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CORPORATE CRIMINAL LIABILITY FOR WORK-SITE DEATHS: OLD LAW USED A NEW WAY

I. INTRODUCTION

Work-related accidents pose a threat to the life of every person in the United States.¹ To the person working on a construction site, death may be the result of having the employee's head knocked against a piece of equipment from an airborne drilling tool,² or the worker may be killed by a five-pound piece of metal dropping eighty feet down a shaft.³ However, work-related injuries resulting in death threaten non-workers as well. A passerby could be killed by the collapse of a multi-ton piece of machinery.⁴ The first thought that comes to mind in these situations is tort liability; but currently, there is an expanding trend to hold corporations criminally liable for such deaths.⁵

It is to be expected that in a modern and industrialized society some work-related deaths will occur.⁶ However, there is a point at which society does not accept this "built-in" death rate. As corporations continue to

1. N. ASHFORD, *CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY* 3 (1976) (recent statistics show that each year in the United States over 14,000 workers are killed in industrial accidents; this figure does not include deaths caused by occupational diseases or exposure to deadly chemicals).

2. On March 25, 1986, a construction worker, working in downtown Milwaukee, Wisconsin, suffered massive head injuries after a weld broke loose, causing a 500-pound drilling tool to knock his head against a crane. *Milwaukee Sentinel*, March 26, 1986, § 1, at 5, col. 5. Less than one week later he died. *Milwaukee Sentinel*, March 31, 1986, § 1, at 5, col. 5.

3. On January 22, 1986, a Racine, Wisconsin man was seriously injured when a five-pound piece of steel, being lowered down a shaft by a string, broke free and hit him in the head. Serious injuries, requiring surgery, were the result even though the worker was wearing a hard hat. *Milwaukee Journal*, January 23, 1986, § 2, at 9, col. 1.

4. In May of 1985, a Manhattan woman had her legs crushed when a crane, operated by an unqualified worker, collapsed on her legs. Seven operations have not completely rehabilitated her legs. *Milwaukee Sentinel*, April 27, 1986, § 2, at 7, col. 1.

5. See *Local Officials Set Up New Programs as Others Urge Caution over Trend to Use Criminal Prosecution for Workplace Hazards*, 15 O.S.H. Rep. (BNA) No. 44, at 1132 (April 10, 1986) [hereinafter *Workplace Hazards*]; *Workplace Fatality Situations Called 'Ripe For Prosecution' By State's Attorney*, 15 O.S.H. Rep. (BNA) No. 47, at 1208 (May 1, 1986); Radin, *Corporate Criminal Liability for Employee-Endangering Activities*, 18 COLUM. J.L. & SOC. PROBS. 49 (1983-85); Comment, *Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?* 38 Sw. L.J. 1275 (1985).

6. Spurgeon & Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 CRIM. L. & CRIMINOLOGY 400 (1981). "[S]imultaneous beneficial and detrimental aspects of corporate conduct present lawmakers with the challenge of curtailing socially harmful activity without stifling the industrial process." *Id.*

grow in number and expand the realm of their activities,⁷ and as traditional methods of controlling corporate behavior fail,⁸ state district attorneys are imposing criminal charges against corporations and/or the individuals within the corporation for work-site deaths.⁹

Following a background section which traces corporate criminal liability in general, this Comment addresses the difficulties local prosecutors have encountered in applying homicide statutes against corporations, with a section devoted to Wisconsin developments and the viability of a corporate homicide charge in the Wisconsin courts. The final section of this Comment examines the defenses relied upon in recent cases, including a preemption argument which must be considered by the United States Supreme Court in the near future.

II. BACKGROUND

According to early common law, corporations could not be held criminally liable.¹⁰ Corporations were viewed as mere legal entities, created for limited purposes¹¹ and therefore not culpable of moral blame.¹² However, with the increased interaction of corporations in society, corporate activity

7. Prior to 1800, there were only 225 private corporations and about 2,000 public corporations. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393, 404 (1982). As of 1983, there were 2,999,000 corporations in the United States. U.S. DEPT. OF COMMERCE, 1987 STATISTICAL ABSTRACT OF THE U.S. 503 (10th ed. 1987).

8. The Occupational Safety and Health Act (OSHA) was passed by Congress in 1970 to assure all workers a safe and healthy working environment. Occupational Safety and Health Act, Pub. L. No. 91-596, § 2(a) *et seq.*, 85 Stat. 1590, 29 U.S.C. § 654 *et seq.* (1982). As this Act was originally written, OSHA inspections were to be unannounced. *Id.* at § 8(a)(1), 84 Stat. 1596 at 8(a)(1), 29 U.S.C. at § 657(a)(1). However, in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the United States Supreme Court decided that unannounced inspections, without a search warrant, were unconstitutional. OSHA also contained provisions allowing a \$1,000 fine for a serious violation and a \$10,000 fine for each willful or repeated violation. *Id.* at § 17, 84 Stat. 1596 at § 17, 29 U.S.C. at § 666. In 1979, the average fine for a willful or repeated violation was \$367. MINTZ, OSHA: HISTORY, LAW AND POLICY 338-39 (1984). Because of these developments, OSHA has not impacted worker safety to the degree intended by Congress.

9. See generally Comment, *Corporations Can Kill Too: After Film Recovery; Are Individuals Accountable for Corporate Crimes?* 19 LOY. L.A.L. REV. 1411 (1986); Developments in the Law, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

10. *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 492 (1909).

11. The argument was that a corporation could only carry on the activities stated in its articles of incorporation. All other activities were *ultra vires*, and therefore the corporation could not commit the offense. This argument was readily rejected by the courts. 18B AM. JUR. 2D *Corporations* § 2134 (1985). See, e.g., *Music Box, Inc. v. Mills*, 10 La. App. 665, 121 So. 196 (1929).

