (B.F. Goodrich's knowingly providing defective brake assemblies for Air Force Jets); Bruce Ingersoll, *Criminal Inquiry of Dow Corning to Be Sought*, WALL ST. J., Feb. 13, 1992, at A3 (Dow Corning continuing to market its silicon breast implants while apparently withholding information that the implants could produce harmful side effects).

37. HILLS, *supra* note 31, at 39.

38. ROBERT CHARLES CLARK, CORPORATE LAW 1 (1986).

39. DEPARTMENT OF THE CENSUS, 1991 STATISTICAL ABSTRACT OF THE UNITED STATES 525 (111th ed.).

40. CLARK, *supra* note 38, at 2.

41. Metzger, *supra* note 16, at 1.

42. Schott, *supra* note 17, at 793.

43. See HILLS, *supra* note 31, at 3.

44. See *infra* notes 69-72 and accompanying text.

45. See generally Carol L. Bros, *A Fresh Assault on the Hazardous Workplace: Corporate Homicide Liability for Workplace Fatalities in Minnesota*, 15 WM. MITCHELL L. REV. 287 (1989).

46. See *infra* notes 124-91 and accompanying text.

historical development of and rationales for the imputation of criminal responsibility to corporations. Part III surveys the penalties that have developed to deter corporate misconduct. Following this background material, Part IV analyzes the Kansas corporate criminal liability case law and statutory provisions, with special attention to the 1992 Legislature's amendment of the criminal code. Part V is an analysis of why there has been little pursuit of life- and health-endangering corporate criminal behavior in Kansas. This Part also examines the failure of federal agencies such as OSHA to adequately protect employees, considers the inadequacy of civil liability as a deterrent to corporate wrongdoing, and culminates in the conclusion that criminal prosecutions of corporations could go a long way toward protecting the health and safety of Kansans. While the issue of individual accountability for corporate criminal acts is not addressed, this Comment in no way advocates eliminating the prosecution of individuals responsible for implementing a corporation's criminal acts.

II. IMPUTING CRIMINAL ACTS TO THE CORPORATION: EVOLUTION OF THE COMMON LAW

At early English common law a corporation could not be convicted of a crime, because the corporation lacked a mind and thus the capacity to form the requisite criminal intent.⁴⁷ More broadly, a corporation, as an artificial entity, "lacked physical, mental, and moral capacity to engage in wrongful conduct, or to suffer punishment."⁴⁸ Further, corporate prosecutions were largely unnecessary because early corporate entities were not as complex as many of today's corporate forms, making individual perpetrators more readily identifiable.⁴⁹

The corporate form proved to be more popular in America than in England, and American courts recognized in the nineteenth century the need to address corporate criminal activity.⁵⁰ The first criminal prosecutions of public corporations were for failing to abate public nuisances.⁵¹ Courts before the middle of the nineteenth century took the view that, as a non-physical being, a corporation

47. Stephen A. Radin, *Corporate Criminal Liability for Employee-Endangering Activities*, 18 COLUM. J.L. & SOC. PROBS. 39, 45 (1983).

48. Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 396 (1982).

49. Miester, *supra* note 7, at 924.

50. *Id.* (citing Stoner, *supra* note 30, at 1276).

51. Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1292 (1990).

was incapable of committing positive acts.⁵² Therefore, corporate prosecutions were restricted to situations in which a corporation failed to act. By the middle of the nineteenth century, however, courts began to prosecute corporations for their acts as well as their omissions.⁵³

Courts at the turn of the present century continued to believe that corporations could not be prosecuted for criminal offenses that required intent.⁵⁴ This view, however, did not stop prosecutions for crimes where intent was not required. For example, after nine hundred people drowned in a steamship accident, a federal court upheld manslaughter indictments against a corporation for furnishing defective life preservers in violation of a federal statute.⁵⁵ The court, in denying the corporation's motion to quash the indictments, held that negligent conduct, and not intent, was all the statute required for criminal liability to attach.⁵⁶

One somewhat common impediment to corporate prosecutions at the turn of the century was that some statutes defined crimes in terms of harm to one human being by "another," and at least one court held that "another" meant another human being,⁵⁷ thus shielding corporations from criminal liability. In *State v. Lehigh Valley Ry. Co.*, the New Jersey Supreme Court criticized this view—which had been adopted by a neighboring state:

The [New York] case is a good illustration of the way in which the proper growth and development of the law can be prevented by the hard and fast language of a statute, and of the advantage of our own system by which the way is open for a court to do justice by the proper application of legal principles.⁵⁸

The question of whether corporations are covered under the pertinent statutory language has been resolved in many jurisdictions by legislatures specifically including corporations in the definition of the term "person" in state criminal statutes.⁵⁹

The final barrier to putting corporations on equal footing with humans for purposes of criminal statutes involved specific intent

52. *Id.*

53. *Id.*

54. *Id.*

55. *United States v. Van Schaick*, 134 F. 592, 608 (1904).

56. *Id.*

57. *People v. Rochester Ry. & Light Co.*, 88 N.E. 22, 24 (N.Y. 1909).

58. 103 A. 685, 686 (N.J. 1917) (discussing *People v. Rochester Ry. & Light Co.*, 88 N.E. 22 (N.Y. 1909)), *aff'd on second appeal*, 106 A. 23 (N.J. 1919); see Schott, *supra* note 17, at 798.

59. Schott, *supra* note 17, at 799; see also KAN. STAT. ANN. § 21-3110(14) (Supp. 1991).

crimes. The issue of whether a corporation, as an artificial being, was capable of the requisite intent was addressed by the Supreme Court in 1909 when it held that: "If . . . 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." ⁶⁰ As a result of the *New York Central* decision, courts began to adopt the proposition that, although a corporate entity could not have a culpable mental state per se, the mental state of a corporation's agent could be imputed to the entity when the agent's actions were within the scope of the agent's authority.⁶¹ The majority rule today is that the corporation is vicariously liable if an agent commits a criminal act in furtherance of the corporation's business.⁶²

The evolution of corporate liability has resulted from the "same social aims as all criminal liability: deterrence, retribution, and rehabilitation. Of these three, deterrence [was] the primary justification for imposing criminal sanctions on corporations."⁶³ In order to obtain deterrence, imputing intent from corporate agents to the corporation was necessary. Imputing such intent was achieved by extending the doctrine of respondeat superior to encompass criminal behavior.⁶⁴ The extension was considered justifiable because a corporation can only act through its agents and employees.⁶⁵ Further, as corporate forms became more complex, determining which individuals were responsible for the corporation's actions became more problematic, thus requiring prosecution of the corporation if criminal conduct was to be deterred.⁶⁶ Although this evolution of the criminal law has had its critics,⁶⁷ the predominant view today is:

60. *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481, 492-93 (1909) (quoting BISHOP'S NEW CRIMINAL LAW § 417 (8th ed. 1892)).