12. The philosophy of early criminal law was to punish the person through imprisonment, and since a corporation could not be imprisoned, there was no reason to find it guilty of a crime. W. LAFAVE & A. SCOTT, CRIMINAL LAW 257 (2d ed. 1986).

which violated the rights of individuals became more prevalent.¹³ The United States had created a creature which it could not control. In response, Congress passed the Interstate Commerce Act of 1887¹⁴ and the Sherman Anti-Trust Act of 1890,¹⁵ which imposed numerous regulations on corporations. Regulatory agencies, however, have proven to be less than effective in regulating corporate behavior. Currently local prosecutors, in an attempt to regulate corporate behavior, are applying traditional criminal law against corporations.¹⁶

A. *The Emergence of Criminal Sanctions Against Corporations*

When regulatory agencies were established, they were given the power to impose criminal fines against corporations for rule violations.¹⁷ During this same period, federal statutes were promulgated which gave the United States Attorney's Office the power to hold corporations liable under criminal statutes.¹⁸

In 1904, in *United States v. Van Schaick*,¹⁹ conventional criminal law principles were applied against a corporation for the first time.²⁰ The corporate owner of a steamship was held criminally liable when the steamship caught fire, forcing the passengers to jump into the river. The life preservers which the steamship provided were ill-maintained and unusable, and over 900 persons drowned. The managing directors, officers, and master of the ship were also indicted. The relevant federal statute in *Van Schaick* allowed prosecution for manslaughter if the life of any person was destroyed by "misconduct, negligence, or inattention to . . . duties on [the] vessel"²¹ by any person employed on the steamship.²² The statute did not even mention the word "intent" and therefore the prosecutor was relieved of the burden of proving intent. Based on the non-intent statute, the court found the corporation and its agents guilty of manslaughter for their criminally negligent conduct.²³

13. Brickey, *supra* note 7, at 404-05.

14. 49 U.S.C. § 1 (1982).

15. 15 U.S.C. § 1 (1982).

16. *See supra* notes 8-9.

17. For instance, the penalties available for imposition by the Federal Trade Commission range from three years imprisonment to a million dollar fine. 15 U.S.C. §§ 1-3 (1982).

18. *See infra* text accompanying notes 19-29.

19. 134 F. 592 (1904).

20. *Id.*

21. 70 U.S. Comp. Stat. § 5344 (1901).

22. *Id.*

23. *Van Schaick*, 134 F. at 609.

Four years later, in *New York Central and Hudson River Railroad Co. v. United States*,²⁴ the United States Supreme Court held that a corporation could be charged with a crime which required specific intent.²⁵ In *New York Central*, the Supreme Court held that a railroad company could be held criminally liable for offering rebates to sugar refining companies that shipped their products with the railroad company. This conduct was in violation of the Elkins Act,²⁶ which further provided that

the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of [the corporation] as well as of that person.²⁷

The Supreme Court upheld the constitutionality of this statute which imputed an agent's knowledge and actions to a corporation. The Court, basing its decision on public policy, believed that if it held to the contrary, Congress would be stripped of its ability to regulate the actions of corporations.²⁸ Interestingly, the Court noted "that there are some crimes, which in their nature cannot be committed by corporations."²⁹

B. State Law

During this same period, the state criminal justice systems also began charging corporations with crimes.³⁰ However, the states faced great difficulty in applying state criminal codes to corporations because most state criminal codes' definition of "person" typically did not include corporations.³¹ When the state systems began criminally charging corporations with homicide, it was usually under statutes requiring some form of specific intent with no provisions for imputation of the *mens rea* of the corporate officers to the corporation.³²

24. 212 U.S. 481 (1909).

25. *Id.* at 493. *New York Central* was affirmed in *United States v. Union Supply Co.*, 215 U.S. 50 (1909), where the Court stated "[corporations] are as much within the mischief aimed at as private persons, and as capable of a 'wilful' breach of the law." *Id.* at 55.

26. 32 U.S. Comp. Stat. § 847 (1909).

27. *Id.* at 847(1).

28. *New York Central*, 212 U.S. at 494-96.

29. *Id.* at 494. For instance, a crime that a corporation could not commit is rape.

30. *See infra* text accompanying notes 33-46.

31. *See infra* text accompanying notes 35-66.

32. Some states still provide no guidance for imputation. Compare Wisconsin Statutes Chapter 939 which provides no statutory guide for imputation of agents' actions or *mens rea* to the corporation with the Kentucky Penal Code which states:

(1) A corporation is guilty of an offense when:

It was not until 1919 that state courts began to accept the notion of corporate homicide. In *Commonwealth v. Punxsutawney Street Passenger Railway Co.*,³³ a street car passenger was allegedly killed by the corporation's criminal negligence. A Pennsylvania County Court of Appeals wrestled with the issue of whether the corporation could be indicted for negligent homicide. The court recognized that a corporation could be held civilly liable for torts such as assault and battery, which require an element of personal violence. However, with no criminal law precedent upon which to rely, the court held that "a corporation cannot be indicted for offenses involving the element of personal violence as assault and battery, nor for offenses involving the element of malice or criminal intent."³⁴

In 1909, the New York Court of Appeals in *People v. Rochester Railway & Light Co.*,³⁵ was asked to hold a corporation liable for second degree manslaughter for negligently installing a leaky gas valve which caused the death of a resident of the home.³⁶ The statute defined homicide as "the killing of one human being by the act, procurement or omission of 'another.'"³⁷ While finding no legislative intent which would support holding the corporation liable, the court in *Rochester Railway* stated:

We think that this final word "another" naturally and clearly means a second or additional member of the same kind or class alone referred to by the preceding words, namely, another human being, and that we should not interpret it as appellant asks us to, as meaning another "person," which might then include corporations. It seems to us that it would be a violent strain upon a criminal statute to construe this word as meaning an agency of some kind other than that already mentioned or referred to, and as bridging over a radical transition from human beings to corporations. Therefore, we construe this definition of homicide as meaning the killing of one human being by another human being.³⁸

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- (a) The conduct constituting the offense consists of a failure to discharge a specific duty imposed upon corporations by law; or
 - (b) The conduct constituting the offense is engaged in, authorized, commanded or wantonly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment in behalf of the corporation; or
 - (c) The conduct constituting the offense is engaged in by an agent of the corporation acting within the scope of his employment and in behalf of the corporation

KY. REV. STAT. ANN. § 502.050 (Baldwin 1984).