61. Schott, *supra* note 17, at 801; Brickey, *supra* note 48, at 415.

62. *People v. O'Neil*, 550 N.E.2d 1090, 1098 (Ill. App. Ct. 1990) (corporation responsible whenever any of its high managerial agents possesses requisite mental state and is responsible for a criminal offense while acting within the scope of his employment); *Granite Constr. Co. v. Superior Court*, 197 Cal. Rptr. 3, 8 (Cal. Ct. App. 1983) (California corporations can form intent, be reckless, and commit acts through their agents); *see also* Foerschler, *supra* note 51, at 1293; Schott, *supra* note 17, at 801.

63. Bros, *supra* note 45, at 292.

64. *Id.* at 290.

65. *Id.* at 290-91.

66. Miester, *supra* note 7, at 930-32; HILLS, *supra* note 31, at 200.

67. Critics argue that people, not corporations, commit crimes and therefore it is the individual, and not the entity, that should be punished. *See e.g.*, KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME* 4-5 (1990); *see also* Reilly, *supra* note 8, at 403-04.

of what corporate criminal conduct is designed to produce: money. Fining corporations for criminal violations, however, is not without opposition.

Critics argue that cash fines are easily passed on by the corporate criminal to consumers through price increases, ultimately forcing the very group that the sanctions were intended to benefit to shoulder the burden imposed by the penalty.⁷⁵ Of course, a company could not pass on costs that exceed the "threshold" at which further increases in the price of goods and services would make the company uncompetitive in the marketplace.⁷⁶ Yet targeting a corporation's financial threshold, though it would enhance the deterrent effect of the fine, would not decrease what the public ultimately pays for corporate criminal acts, as anything below the threshold will still be absorbed by consumers.

Nevertheless, the idea that any criminal can be punished without society bearing some cost seems unrealistic. Punishing criminal acts costs society in one sense or another, whether through increased insurance premiums or through an increase in tax dollars for more prisons. Although use of methods that limit what society pays for criminal acts is desirable, cost containment should not overshadow the ultimate goal of punishment for corporate misconduct: deterrence of similar future behavior.

Some opponents of monetary fines argue that by adversely affecting the corporation's financial position, fines unfairly cause shareholders' stock to decrease in value.⁷⁷ This argument rests on the premise that stockholders typically have little influence on a corporation's decision-making process and therefore should not be punished when such decisions harm others.⁷⁸ While there appears to be some merit to this argument, it is at least partially negated when one considers that shareholders quite likely received "unjust enrichment" from the criminal corporate conduct before the fine was imposed.⁷⁹ Moreover, it can be argued that "losses from criminal fines are indistinguishable from losses resulting from corporate civil liability or from mismanagement, and thus should be considered simply another investment risk."⁸⁰ In addition, if corporate shares decrease in value because of fines resulting from

75. *Id.* at 933; Jeffrey P. Grogin, *Corporations Can Kill Too: After Film Recovery, Are Individuals Accountable for Corporate Crimes?*, 19 Loy. L.A. L. Rev. 1411, 1444 (1986).

76. *Cf.* Grogin, *supra* note 75, at 1444.

77. *See id.*

78. *See* Anderson, *supra* note 16, at 404-05.

79. Grogin, *supra* note 75, at 1444.

80. Metzger, *supra* note 16, at 66-67.

[C]ourts 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.⁶⁸

Two recent cases, one from New York and one from Texas, illustrate the type of corporate behavior the criminal law has evolved to encompass. In *People v. Pymm Thermometer Corp.*,⁶⁹ New York prosecutors convicted a corporation of assault after one of its employees suffered brain damage from being exposed to mercury vapor levels five times those permitted by OSHA. Although the corporation had been cited twice previously by OSHA for hazardous workplace conditions, New York prosecutors discovered that mercury contamination had been an ongoing problem at the facility for over ten years.⁷⁰ In *Sabine Consolidated, Inc. v. State*,⁷¹ two workers died when the walls of a trench at an excavation site collapsed and buried them. Texas prosecutors charged and convicted the construction company of criminally negligent homicide for failing to install and maintain an adequate shoring system which could have prevented the workers' deaths.⁷²

III. CORPORATE PENALTIES

A. Cash Fines

When a corporation acts with indifference to human life, few would disagree that aggressive prosecution of the entity is warranted. However, if and when a conviction is obtained, the issue of how to punish the corporation arises.

Although many penalties have been suggested as a means to punish corporate criminal behavior, cash fines are the most common penalties imposed, simply because they are the most easily administered.⁷³ Among other advantages, cash fines produce monetary resources for law enforcement⁷⁴ and strike at the very heart

68. Bros, *supra* note 45, at 300 (quoting 10 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4942 (perm. ed. rev. vol. 1986)).

69. 563 N.E.2d 1 (N.Y. 1990).

70. *Id.* at 2-3.

71. 806 S.W.2d 553 (Tex. 1991).

72. *Id.* at 555.

73. Miester, *supra* note 7, at 932.

74. *Id.*

a corporation's criminal behavior, shareholders are less likely to invest funds in the corporation, thereby making it more difficult for the corporation to raise capital. This indirect effect on the ability to raise funds would likely force corporate management to ensure that criminal behavior is avoided.

B. *Adverse Publicity*

Although cash fines are the most popular form of punishing corporate criminal acts, other sanctions also have been advocated. Some states have enacted statutes which require convicted corporations to publicize their criminal acts.⁸¹ The underlying principle is that corporations will be loath to risk the "manicured public image that they strive to maintain for their creditors, stockholders, consumers, and employees."⁸² Some indirect evidence exists that forced-publicity sanctions could have a deterrent effect. In *Granite Construction Co. v. Superior Court of Fresno*,⁸³ seven construction workers were killed at a construction site accident.⁸⁴ After the State of California brought manslaughter charges against the corporation, the company, apparently concerned about the publicity surrounding a criminal conviction, argued, inter alia, that it should be prosecuted under the labor code instead of the penal code, even though the fine was much larger under the labor code.⁸⁵ Ford Motor Company's expenditure of over one million dollars to defend the homicide charges brought against it in Indiana, even though it faced a maximum penalty of only \$30,000, provides another example suggesting that corporations will go to great lengths to avoid the publicity associated with a criminal conviction.⁸⁶

C. *The "Death" Penalty*

At least three states have authorized corporate dissolution as a means of sanctioning criminal conduct.⁸⁷ For example, in New Jersey, the attorney general, by court order, may institute pro-

81. See ME. REV. STAT. ANN. tit. 17-A, § 1153(1) (West 1983); N.D. CENT. CODE § 12.1-32-03 (1985); UTAH CODE ANN. § 76-3-303(1) (1990).

82. Miester, *supra* note 7, at 943.

83. 197 Cal. Rptr. 3 (Cal. Ct. App. 1983).

84. *Id.* at 4.

85. *Id.* at 9.

86. Miester, *supra* note 7, at 943.

87. See ARIZ. REV. STAT. ANN. § 13-603(G) (West Supp. 1989); HAW. REV. STAT. § 706-608(2) (1989); N.J. STAT. ANN. § 2C:43-4 (West 1982); see also Magnuson & Leviton, *supra* note 17, at 929 n.87.

ceedings "to dissolve the corporation, forfeit its charter, revoke any franchises held by it, or revoke the certificate authorizing the corporation to conduct business in the state."⁸⁸ Such a severe penalty, however, would seem appropriate only in response to a very serious criminal violation. Moreover, the effect on such third parties as employees, stockholders, and creditors might outweigh any possible benefits of dissolution.⁸⁹

IV. CORPORATE CRIMINAL LAW IN KANSAS

A. Case Law

Kansas first addressed the issue of corporate liability for criminal acts in the 1910 case, *State v. The Belle Springs Creamery Co.*⁹⁰ In *Belle Springs*, the defendant corporation was convicted of selling butter in violation of a statute which required the butter to conform to the weight listed on its package.⁹¹ The defendant argued, that because the statute provided for a penalty of a fine, imprisonment, or both, the statute could not have uniform operation, and thus violated the state constitution by discriminating against corporations.⁹² The Supreme Court of Kansas rejected this argument and affirmed the corporation's conviction, holding that the fact that a corporation can only be fined does not affect the validity of the statute.⁹³ The court stated that "[t]he apparent discrimination grows out of conditions that cannot be avoided, and the corporation that is favored by the discrimination can not complain."⁹⁴

While other Kansas cases have discussed corporate crimes in a different context,⁹⁵ the *Belle Springs* case is apparently the only opportunity Kansas appellate courts have had to directly address the issue of a corporation's criminal responsibility. Kansas criminal statutes, however, are aptly suited to encompass corporate criminal behavior.

88. N.J. STAT. ANN. § 2C:43-4 (West 1982).

89. Cf. Metzger, *supra* note 16, at 68.

90. 83 Kan. 389, 111 P. 474 (1910).

91. *Id.* at 391, 111 P. at 474.

92. *Id.* at 394, 111 P. at 476.

93. *Id.* at 398, 111 P. at 477.

94. *Id.* (quoting *W.H. Small & Co. v. Commonwealth*, 120 S.W. 361, 363 (Ky. 1909)).

95. E.g., *State v. Marshall & Brown-Sidorowicz, P.A.*, 2 Kan. App. 182, 577 P.2d 803 (1978) (holding that an indictment charging the corporation with conspiracy was not objectionable for failing to identify which officers or agents engaged in the conspiracy).

B. Statutory Law

1. Section 21-3206

Section 21-3206 of the Kansas Criminal Code specifically provides that a corporation is "criminally responsible for the acts committed by its agents acting within the scope of their authority."⁹⁶ Agent is defined under the Code as "any director, officer, servant, employee or other person who is authorized to act on behalf of the corporation."⁹⁷ Because the statute has never been interpreted by Kansas appellate courts, the definition of "scope of authority" under the statute is unknown.⁹⁸ However, a survey of civil respondeat superior decisions addressing the "scope of employment" issue offers some insight into how Kansas courts might ultimately interpret the provision.

One of the most widely cited definitions of "scope of employment" comes from *Hollinger v. Jane C. Stormont Hospital*.⁹⁹ In that case, the Kansas Court of Appeals held:

An employee is acting within *the scope of his authority* when he is performing services for which he has been employed or when he is doing anything which is reasonably incidental to his employment. . . . The liability of an employer for the acts of his employee depends not upon whether the injurious act of the employee was willful and intentional or was unintentional, but upon whether the employee, when he did the wrong, was acting in the prosecution of the employer's business and within the scope of his authority or had stepped aside from that business and had done an individual wrong. . . . [T]he employer is liable for reckless, willful, intentional, wanton, or malicious acts of his employee as well as for his heedless and careless acts if they are committed while the employee is acting in the execution of his authority and within the course of his employment, or with a view to the furtherance of his employer's business, and not for a purpose personal to the employee.¹⁰⁰

Thus, assuming Kansas appellate courts rely on civil respondeat superior decisions when interpreting the "scope of authority" provision of section 21-3206, any criminal act by a corporation's agent in furthering the entity's business could subject the corporation to a criminal prosecution.

96. KAN. STAT. ANN. § 21-3206(1) (1988).

97. KAN. STAT. ANN. § 21-3206(2) (1988).

98. KAN. STAT. ANN. § 21-3206 (1988). Apparently no reported appellate court decisions in Kansas have interpreted the statute in a corporate context. See *infra* note 122 and accompanying text.

99. 2 Kan. App. 2d 302, 578 P.2d 1121 (1978).

100. *Id.* at 311, 578 P.2d at 1130 (emphasis added) (citing *Williams v. Community Drive-in Theater, Inc.*, 214 Kan. 359, 520 P.2d 1296 (1974); *Beggerly v. Walker*, 194 Kan. 61, 397 P.2d 395 (1964)).

Under the Kansas Criminal Code, corporations are subject to prosecution in Kansas regardless of where the criminal act takes place, so long as the harm from the act occurs in Kansas.¹⁰¹ Moreover, it may be that criminal liability could be imposed upon a corporation under Kansas law if an act by the corporation's agent in furtherance of the corporation's business violates a criminal statute, even if corporate management forbids the behavior. At the federal level at least, the fact that an employee's act is expressly forbidden, or is done in a manner that was prohibited, will not shield the corporation from liability.¹⁰² For example, in *United States v. Hilton Hotel Corp.*,¹⁰³ the Hilton Hotel Corporation was found guilty of violating the Sherman Antitrust Act even though management had twice specifically instructed its employee to take no part in the illegal activity.¹⁰⁴

The Kansas legislature has also taken steps to avoid ambiguity regarding whether the criminal statutes apply to corporations. The Kansas Criminal Code defines "person" as "an individual, public or private *corporation*, government, partnership, or unincorporated association."¹⁰⁵ The Kansas Criminal Code supports the criminal prosecution of corporations in yet another way. The Code provision that allows substituting fines for prison sentences seems tailor-made for punishing corporate criminal behavior.¹⁰⁶ Specifically, section 21-4503 allows a court to substitute fines in place of incarceration for both felony and misdemeanor convictions.¹⁰⁷ Moreover, under the statute, a corporation may be fined double its pecuniary gain from a crime.¹⁰⁸ Depending on how the statute is judicially interpreted, if Ford had been prosecuted in Kansas for a death associated with its Pinto, the company conceivably could have faced a fine for as much as \$175 million.¹⁰⁹

101. See KAN. STAT. ANN. § 21-3104 (1988).

102. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 502 (5th ed. 1984).

103. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

104. *Id.* at 1004.

105. KAN. STAT. ANN. § 21-3110(14) (1988 & Supp. 1991) (emphasis added).

106. KAN. STAT. ANN. § 21-4503 (1988 & Supp. 1991).

107. KAN. STAT. ANN. § 21-4503(1)-(4) (1988 & Supp. 1991).

108. KAN. STAT. ANN. § 21-4503(4) (1988 & Supp. 1991).

109. Ford Motor Company refused to spend approximately \$137 million to ensure that its Pinto would not explode during a rear-end collision. Ford concluded the cost savings would amount to \$87.5 million. See Anderson, *supra* note 9, at 373 (quoting *60 Minutes: Is Your Car Safe?* (CBS Television Broadcast, June 11, 1978)). Doubling this projected gain produces the \$175 million figure. However, because appellate courts have not interpreted KAN. STAT. ANN. § 21-4503(4) in the context of corporate criminal fines, one can only speculate that Kansas courts would interpret the statute in this manner. It is entirely

2. Recent Amendments

As the foregoing indicates, the Kansas legislature clearly has provided the mechanisms by which corporations can be held accountable for their criminal acts. However, until amendments to the Kansas Criminal Code approved by the 1992 legislature take effect in July 1993, the range of charges prosecutors can impose upon corporate criminals remains somewhat limited. For example, assume that a corporation knowingly marketed a defective product that caused the death of a Kansan. Although one could argue that the corporation's actions were reckless or wanton, whether a prosecutor could prove the corporation *intended* to cause the death seems unlikely. As a result, Kansas prosecutors could likely convict the corporation only for involuntary manslaughter under the law to date because a conviction of first degree murder, second degree murder, or voluntary manslaughter requires more culpability than reckless or wanton conduct.¹¹⁰

Further, although Kansas's to-date involuntary manslaughter statute can encompass unintentional corporate acts that produce deaths, the Kansas statutes have not permitted prosecution for unintentional corporate criminal acts that produce *injuries* short of death. For example, under existing Kansas criminal statutes, "battery" is defined as "the unlawful, *intentional* touching or application of force to the person of another, when done in a rude, insolent, or angry manner."¹¹¹ Aggravated battery is defined as "the unlawful touching or application of force to the person of another with *intent* to injure that person or another."¹¹² Thus, assuming that a corporation knowingly marketed a defective product that caused injury to a Kansan, the battery statutes heretofore available to Kansas prosecutors seem to require a showing that the corporation *intended* to cause the injury. Again, the mere fact that the corporation, through its agents, knew that injuries would result from its product does not necessarily mean that it intended to cause the injury. As a result, although the Kansas legislature

possible, at the other extreme, that Kansas courts would interpret the statute as meaning only the pecuniary gain derived from the particular item or instance. In that case, Ford's fine would have been twenty-two dollars, as it saved eleven dollars per car by not correcting the Pinto's defect.

110. See KAN. STAT. ANN. § 21-3401 (Supp. 1991) (defining first degree murder); § 21-3402 (1988) (defining second degree murder); § 21-3403 (1988) (defining voluntary manslaughter); and § 21-3404 (1988) (defining involuntary manslaughter).

111. *Id.* § 21-3412 (1988) (emphasis added).

112. § 21-3414 (1988) (emphasis added).

historically has indicated clearly that corporations are proper criminal defendants under the appropriate circumstances, the wording of the criminal law statutes has unduly restricted the available charges a Kansas prosecutor could bring to deter corporate criminal misconduct.

Changes are underway, however. A bill passed this session by the Kansas Legislature, and signed by the Governor on May 22, 1992, will remove some barriers to prosecuting corporations for both death and injury. Criminal intent can be established under the revised statute by proof of reckless conduct.¹¹³ Under Senate Bill 358,¹¹⁴ second degree murder is "expanded to include *unintentional* but reckless killings under circumstances manifesting an extreme indifference to the value of human life—the so-called 'depraved heart' murder."¹¹⁵ A corporation that occasions a death by knowingly marketing a dangerously defective product or exposing its employees to life-threatening conditions could be liable for depraved heart murder, which has been defined as risk-taking that manifests such insensitivity regarding human life that it may be said that the actor's conduct is as though he intended to kill his victim.¹¹⁶ Moreover, a corporation could be convicted of involuntary manslaughter more easily under the revised statutes—all that is required is a showing that a corporation's reckless¹¹⁷ acts caused death, a lesser requirement than the current one of showing that the death-causing act was "done intentionally in the wanton commission of an unlawful act, . . . or in the commission of a lawful act in an unlawful or wanton manner."¹¹⁸

Senate Bill 358 also significantly enhances a Kansas prosecutor's ability to prosecute corporations for criminal acts that produce nonfatal injuries. Under the bill, "the crimes of battery and aggravated battery are expanded to include reckless acts,"¹¹⁹ thus eliminating the intentional element and increasing greatly the scope of acts for which a corporation could be held criminally liable.

113. S. 358, 1992 Kan. Leg. § 2(1) (enacted). Reckless conduct is defined as "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a wanton disregard or complete indifference and unconcern for the probable consequence of such conduct." *Id.* § 2(3).

114. *Id.* § 4(b).

115. Supplemental Note on Senate Bill No. 358 at 1 (1992) (emphasis added); see S. 358, 1992 Kan. Leg. § 4(b) (enacted).

116. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06 (1990).

117. S. 358, 1992 Kan. Leg. § 6(a) (enacted).

118. KAN. STAT. ANN. § 21-3404 (1988).

119. Supplemental Note on Senate Bill No. 358 at 2 (1992); see S. 358, Kan. Leg. §§ 11(a), 12(b) (enacted).

C. Summary

The Kansas criminal statutes have armed Kansas law enforcement officials with an arsenal of weapons which, if used, could help ensure that Kansans are protected from corporate criminal behavior. Up to the present, however, corporate criminal prosecutions in Kansas have been rare;¹²⁰ and apparently no corporation has ever been prosecuted for homicide.¹²¹ Furthermore, even though the Kansas statute that allows the imposition of criminal liability upon corporations has been in effect for nearly twenty-two years, it has never been litigated beyond the trial court level.¹²² Although criminal charges against a corporation need not be brought under section 21-3206 specifically,¹²³ one could reasonably expect that if corporate criminal acts were routinely prosecuted, some appellate case law would exist challenging the corporate liability provisions of the statute.