33. 24 Pa. C. 25, reprinted in 48 PITTS. LEG. J. 42 (1900).

34. *Punxsutawney*, 24 Pa. C. at 26.

35. 195 N.Y. 102, 88 N.E. 22 (1909).

36. *Id.*

37. *Id.*

38. *Id.* at 107-08, 88 N.E. at 24.

This strict reading of the statute³⁹ prevented the corporation from being subjected to criminal liability.⁴⁰

Four years later in *Commonwealth v. Illinois Central Railway Co.*,⁴¹ the Kentucky Court of Appeals was faced with a case almost identical to *Punxsutawney*. At that time, the Kentucky courts had no statutory definition of manslaughter to rely upon, and therefore relied on the common law definition.⁴² Quoting extensively from *Rochester Railway and Punxsutawney*, the court dismissed the action, but added in dicta "that an indictment might be made to lie, if authorized by a statute including corporations."⁴³

As time has shown, the most influential of the early corporate homicide cases was *State v. Lehigh Valley Railway Co.*⁴⁴ In *Lehigh*, a railway company was charged with manslaughter after one of its railway cars loaded with explosives blew up and killed a person.⁴⁵ Noting that the statutory definition of "person" for purposes of applying the manslaughter statute included corporate bodies, the court indicted the railway company⁴⁶ and stated:

[*Rochester Railway*] 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.⁴⁷

The foregoing state cases all dealt with a corporation's criminal liability for violating a statute with a *mens rea* element of criminal negligence. As will be seen in the next section of this Comment, prosecutors are now hold-

39. One author divides corporate homicide cases into two categories: (1) "strict common law" cases, which do not find corporations within the definition of "person"; and (2) "statutory common law" or "interpretative common law" cases which do include corporations within the definition of "person", and therefore allow a corporate homicide indictment. Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465, 476-82 (1980-81).

40. *Rochester Railway*, 195 N.Y. at 108, 88 N.E. at 24.

41. 152 Ky. 320, 153 S.W. 459 (1913).

42. *Id.* at ___, 153 S.W. at 461. Manslaughter was defined by common law as "the killing of one person by another person. . . ." The court noted that there was statutory authority for including corporations within the definition of "person" but that "the word 'another' can only mean another member of the same class as the slayer, and a corporation, though a 'person' in law, is but an artificial person, and therefore not of the class to which the person slain belongs." *Id.* at ___, 153 S.W. at 461-62.

43. *Id.* at ___, 153 S.W. at 463.

44. 90 N.J.L. 372, 103 A. 685 (1917), *aff'd on second appeal*, 92 N.J.L. 261, 106 A. 23 (1919).

45. The facts of *Lehigh Valley* are found only in the report of the second appeal. 92 N.J.L. at ___, 106 A. at 23.

46. 90 N.J.L. at ___, 103 A. at 687, *aff'd on second appeal*, 92 N.J.L. at ___, 106 A. at 23.

47. 90 N.J.L. at ___, 103 A. at 686.

ing corporations indictable for statutes with a *mens rea* element of recklessness.

III. HOLDING CORPORATIONS CRIMINALLY LIABLE

Before a corporation can be charged with a homicide, there are three obstacles the prosecutor must overcome: 1) the corporation must fall within the definition of "person" as used in the homicide statute; 2) the corporation must possess the required *mens rea* through imputation; and 3) the corporation must have "caused" the death.

A. Including Corporations Within the Statutory Definition of "Person"

An analysis of the state criminal code is the first step for a prosecutor in determining whether a corporation can be indicted for a criminal homicide prosecution. More specifically, it must be determined whether a corporation is included within the definition of the term "person" as used in the homicide statute.⁴⁸ Recent cases have shown, however, that the statutory language is not determinative of whether a corporation will be indicted for homicide.⁴⁹ Some courts have refused to hold corporations within the statutory definition of "person" even when it appears obvious that the drafting legislature intended to include corporations.⁵⁰ Conversely, other courts have held corporations criminally indictable for homicide when it is not even implied by the language of the statute that corporations should be included within the definition of "person."⁵¹

Recently, many state legislatures have specifically included "corporations" within the definition of "person" in their homicide statutes.⁵² A good example is the Texas Penal Code. Texas Penal Code section 19.07(a) states: "A person commits an offense if he causes the death of an individual

48. Most often the term "person" is used in homicide statutes. However, the statute may state that "whoever commits the following act is guilty of manslaughter" or "one who commits the following act is guilty of manslaughter." Regardless of the term used, the corporation must be included within the definition of the term if the statute is to be applied to a corporation.

49. The following cases have upheld homicide indictments against corporations even though no statute specifically addresses corporate homicide. *Granite Constr. Co. v. Superior Court of Fresno*, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983); *People v. Ebasco Services, Inc.*, 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974); *Commonwealth v. McIlwain School Bus Lines, Inc.*, 283 Pa. Super. 1, 423 A.2d 413 (1980). Absent corporate homicide statutes, the following cases have rejected corporate homicide indictments: *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961); *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Ct. App. 1983), *rev'd*, 737 S.W.2d 805 (Tex. Ct. App. 1987).

50. *See, e.g., Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Ct. App. 1983) *rev'd*, 737 S.W.2d 805 (Tex. Ct. App. 1987).

51. *See, e.g., State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961).

52. *See, e.g., TEX. PENAL CODE ANN. §§ 19.07(a), 1.07(17) and 1.07(27)* (Vernon 1974).

by criminal negligence."⁵³ The statute goes on to define an "individual" as a "human being who has been born and is alive"⁵⁴ and further defines the "person" able to commit a homicide as "an individual, corporation or association."⁵⁵ The consensus should be that when a legislature explicitly includes "corporation" within the definition of "person" in the homicide statute, with no limitations,⁵⁶ it is clear that the legislature intended to allow corporations to be charged with homicides.⁵⁷

Other state legislatures have added what has been termed a "safe-harbor provision" to the definition of "person."⁵⁸ For instance, in *Commonwealth of Kentucky v. Fortner LP Gas Co.*⁵⁹ the Court of Appeals had to extrapolate the legislature's intent from a criminal statute which read: a "'person' [able to commit a homicide] means human being, and where appropriate, a public or private corporation"⁶⁰ The court, relying on other factors,⁶¹ decided that the Kentucky legislature intended to include corporations within the statutory definition of "person" when applying the homicide statute. Accordingly, *Fortner LP Gas* illustrates how "safe-harbor provisions" can provide a court with greater interpretive powers and opportunity for judicial legislation.

However, when *State v. Pacific Powder Co.*⁶² was decided by the Supreme Court of Oregon, the Oregon statute contained language almost identical to that relied upon by the court in *Fortner LP Gas*.⁶³ Although the Oregon statute included corporations within the definition of "person," the Oregon legislature qualified this definition with the phrase "unless the context requires otherwise."⁶⁴ The court examined the penalty for involuntary

53. *Id.*

54. *Id.* § 1.07(17).

55. *Id.* § 1.07(27).

56. See *infra* text accompanying notes 59-65.

57. *But see* *Vaughan & Sons, Inc. v. State*, 649 S.W.2d 677 (Tex. Ct. App. 1983), *rev'd*, 737 S.W.2d 805 (Tex. Ct. App. 1987) (The Texas Court of Appeals refused to hold a corporation liable for criminally negligent homicide even though the homicide statute included corporations within the definition of "person.").

58. Barbone, *The Corporation's Liability In Criminal Law*, 20 THE PROSECUTOR 13, 28 (1986).

59. 610 S.W.2d 941 (Ky. Ct. App. 1980).

60. KY. REV. STAT. ANN. § 500.080(12) (Baldwin 1984) (emphasis added).

61. The court made reference to other Kentucky statutes which specifically enunciated what type of corporate conduct constituted an offense and noted that the statute prescribed the amount of fines applicable to corporations. *Fortner LP Gas*, 610 S.W.2d at 942-43.

62. 226 Or. 502, 360 P.2d 530 (1961).

63. *Id.* at ___, 360 P.2d at 532. The Oregon statute has been revised, but still contains a safe-harbor provision. It now states: "'Person' means a human being and, where appropriate a public or private corporation" OR. REV. STAT. § 161.015(5) (1983).

64. OR. REV. STAT. § 161.015 (1983); see also *Pacific Powder*, 226 Or. at ___, 360 P.2d at 531.

manslaughter, which was a mandatory prison term, and decided that a corporation was not within the definition of "person" as used in the manslaughter statute.⁶⁵ Still other states, by not defining the term "person" in their homicide statutes, leave the area completely open for judicial interpretation.⁶⁶

B. *Imputing the Agent's Mens Rea to the Corporation*

If it is determined that the corporation falls within the definition of a "person" able to commit a homicide, the second obstacle for the prosecutor is imputing the requisite *mens rea* of the offense to the corporation. Some crimes have no *mens rea* element and therefore a mere commission of the act is a crime, regardless of the mental state of the actor. These are strict liability offenses.⁶⁷ If the offense is a strict liability offense, only the actions of the agent must be imputed to the corporation, because the *mens rea* need not be proven. Generally, the actions of an agent are imputed to the corporation if the agent was acting within the scope of his authority.⁶⁸ If the agent's actions are imputed to the corporation, the corporation is then vicariously liable for the agent's criminal actions. As a result, the corporation is held liable for the actions of another.⁶⁹ However, if the offense is not a strict liability offense, the mental element required by the homicide statute⁷⁰ must be met. Theoretically, corporations can violate statutes with any *mens rea* level.⁷¹

In *People v. Film Recovery Systems, Inc.*,⁷² a recent and well-publicized case, a corporation was charged with and convicted of violating a statute with *mens rea* elements of both recklessness and intent.⁷³ This is very unusual because typically a corporation is charged with violating a statute with only a recklessness or criminally negligent *mens rea* element. The differ-

65. *Id.*

66. *See, e.g.*, WIS. STAT. § 939.22 (1985-86).

67. For a detailed explanation of vicarious and strict liability see *State v. Beaudry*, 123 Wis. 2d 40, 365 N.W.2d 593 (1985); W. LAFAVE & A. SCOTT, *supra* note 12, at 242-67.

68. W. LAFAVE & A. SCOTT, *supra* note 12, at 260.

69. *Id.*

70. The Model Penal Code lists four levels of *mens rea*: (1) purposely; (2) knowingly; (3) recklessly; and (4) negligently. MODEL PENAL CODE § 2.02 (Official Draft 1985).

71. *Id.*

72. *People v. Film Recovery Sys., Inc.*, No. 83-11091 (Cook County Cir. Ct. of Ill. June 14, 1985) consolidated with *People v. O'Neil*, No. 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985).