V. AN ANALYSIS OF THE APPARENT LACK OF CORPORATE CRIMINAL PROSECUTIONS IN KANSAS

A. No Corporate Crime in Kansas?

Kansas has authorized more than 65,000 corporations to conduct business within the state.¹²⁴ Over the past six years in Kansas, there have been nearly 450,000 injuries, 16,000 cases of occupational diseases, and 429 fatalities resulting in workers compensation

120. Telephone Interview with Doug Roth, Chief Assistant District Attorney, Sedgwick County, Kansas (Jan. 8, 1992); Telephone Interview with Bill Ossmann, First Assistant District Attorney, Shawnee County, Kansas (Jan. 7, 1992); Telephone Interview with Paul Theroff, Assistant District Attorney, Wyandotte County, Kansas (Jan. 7, 1992); Telephone Interview with Ed Van Petten, Deputy Attorney General, Office of Attorney General of Kansas (Nov. 1, 1991).

121. *Id.*

122. Computer assisted research (both Westlaw and Lexis) and the annotations appended to KAN. STAT. ANN. § 21-3206 (1988 & Supp. 1991) indicate from the absence of any reported cases that this statute has not been litigated beyond the trial court level up to the time of publication of this Comment.

123. For example, involuntary manslaughter in Kansas is defined as "the unlawful killing of a human being, without malice, which is done unintentionally in the wanton commission of an unlawful act not amounting to a felony, or in the commission of a lawful act in an unlawful or wanton manner." KAN. STAT. ANN. § 21-3404 (1988). If a prosecutor determined manslaughter charges were warranted against a corporation, he or she could charge the corporation directly under the manslaughter statute without referring to the corporate liability provisions of KAN. STAT. ANN. § 21-3206 (1988).

124. Telephone Interview with Sam Smith, Programmer, Office of the Secretary of State of Kansas (Jan. 9, 1992).

claims.¹²⁵ The actions of corporations in Kansas and elsewhere also contribute to nonemployee deaths and injuries. Every year in the United States, an estimated 30,000 deaths¹²⁶ and up to 36 million injuries occur from consumer-product-associated accidents.¹²⁷ Combining these figures with the fact that corporations are solely responsible for reporting job-related injuries and diseases to OSHA,¹²⁸ and that between 40 and 60 percent of fatalities that occur in the work place never get reported to OSHA,¹²⁹ it seems likely that some Kansans are injured and perhaps some killed each year by the commission of corporate crimes. Yet there are apparently very few if any prosecutions. The lack of corporate criminal prosecutions in Kansas may derive from a combination of several factors.

B. Inadequate Statutory Provisions

Although, as described above, statutory authority has existed in Kansas for criminally prosecuting corporations, the general restriction of statutory provisions to intentional acts has no doubt limited the extent of prosecutions. The recent amendments to the Criminal Code appear to rectify this problem.¹³⁰ Other factors likely also have had an impact on the lack of corporate prosecutions in Kansas.

C. Accepting Corporate Crime as Crime

At the outset, one must note that corporate crimes may be easily concealed.¹³¹ A victim of an "unsafe, toxic, or carcinogenic product typically remains unaware of the hazards to which he has been exposed,"¹³² and the worker who suffers an injury or contracts an occupational disease may be unaware that the employer's failure to comply with safety requirements is responsible for the worker's

125. *Seventeenth Annual Statistical Report*, Division of Workers Compensation, Kansas Dep't of Human Resources (July 1, 1991).

126. HILLS, *supra* note 31, at 4; *see also* Adler & Pittle, *supra* note 16, at 18 (estimated 28,000 deaths).

127. Adler & Pittle, *supra* note 16, at 18.

128. MARSHALL B. CLINARD, *CORPORATE CORRUPTION* 92 (1990).

129. *The OSHA Criminal Penalty Reform Act: Hearings on S. 445 Before the Subcomm. on Labor of the Senate Comm. of Labor and Human Resources*, 102d Cong., 1st Sess. 82 (1991) [hereinafter *Hearings*] (statement of Gerald F. Scannell, Assistant Secretary for Occupation Safety and Health).

130. *See supra* part IV.B.2.

131. *See* John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 390 (1981).

132. *Id.* at 390-91.

condition. One can hardly expect law enforcement officials to address a harm if the public itself is not aware of its source.

This predicament is attributable to society's tendency to view deaths and injuries that occur in the workplace or that are associated with consumer products as different from those that result from street crimes.¹³³ Deaths and injuries attributable to corporations are typically viewed as tragic accidents.¹³⁴ When prosecutors look into such "accidents," however, they often find the death or injury to be the result of a willful safety violation.¹³⁵

*People v. Chicago Magnet Wire Corp.*¹³⁶ is illustrative. Forty-two employees suffered injuries after being exposed to poisonous substances used in the corporation's manufacturing process.¹³⁷ Illinois prosecutors found sufficient evidence to charge the corporation with aggravated battery for knowingly and recklessly endangering its workers and for failing to provide necessary instructions and equipment.¹³⁸ The defendant corporation appealed the indictments, arguing that the charges were strictly within the province of federal prosecutors.¹³⁹ The Supreme Court of Illinois, however, held that the corporation could be prosecuted under state law for its alleged criminal behavior,¹⁴⁰ and remanded the case to the trial court.

Criminal cases of this nature are becoming more frequent; yet because society does not see "corporate crime as crime,"¹⁴¹ such cases are still exceptions to the norm. The *Chicago Magnet Wire* case illustrates, however, that aggravated battery is aggravated battery whether it is a pistol whipping or an employer willfully exposing employees to toxic substances.¹⁴² Until society becomes more willing to equate physical harm suffered on the job or in an exploding automobile with physical harm from street crimes, prosecutors cannot address these harms and, as a consequence, cor-

133. See Anderson, *supra* note 16, at 383. "[T]he principle difference between corporate induced deaths and those incurred in back alleys by gun-wielding individuals is that with companies, the *corpus delicti* is provided by internal company documents, which contain the smoking pistol, spent cartridge, and the body all rolled into one." *Id.* at 383.