73. In *Film Recovery*, the Cook County State Attorney's office convicted the corporation and five members of the company of involuntary manslaughter. The charge came after an employee of Film Recovery died of cyanide poisoning. A cyanide solution was used to recover silver from used film. Although Film Recovery had a gross income between thirteen and twenty million

ence between these two mental states is that a reckless act requires the actor to have a conscious disregard of the risk,⁷⁴ whereas a criminally negligent act is considered objectively, that is, without concern for whether the actor consciously knew of the risk.⁷⁵ Whether the particular conduct violated these standards is a question of fact. Therefore, the definition given to these terms in the jury instructions becomes very important.

Each state defines these terms, but the Model Penal Code states that "[a] person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the [death] will result from his conduct."⁷⁶ The Model Penal Code states that "[a] person acts negligently . . . when he should be aware of a substantial and unjustifiable risk that the [death] will result from his conduct . . . [and the conduct is] a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."⁷⁷

Traditionally, statutes with recklessness or criminal negligence as a *mens rea* element were used only to prosecute conduct such as waving a gun in a person's face and having it discharge, or causing a death by driving a car at excessive speeds.⁷⁸ In these cases there was *no* intentional or purposeful homicide, yet a death resulted from egregious conduct. Despite case law defining these mental elements, recent successful corporate homicide prosecutions appear to erode the level of culpability required under these statutes,⁷⁹ especially when the "person" committing the offense is a corporation which will not be subject to a term of imprisonment and will merely have to pay a fine from the company coffers. Professor LaFave explains criminal negligence this way:

Thus it has been suggested that if there were 1000 pistols on a table, all unloaded but one, and if A, knowing this, should pick one at

dollars per year, it failed to implement even the simplest safety devices such as fans, protective clothing or face masks. Comment, *supra* note 9, at 1425-28.

There are indications that the company even removed the warning labels from the cyanide containers so as to not allow the employees to read them. Barbone, *supra* note 58, at 13. The Illinois prosecutor also had to prove the intentional element of the involuntary manslaughter statute. Illinois defined involuntary manslaughter as follows: "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly . . ." ILL. ANN. STAT. ch. 38, ¶ 9-3 (Smith-Hurd 1979).

74. MODEL PENAL CODE § 2.02(2)(c) (Official Draft 1985).

75. *Id.* at § 2.02(2)(d).

76. *Id.* at § 2.02(2)(c).

77. *Id.* at § 2.02(2)(d).

78. W. LAFAVE & A. SCOTT, *supra* note 12, at 233, 239.

79. See *infra* text accompanying notes 92-101.

random and fire it at B, killing him, A's conduct in creating the risk of death, though the risk is very slight (one-tenth of 1%) would be [criminally negligent], in view of its complete lack of social utility.⁸⁰

It is *not* difficult to imagine occupations which flirt with the odds of death similar to those of the pistol example, such as policemen or firemen or window washers. However, because the persons in those occupations arguably have a greater utility to society than a company which reclaims silver and grosses between thirteen and twenty million dollars,⁸¹ their chance of being criminally charged with a homicide is less.

Next, the mental element of the homicide statute must be transferred (imputed) from the agent(s) to the corporation. Because a corporation, by itself, has no mental capacity, the mind and mental state of the corporation is the mind and mental state of the people employed by the corporation.⁸² The charge may be lodged against the corporation to hold "someone" liable when individual accountability cannot be established because many employees were involved and collectively had the required *mens rea*.⁸³ Successful corporate prosecutions are less difficult because "[t]he collective knowledge of corporate agents may suffice to establish a knowing violation of a criminal statute notwithstanding the absence of proof that any single agent intended to commit the offense or even knew of the operative facts that led to the violation."⁸⁴ For instance, a corporation can be successfully prosecuted when one agent knows of a dangerous element in the corporation and believes there are adequate safety precautions, and another agent knows the precautionary measures are not present.

However, to indict the corporation, there must exist a "sufficiently close relationship" between the corporation and the agent(s) possessing the required *mens rea* and the agent(s) committing the wrongful act.⁸⁵ Exactly what constitutes a "sufficiently close relationship" has not been fully litigated by the state courts in the corporate homicide context, but guidance can be obtained from federal regulatory criminal cases.⁸⁶

80. W. LAFAVE & A. SCOTT, *supra* note 12, at 233.

81. *See supra* note 73.

82. W. LAFAVE & A. SCOTT, *supra* note 12, at 257; *see also New York Central*, 212 U.S. 481 (1909).

83. *See United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974).

84. 1 K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* 83 (1984).

85. *See* MODEL PENAL CODE § 2.07(4)(b) (Official Draft 1985) which defines an "agent" as "any director, officer, servant, employee or other person authorized to act in behalf of the corporation"; *see also* 18B AM. JUR. 2d *Corporations* § 2136 (1985). *But see* *State v. Chapman Dodge Center, Inc.*, 428 So. 2d 413 (La. 1983). *See also infra* text accompanying notes 88-90.

86. In *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975), the states of mind of the company president, superintendent, foreperson and machine operator were imputed to the corporation in order to find it guilty of a willful OSHA violation. In *United States v. Hilton*

In most jurisdictions, corporations can be held liable for acts (or omissions) of an employee, whether the employee is an officer, director, manager, supervisor or agent, if the employee is acting within the scope of authority. Some jurisdictions, however, have limited corporate criminal liability to acts committed by "high managerial officers."⁸⁷

The holding in *State v. Chapman Dodge Center, Inc.*,⁸⁸ that low-ranking employees' intent was *not* imputed to the corporation for a lesser included offense of theft, cannot be reconciled with federal courts which have found corporations liable for conduct of even the lowest ranking employee.⁸⁹ Future cases coming before courts will be forced to resolve this issue. Because corporations are controlled by "high managerial officers" and therefore tend to reflect the collective identities of those officers, it is logical to hold the corporation criminally liable only for the *mens rea* and acts of "high managerial officers." An alternative method would hold the corporation vicariously liable for all agents conducting "high managerial activities," leaving the question of what constitutes "high managerial activities" to the trier of fact.

In the federal courts it is not a defense to claim that the employee acted against the express direction of a superior, if the employee acted within the scope of authority.⁹⁰ However, the federal courts require that the corporation obtain a benefit from the employee's action before holding the corporation liable for the employee's criminal act.⁹¹

Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the corporation was held criminally liable for an agent's conduct "even though contrary to general corporate policy and express instructions to the agent." *Id.* at 1007.

87. See, e.g., *State v. Adjustment Dept. Credit Bureau, Inc.*, 94 Idaho 156, 483 P.2d 687 (1971); *Commonwealth v. Penn Valley Resorts, Inc.*, 343 Pa. Super. 387, 494 A.2d 1139 (1985).

88. 428 So. 2d 413 (La. 1983).

89. See, e.g., *Dye Constr. Co.*, 510 F.2d 78; *Hilton Hotels*, 467 F.2d 1000.

90. *Hilton Hotels*, 467 F.2d 1000.

91. See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909); *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963), *cert. denied*, 373 U.S. 915 (1963); *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943), *cert. denied*, 320 U.S. 788 (1943); *United States v. LaBar*, 521 F. Supp. 203 (M.D. Pa. 1981), *aff'd*, 688 F.2d 826 (3rd Cir. 1982), *cert. denied*, 459 U.S. 945 (1982); cf. *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950 (9th Cir. 1959), *cert. denied*, 361 U.S. 815 (1959). *But see* *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962) (corporation held not liable where employees advanced interests of parties other than their employer).

C. Who/What 'Caused' the Death?

If the corporation falls within the statutory definition of "person"⁹² and the agent's mental state and actions are imputed to it,⁹³ the third obstacle for the prosecutor is to show that the wrongful act "caused" the death. Clearly, when a human being points a gun at another human being and pulls the trigger, and death results, the actor has "caused" a death. In contrast, it is much more difficult to determine whether a corporation has "caused" the death of a human being when it acts recklessly or negligently.

A recent case offers a good example. In *Connecticut v. PGP Industries, Inc.*,⁹⁴ a security guard on duty at PGP died from carbon monoxide poisoning after a hurricane knocked out the power in the industrial plant for three hours. Without power, the exhaust fans over the smelting furnaces did not force carbon monoxide generated from the furnaces out of the building. The work area filled with poisonous gas and killed the security guard. PGP was charged with criminally negligent homicide for "causing" the death of the security guard. To obtain the indictment, the prosecutor argued that PGP's failure to have an emergency backup power source for the operation of the fans was criminally negligent behavior. Defense counsel contended that the hurricane caused the death, not the corporation.⁹⁵ A jury was to decide the case, but at the close of the state's case defense counsel made a motion for dismissal which was granted by the circuit court judge.

In *People v. Warner-Lambert Co.*,⁹⁶ a state court specifically addressed the issue of "cause" in the corporate homicide context. In *Warner-Lambert*, six employees were killed when magnesium stearate (MS) a dust used in making chewing gum, was ignited by an unknown source and a massive fire and explosion ensued.⁹⁷ The corporation and the individual defendants admitted that they were aware of the risk of explosion when using MS.⁹⁸ The prosecution charged the corporation with both reckless and criminally negligent homicide,⁹⁹ but the trial court found that the evidence was legally insufficient to sustain the indictments. The appellate division reversed.¹⁰⁰ The Court of Appeals of New York, in quashing the indictment, stated:

92. See *supra* notes 48-66 and accompanying text.

93. See *supra* notes 67-90 and accompanying text.

94. *Connecticut v. PGP Indus.*, No. CR-123536 (Waterbury Cir. Ct. of Conn. 1986).

95. *New Haven Advocate*, Jan. 8, 1986, § 1, at 1, col. 1.

96. 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

97. *Id.*

98. *Id.* at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

99. *Id.* at 302, 414 N.E.2d at 663, 434 N.Y.S.2d at 162.

100. *Id.* at 295, 414 N.E.2d at 660, 434 N.Y.S.2d at 159.

The focus of our attention must be on the issue of culpability, taking into account the conduct of defendants and the factors both of foreseeability and of causation, all of which in combination constitute the ultimate amalgam on which criminal liability may or may not be predicated.

* * *

We subscribe to the requirement that the defendants' actions must be a *sufficiently direct cause* of the ensuing death before there can be any imposition of criminal liability, and recognize, of course, that this standard is greater than that required to serve as a basis for tort liability (citation omitted).

* * *

[T]he evidence . . . was not legally sufficient to establish the foreseeability of the actual immediate, triggering cause of the explosion. . . .¹⁰¹

Because the spark came from an unknown source and was not foreseeable, the *Warner-Lambert* court determined that the corporation should not be held criminally liable for these deaths. The *Warner-Lambert* court has given direction to the area of "cause" within homicide statutes. *Warner-Lambert* stands for the proposition that the life-threatening situation by which a human being is killed must have been reasonably foreseeable by the corporation. After this is affirmatively decided, the corporation's conduct is compared to the standard of care required by the statute. Therefore, prosecutors must analyze each factual pattern carefully to determine if the above-mentioned obstacles can be overcome.

IV. VIABILITY OF A CORPORATE HOMICIDE CHARGE IN WISCONSIN

A current question is whether a corporate homicide charge will withstand judicial scrutiny in Wisconsin. Viewing the statutes and common law from non-homicidal cases, the law appears ready to accept a corporate homicide conviction. However, Wisconsin prosecutors will have to closely scrutinize the factual pattern of each case because Wisconsin courts have exhibited some of the same reservations mentioned above.¹⁰²

Chapter 939 of the Wisconsin Statutes addresses general provisions concerning crimes in Wisconsin.¹⁰³ Section 939.22 specifically defines words and phrases used throughout the criminal code.¹⁰⁴ Although the word

101. *Id.* at 304-07, 414 N.E.2d at 664-66, 434 N.Y.S.2d at 164-65.