134. See generally HILLS, *supra* note 31, at 5.

135. See *infra* notes 136-40 and accompanying text.

136. 534 N.E.2d 962 (Ill.), *cert. denied sub nom. Asta v. Illinois*, 111 S. Ct. 52 (1989).

137. *Id.* at 963.

138. *Id.*

139. *Id.*; see discussion *infra* notes 163-64 and accompanying text.

140. *Id.* at 970.

141. HILLS, *supra* note 31, at 5.

142. See *Chicago Magnet Wire*, 534 N.E.2d at 962; see also *People v. Pymm Thermometer Corp.*, 563 N.E.2d 1 (N.Y. 1990) (finding corporation guilty of assault after exposing employee to mercury vapor levels five times those permitted by OSHA).

porate crimes will continue to go undetected and unpunished.

D. Federal Agencies and Corporate Crime

The paucity of Kansas prosecutions of corporations for injuries or death may also be attributable to the belief that federal statutory schemes enforced by agencies such as the Consumer Product Safety Commission (CPSC) and OSHA pre-empt state involvement. Relatedly, state law enforcement officials may expect that agencies such as CPSC or OSHA will ultimately address corporate acts that injure or kill workers and consumers.

Congress enacted the Occupational Safety and Health Act of 1970¹⁴³ to ensure, "so far as possible every working man and woman in the Nation" a safe working environment by "authorizing the Secretary of Labor to set mandatory occupational standards applicable to businesses affecting interstate commerce."¹⁴⁴ In order to carry out Congress's purpose, the Occupational Safety and Health Act empowers the Secretary of Labor to enter work sites to ensure compliance with OSHA standards,¹⁴⁵ and to impose civil and criminal penalties upon employers who violate OSHA regulations.¹⁴⁶ While Congress's concern with worker safety and its enactment of legislation to address the problem is admirable, the 1970 Act's impact on working conditions has been far from profound.

Nearly 200,000 workers have died on the job since OSHA's inception, but only 74 cases of criminal violations have been referred for prosecution to the Department of Justice.¹⁴⁷ OSHA has less than 1000 inspectors faced with the task of ensuring that six million employers comply with the Act.¹⁴⁸ As a result of this hopeless understaffing of inspectors, OSHA is able to inspect less than four percent of the nation's workplaces each year.¹⁴⁹ Moreover, surprise inspections, which are designed to counter the low probability of an

143. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (1988)).

144. 29 U.S.C. § 651(b) (1988).

145. *Id.* § 657.

146. *Id.* § 666.

147. *Hearings*, *supra* note 119, at 7 (summary of S. 445) (of those 74 cases, 20 were prosecuted, resulting in 15 convictions).

148. Harry Bernstein, *OSHA Needs Muscle to Reduce On-The-Job Injuries*, L.A. TIMES, Nov. 28, 1989, at D3; see also Garth L. Mangum, *Murder in the Workplace: Criminal Prosecutions v. Regulatory Enforcement*, LAB. L.J. 220, 228 (Apr. 1988).

149. See Brickey, *supra* note 8, at 778 n.143.

OSHA investigation, have been ruled unconstitutional unless a search warrant is first obtained.¹⁵⁰ This requirement, however, can be met without announcing the inspection.¹⁵¹ Even in cases in which OSHA becomes involved, the results would hardly seem to deter corporate misconduct, because the average penalty for serious and willful violations—violations that create a probability of death or serious injury—was recently reported to be less than four hundred dollars.¹⁵²

The case of Stefan Golab is a tragic illustration of OSHA's failure to investigate and prosecute corporate wrongdoing. Golab worked for Film Recovery Systems Inc., a corporation operating a silver reclamation plant in which workers chopped used film into small pieces, dumped the chips into tanks of water and sodium cyanide, and stirred them constantly until silver separated from the film.¹⁵³ On February 10, 1983, Golab had been stirring a tank when he left the production area to rest.¹⁵⁴ Within minutes, he went into convulsions, frothed at the mouth, passed out, and died of "acute cyanide toxicity."¹⁵⁵

An investigation into Golab's death revealed that Film Recovery Systems not only failed to protect workers from cyanide poisoning, but also failed to disclose to its employees that they were working with cyanide.¹⁵⁶ Cook County, Illinois prosecutors ultimately charged and convicted Film Recovery Systems and its parent company for involuntary manslaughter, and three corporate managers of Film

150. *Marshall v. Barlows, Inc.*, 436 U.S. 307, 322 (1978).

151. The Supreme Court in *Marshall* held that for OSHA to obtain a warrant, the agency would not necessarily need to demonstrate probable cause as it is defined in the criminal sense. The court stated that:

[F]or purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights.

Id. at 320-21 (footnotes omitted) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

152. Mangum, *supra* note 148, at 228.

153. *People v. Film Recovery Systems, Inc.*, Nos. 84 C 5064 & 83 C 11091 (Cir. Ct. of Cook County Ill. June 14, 1985); *see also* Magnuson & Leviton, *supra* note 17, at 913-14.

154. Magnuson & Leviton, *supra* note 17, at 914.

155. *Id.*

156. *Id.*

Recovery Systems were convicted of murder.¹⁵⁷ The convictions were overturned on appeal.¹⁵⁸

OSHA had received information in 1982 that illnesses and injuries were occurring at Film Recovery Systems.¹⁵⁹ The agency, however, failed to conduct an on site inspection,¹⁶⁰ which would have revealed workers were being exposed to "lethal" amounts of toxic substances without adequate training or safety equipment.¹⁶¹ After Golab's death, OSHA's inspectors found seventeen significant violations of OSHA standards.¹⁶²

Some corporations that have been the target of criminal prosecutions involving workplace hazards argue that the federal Occupational Safety and Health Act of 1970 pre-empts state prosecutors from bringing criminal charges for workplace injuries and deaths. The issue has not been addressed by the United States Supreme court. It declined to review the Illinois Supreme Court decision in *People v. Chicago Magnet Wire Corp.*—a decision that allowed the prosecution of a corporation for willfully exposing employees to workplace hazards.¹⁶³ Other state courts have held similarly to the Illinois court.¹⁶⁴

As with OSHA, the ability of the CPSC to protect the public from unreasonable dangers also seems questionable. In 1972 Congress formed the CPSC because "an unacceptable number of consumer products which present[ed] unreasonable risks of injury [were being] distributed in commerce."¹⁶⁵ Congress declared that the "public should be protected against unreasonable risks of injury associated with consumer products";¹⁶⁶ nonetheless, tens of millions of consumers are still injured, and tens of thousands are still killed each year in consumer-product-associated accidents.¹⁶⁷ In spite of

157. *Id.* at 914-15.