102. *Compare* State v. Beaudry, 123 Wis. 2d 40, 365 N.W.2d 593 (1985) with People v. Warner-Lambert, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159, cert. denied, 450 U.S. 1031 (1981).

103. WIS. STAT. §§ 939.01-74 (1985-86).

104. *Id.* at § 939.22.

"whoever" is used in the homicide statutes,¹⁰⁵ the code does not further define this term. Both the reckless and negligent homicide statutes state: "[w]hoever causes the death of another human being"¹⁰⁶ is guilty of a homicide. Use of "another" implies that the term "whoever" must also be a human being.¹⁰⁷ Although there was a section enacted with the original homicide statute which reflected a legislative intent to include a corporation as one able to commit a homicide, this subsection was later repealed.¹⁰⁸ When the Wisconsin Criminal Code was promulgated there was an additional section included,¹⁰⁹ which "was eliminated, upon motion of an advisory committee member who was a house counsel for a large industrial corporation."¹¹⁰ Section 339.07¹¹¹ stated that "[a] corporation is criminally responsible for acts committed by its agents when acting within the scope of their authority."¹¹²

Under a fundamental principle of statutory construction, courts should interpret terms by their common usage if not explicitly defined in a statute.¹¹³ In the past, the Wisconsin Supreme Court has exhibited a willingness to violate this principle.¹¹⁴ Although the statute which was violated did not use the term "whoever," the Wisconsin Supreme Court in *Vulcan Last Co. v. State*,¹¹⁵ held a corporation liable for a criminal offense under a statute which stated that no "person" shall attempt to influence a voter by threatening the person with discharge from employment.¹¹⁶ To support the extension of the statute to corporations the court used the fact that the term "person" includes corporate entities in a wholly separate statute.¹¹⁷ As additional support for its holding, the court quoted a treatise stating that "[t]he same law that creates a corporation may create the crime, and to

105. WIS. STAT. §§ 940.01-.09 (1985-86).

106. *Id.* at § 940.06, .08.

107. *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459 (1913); *People v. Ebasco Service*, 77 Misc. 2d 784, 354 N.Y.S.2d 807 (1974); *People v. Rochester R.R. Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909); *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961).

108. See *infra* notes 108-12 and accompanying text.

109. WIS. STAT. § 339.07 (Proposed Draft 1953).

110. Platz, *The Criminal Code*, 1956 WIS. L. REV. 350, 362 (1956).

111. WIS. STAT. § 339.07 (Proposed Draft 1953). The Wisconsin Criminal Code was renumbered to the 900 series. If this section had been retained, it would now be § 939.097.

112. LEGISLATIVE COUNCIL OF WISCONSIN, REPORT TO THE GENERAL ASSEMBLY OF 1953, Bill No. 100, A, at 6-7 (1953).

113. See generally W. LAFAVE & A. SCOTT, *supra* note 12, at 76; Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

114. See *infra* text accompanying notes 114-21.

115. 194 Wis. 636, 217 N.W. 412 (1928).

116. *Id.*

117. WIS. STAT. § 370.01(12) (1927).

assert that the legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not . . . bear discussion."¹¹⁸ The court, however, failed to adequately address the issue. The issue was not whether the legislature *could* create a law which imposed sanctions against a corporation, but rather, *did* the legislature create a law which imposed criminal sanctions against a corporation. *Vulcan Last* has repeatedly been referred to for the general proposition that Wisconsin allows corporate criminal liability.¹¹⁹

Also in support of the position that corporations generally are subject to criminal statutes, a Wisconsin prosecutor may cite *State v. Dried Milk Products Cooperative*,¹²⁰ where the corporate owner of a truck was found guilty of a criminal offense. The statute stated that no "person" shall operate a truck on Class "A" highways when over a certain weight limit. Even though only one employee was driving the truck, the corporation was held liable for this offense.¹²¹ In that case, however, two other sections of the same statute made it clear that the legislature wanted the "owner of the vehicle" who permitted the violation to be held liable for the fine.¹²² In addition, *Dried Milk Products* is also distinguishable from homicide cases because the statute violated in that case was a general welfare statute, and such statutes have traditionally been applied to corporations.

If it is found that a corporation falls within the definition of "whoever" as used in the homicide statutes, corporations could violate statutes of three *mens rea* categories.¹²³ If the harmful conduct of the corporation was as egregious as the harm in *People v. Film Recovery Systems, Inc.*,¹²⁴ it would

118. *Vulcan Last*, 194 Wis. at 643, 217 N.W. at 415.

119. *Vulcan Last* is cited as supporting corporate criminal prosecutions in the following cases and annotations: *State v. Dried Milk Prod. Co-op.*, 16 Wis. 2d 357, 114 N.W.2d 412 (1962); 36 Op. Wis. Att'y Gen. 30, 32 (1947); Annotation, *Corporation's Liability to Criminal Prosecution as Affected by Punishment or Penalty Imposed*, 80 A.L.R. 3d 1220 (1977).

120. 16 Wis. 2d 357, 114 N.W.2d 412 (1962).

121. *Id.* at 363, 114 N.W.2d at 415.

122. WIS. STAT. § 348.02(3) (1961) provided: "Any owner of a vehicle who causes or permits such vehicle to be operated on a highway in violation of this chapter is guilty of the violation the same as if he had actually operated the vehicle himself." *Id.* WIS. STAT. § 348.20(1) (1961) provided:

It is declared to be the public policy of the state that prosecutions for overweight violations shall in every instance where practicable be instituted against the person holding the authority, certificates, licenses or permits evidencing operating privileges from the public service commission or motor vehicle department which may be the proper object of cancellation or revocation proceedings.