158. The convictions were overturned in 1990 by the Illinois Court of Appeals after it found that the convictions of murder and manslaughter, which require different mental states, were legally inconsistent given that both convictions were based on the same evidence. See *People v. O'Neil*, 550 N.E.2d 1090, 1098 (Ill. App. Ct. 1990).

159. Magnuson & Leviton, *supra* note 17, at 930-31.

160. *Id.*

161. *Id.* at 931.

162. *Id.*

163. *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill.) *cert. denied sub nom. Asta v. Illinois*, 111 S. Ct. 52. (1989); see text accompanying *supra* notes 136-40.

164. See *People v. Pymm Thermometer Corp.*, 563 N.E.2d 1, 6 (N.Y. 1990) (holding that state prosecution of employers for criminal liability is not pre-empted by OSHA); *Sabine Consol., Inc. v. State*, 806 S.W.2d 553, 557 (en banc) (Tex. Crim. App. 1991) (holding that OSHA does not pre-empt state from prosecuting employer for criminally negligent homicide).

165. 15 U.S.C. § 2051 (1988).

166. 15 U.S.C. § 2051(a)(1).

167. Adler & Pittle, *supra* note 16, at 18; see *supra* notes 126-27 and accompanying text.

this, the Reagan administration slashed the CPSC's budget, reduced its number of employees, and cut its area offices from fourteen to three.¹⁶⁸ When CPSC Commissioner Stuart Statler resigned in 1986 amidst budget cuts and staff reductions, he stated that "[s]uch cuts 'mean that, for the future, the agency will be unable to assess emerging risks from new products, or even identify them in the first place. . . . As a result, more Americans will be maimed and charred and killed before we can even begin to seek solutions.'"¹⁶⁹

The failure of federal agencies such as OSHA and the CPSC to protect the public from corporations that endanger the lives of workers and consumers has prompted some states to criminally prosecute corporations.¹⁷⁰ An era of budget cuts, hands-off government, and deregulation warrants a heightened interest by state prosecutors in worker and consumer safety. If "the traditional duty of a prosecuting agency is to insure the welfare of the citizens within its jurisdiction, whether they be in their homes, on the streets, [or] at work,"¹⁷¹ and federal agencies have failed to protect the public, state prosecutors are the last line of defense against egregious corporate acts. If Kansas prosecutors fail to address corporate acts that threaten Kansans, there will be less motivation for unscrupulous corporations to act with due regard for society's safety.

E. Civil Liability as a Deterrent to Corporate Misconduct

The effectiveness of civil liability in deterring corporate misconduct depends on the extent to which corporate law breakers are in fact penalized.¹⁷² Ford's decision to market the Pinto automobile in spite of its defective gas tank is a striking example of how civil liability may offer inadequate deterrent value. Ford compared estimated civil claim losses to the cost of correcting the defect and decided that saving \$87.5 million was worth 180 deaths and 180 serious injuries.¹⁷³ One can hardly assert there was any deterrent effect in this case.

The insurability of civil liability, to a great extent, further diminishes the deterrent effect civil penalties can have on corporate acts.¹⁷⁴ Insurance policies shift the responsibilities of corporations

168. *Id.*

169. W. PAGE KEETON ET AL., *PRODUCTS LIABILITY AND SAFETY* 13 (2d ed. 1989) (quoting BNA Prod. Saf. & Liab. Rep. 673 (Mar. 28, 1986)).

170. See Magnuson & Leviton, *supra* note 17, at 931; Schott, *supra* note 17, at 795.

171. Magnuson & Leviton, *supra* note 17, at 928.

172. Anderson, *supra* note 16 at 389.

173. *Id.*; see *supra* notes 26-32 and accompanying text.

174. See Anderson, *supra* note 16, at 390.

to third parties.¹⁷⁵ The public policy goals of guaranteeing safe products and work environments can be thwarted if corporations regard liability insurance as a cost-saving substitute for society's safety.¹⁷⁶ The recent controversy surrounding Dow Corning Corporation's marketing of silicon breast implants is an example of a corporation relying on liability insurance to protect it from possible misconduct. Although there is evidence Dow Corning may have intentionally delayed warning the public about dangerous side effects associated with its breast implants, the corporation stated that "the company's \$250 million in insurance is more than enough to cover its potential implant liability."¹⁷⁷

In contrast to civil fines, criminal fines are not insurable in Kansas. In *Herman v. Folkerts*,¹⁷⁸ the Kansas Supreme Court held that an insurance policy is void as against public policy if it is intended to indemnify the insured for criminal acts.¹⁷⁹ Consequently, if routine corporate prosecutions occurred in Kansas, corporations contemplating illegal acts that endanger human lives would have to factor uninsurable criminal penalties into their life versus profits equations. In Kansas, those penalties can amount to twice the corporation's pecuniary gain from the criminal acts.¹⁸⁰

Punitive damages in civil actions are borrowed from the criminal law as a means to punish the wrongdoer for malicious, vindictive, or willful and wanton injuries.¹⁸¹ The deterrent effect of punitive damages is vitiated, however, to the extent the damages are insurable.¹⁸² Whether or not punitive damages are insurable or have a deterrent effect, criminal liability should also apply in many cases where punitive damages are warranted.

In *Tetuan v. A.H. Robins Co.*,¹⁸³ the Kansas Supreme Court reviewed a jury award of over seven million dollars in punitive damages. The appellee, Loretta L. Tetuan had filed suit against A.H. Robins Company for injuries resulting from the use of the corporation's intrauterine contraceptive device, the "Dalkon

175. See *id.* at 389-90.

176. See *id.* at 390.

177. See Scott McMurray & Thomas M. Burton, *Dow Corning Plans to Quit Implant Lines*, WALL ST. J., Mar. 19, 1992, at A3.

178. 202 Kan. 116, 446 P.2d 834 (1968).

179. *Id.* at 120, 446 P.2d at 837.

180. KAN. STAT. ANN. § 21-4503(4) (Supp. 1991).

181. Gould v. Taco Bell, 239 Kan. 564, 571, 722 P.2d 511, 517 (1989).

182. Anderson, *supra* note 16, at 388-89. Regarding the insurability of punitive damages, see generally Grace M. Giesel, *The Knowledge of Insurers and the Posture of the Parties in the Determination of the Insurability of Punitive Damages*, 39 KAN. L. REV. 355 (1991).

183. 241 Kan. 441, 738 P.2d 1210 (1987).

Shield.”¹⁸⁴ Tetuan alleged that she was required to undergo a total abdominal hysterectomy because of a pelvic infection caused by the device.¹⁸⁵ The jury awarded her \$1.7 million in compensatory damages and \$7.5 million in punitive damages.¹⁸⁶ In upholding the awards, the Kansas Supreme Court stated:

Robins knew the Dalkon Shield was not safe or effective; . . . Robins misled doctors through claims of safety and efficacy while it knew there was no basis for a claim of safety, [Robins] deliberately and intentionally concealed [the] dangers [associated with the Dalkon Shield]. . . . Far from simply being ‘grossly negligent’ in marketing the Dalkon Shield, there was substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield for year after year until those dangers worked their tragic results on Loretta Tetuan.¹⁸⁷

Obviously, differences between civil and criminal trials exist, including the much higher burden of proof required in criminal trials.¹⁸⁸ The evidence in *Tetuan*, however, suggests that a criminal investigation was warranted, regardless of whether a prosecution would have ensued. The Kansas statute that imposes criminal liability upon corporations for deceptive commercial practices seems tailor-made to address precisely this type of fraudulent behavior.¹⁸⁹

Even assuming that civil liability could accomplish the goal of deterring corporate misconduct, civil suits are characteristically unable to redress workplace harms. Workers’ compensation laws typically provide the only available remedy for employees injured on the job and bar them from suing their employers.¹⁹⁰ If a worker cannot sue an employer for willfully inflicting injury, and OSHA is unable to assure the employee a safe working environment, unscrupulous corporations have less incentive to provide workers

184. *Id.* at 442, 738 P.2d at 1215. “The Dalkon Shield is a white piece of plastic less than two centimeters in diameter. Roughly oval in shape, it contains four phalanges on either side which enable it to remain secure in the uterus and gives the shield a crab-like appearance. Attached to the shield is a black string 8-9 centimeters in length.” *Id.* at 444-45, 738 P.2d at 1216. “The tail string of the shield, made up of tiny strands encased in nylon, hangs out of the uterus in such a way that a woman could check to verify that it is in place. The wicking properties of the string facilitated the movement of bacteria from the outside into the uterus, resulting in infection.” CLINARD, *supra* note 128, at 103.

185. *Tetuan*, 241 Kan. at 444, 738 P.2d at 1216.

186. *Id.* at 442, 738 P.2d at 1215.

187. *Id.* at 483-84, 738 P.2d at 1240.

188. KAN. STAT. ANN. § 21-3109 (1988); *State v. Norris*, 244 Kan. 326, 337, 768 P.2d 296, 304 (1989) (stating that an accused in a criminal trial may only be convicted on proof beyond a reasonable doubt).

189. See KAN. STAT. ANN. § 21-4403 (1988).

190. See, e.g., *id.* § 44-501(a) & (b) (Supp. 1991).

with safe surroundings, unless the criminal justice system is used to accomplish what OSHA cannot.

F. Political Considerations

It is possible that political considerations may affect the extent to which corporate crime is prosecuted. As one commentator has noted, elected prosecutors can face particularly difficult choices: "If the [prosecutor] chooses not to prosecute in a certain situation he may incur the wrath of employees, unions, and environmental organizations. If he chooses to prosecute, potentially powerful members of society, who identify with corporate defendants, will be disturbed."¹⁹¹ Furthermore, the possibility exists that a portion of corporate America will avoid doing business in Kansas if the State starts sending the message that it is particularly tough on corporate crime. At least as to the issue of the health and safety of Kansans, however, this is the message Kansas should be sending to corporate America.

VI. CONCLUSION

Corporations have long been considered citizens with equal protection, free speech, and due process rights; yet there has been a reluctance to hold corporations liable for criminal activity.¹⁹² The concealable nature of corporate crimes, reliance on federal agencies, and a belief that civil remedies will deter corporate misconduct may all, to a greater or lesser extent, have influenced prosecutorial decisions regarding corporations. An additional factor in Kansas may have been somewhat restrictive statutory definitions of battery and homicide, definitions that are now being expanded.¹⁹³

The evidence suggests that the criminal justice system should bolster other deterrents to corporate wrongdoing in order to ensure that the existence of safe products and healthy work environments is not dependent merely on corporate decision makers. If the citizens of the several states, including Kansas, are to be further protected from corporate criminal acts, "the criminal law must make business crime its business and must not fear stepping into the corporate fray and saying: 'no more.'"¹⁹⁴

Tackling corporate criminal behavior will not be easy, especially when offending corporations are well-financed and control "the

191. Magnuson & Leviton, *supra* note 17, at 936.

192. Anderson, *supra* note 16, at 379.

193. See *supra* part IV.B.2.

194. Fred L. Rush, Jr., *Corporate Probation: Invasive Techniques for Restructuring Institutional Behavior*, 21 SUFFOLK U. L. REV. 33, 89 (1987).

information upon which a successful prosecution must be based."¹⁹⁵ Moreover, limited precedents,¹⁹⁶ budget constraints, the possibility of federal pre-emption, and the difficulty of using some state statutes to encompass corporate criminal behavior¹⁹⁷ can compound the difficulties. The impediments are not insurmountable, however: officials in California, Wisconsin, Michigan, Indiana, New York, Texas, and Illinois are making some progress toward ensuring that the health and safety of their citizens are not treated merely as a corporate expense.¹⁹⁸

Kansas is in a good position to follow suit. The Kansas legislature has clearly provided its district attorneys with the necessary tools to address corporate crime. This is not to say the task will be easy: "There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things."¹⁹⁹ Nevertheless, the citizens of Kansas have a right to expect that the State will take reasonable steps to deter corporate conduct that endangers their health and safety.

195. Magnuson & Leviton, *supra* note 17, at 931.

196. Only twenty-eight states have adopted principles governing corporate criminal liability. Foerschler, *supra* note 51, at 1295.

197. For example, until recently passed amendments take effect, Kansas defines aggravated battery as the "unlawful touching or application of force to the person of another with intent to injure that person or another which either: (a) Inflicts great bodily harm upon him; or (b) Causes any disfigurement or dismemberment to or of his person; or (c) Is done with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted." KAN. STAT. ANN. § 21-3414 (1988). In a situation where an employee was exposed to toxic substances as a cost savings means for the employer to avoid safety precautions, whether Kansas courts would consider such behavior "intentional" is unknown.

198. See *supra* notes 9-17 and accompanying text; see also Sharon Cohen, *Unsafe Conditions at Work Can Lead to Criminal Trials*, L.A. TIMES, Oct. 29, 1989, at A2.

199. NICCOLO MACHIAVELLI, *THE PRINCE* 43 (W.K. Marriott trans.), quoted in Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 629 (1988).