Id.

123. See generally Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

124. No. 83-11091 (Cook County Cir. Ct. of Ill. June 14, 1985) consolidated with *People v. O'Neil*, No. 84-5064 (Cook county Cir. Ct. of Ill. June 14, 1985); see also *supra* note 73.

be possible for a corporation to be indicted for violating section 940.02(1),¹²⁵ which requires proof of "conduct imminently dangerous to another and evincing a depraved mind, regardless of human life."¹²⁶ It would be more probable for a corporation to be charged with violating the homicide by reckless conduct statute.¹²⁷ The corporation would have to be held vicariously liable for the conduct and the *mens rea* of the agent(s).¹²⁸ Although no decisions have been rendered which conclusively address the issue of imputation of conduct and *mens rea* in a corporate homicide context, it is probable that the courts would rely upon *State v. Beaudry*.¹²⁹ In *Beaudry*, the Wisconsin Supreme Court determined that Janet Beaudry, the licensee of a corporation, was criminally responsible for the acts of her employee. The criminal statute violated was a strict liability statute.¹³⁰ The statute did not contain language to the effect that the act of a corporate employee would be imputed to the licensee corporate owner.¹³¹ Notwithstanding, the court held that corporate employee conduct would be imputed to Beaudry.¹³²

Despite the Wisconsin courts showing a tendency toward holding corporations liable under the homicide statutes, the same courts have recently shown some reservations, especially in the area of proving "cause." For example, in *State v. Serebin*,¹³³ in a manner similar to the *Warner-Lambert* court,¹³⁴ the Supreme Court of Wisconsin reversed a jury verdict which found the defendant, an administrator of a nursing home, guilty of homicide by reckless conduct.¹³⁵ Serebin was charged after a resident from his

125. WIS. STAT. § 940.02(1) (1985-86). Section 940.02(1) states: "Whoever causes the death of another human being . . . [b]y conduct imminently dangerous to another and evincing a depraved mind" commits a second degree murder. *Id.*

126. *Id.*

127. *Id.* at §§ 940.06(1), (2). This section states:

Whoever causes the death of another human being by . . . conduct consist[ing] of an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and which demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury is guilty of homicide by reckless conduct.

Id.

128. *See supra* notes 67-90 and accompanying text.

129. 123 Wis. 2d 40, 365 N.W.2d 593 (1985).

130. *See supra* text accompanying note 67.

131. *Beaudry*, 123 Wis. 2d at 51, 365 N.W.2d at 598.

132. *Id.* at 58, 365 N.W.2d at 601-02.

133. 119 Wis. 2d 837, 350 N.W.2d 65 (1984).

134. *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981); *see also supra* text accompanying notes 96-100.

135. *Serebin*, 119 Wis. 2d at 851, 350 N.W.2d at 72.

insufficiently staffed nursing home wandered away from the home and froze to death.¹³⁶

First, the *Serebin* court determined that the evidence was sufficient to sustain the jury verdict that the defendant Serebin acted recklessly in light of the fact that state inspectors and staff nurses had repeatedly warned him that the staff deficiencies put the safety and health of the residents in jeopardy.¹³⁷ Next, the court stated that "[i]n order to prove that the defendant's reckless conduct caused the death of [the victim], the state is required to prove . . . that Serebin's recklessness in staffing [the nursing home] at an insufficient level was 'a substantial factor in producing the death.'" ¹³⁸ The court pointed out that even with sufficient staffing, the victim may have wandered away from the nursing home and died because of the cold weather.¹³⁹ In *Serebin*, the Wisconsin Supreme Court showed a reluctance to hold one liable for homicide when that person has not directly caused the death at issue.¹⁴⁰

V. POST-CHARGING OPTIONS AND OTHER CONSIDERATIONS

In this new and uncharted area, corporations should become aware of post-charging options. While not exhaustive, this section of the Comment offers advice for corporate action after the homicide charge has been issued.

Currently, some local district attorneys are investigating work-site deaths.¹⁴¹ These investigators will wish to speak with workers, managers and probably even the corporate officers. Knowing that the decision to issue a charge lies totally within the discretion of the district attorney,¹⁴² the corporation's cooperation with investigators will be appreciated and may influence a decision not to prosecute a charge. However, the decision to cooperate must be balanced with another consideration. As recent cases have shown, individuals within the corporation may also be personally charged with the offense.¹⁴³ Therefore, when the district attorney investiga-

136. *Id.* at 839, 350 N.W.2d at 66.

137. *Id.* at 844, 350 N.W.2d at 69.

138. *Id.* at 846-47, 350 N.W.2d at 70 (citing *Cranmore v. State*, 85 Wis. 2d 722, 271 N.W.2d 402 (Ct. App. 1978); *Hart v. State*, 75 Wis. 2d 371, 249 N.W.2d 810 (1977)).

139. *Serebin*, 119 Wis.2d at 851, 350 N.W.2d at 72.

140. *But see State v. McClose*, 95 Wis. 2d 49, 289 N.W.2d 340 (Ct. App. 1980) (expanding the concept of direct cause).

141. *Workplace Hazards*, *supra* note 5, at 1132-33.

142. *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, 401 N.W.2d 782 (1987); Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 878-931 (6th ed. 1986).

143. *See generally United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943); *People v. Film Recovery Sys., Inc.*, No. 83-11091 (Cook County Cir. Ct. of Ill. June 14, 1985).

tors arrive at the scene of the death, the corporation's employees may choose not to answer questions and claim the fifth amendment privilege against self-incrimination.¹⁴⁴ This strategy may appear to "secure for the corporation the benefits of a privilege it does not have."¹⁴⁵ But as *People v. Film Recovery Systems, Inc.*¹⁴⁶ has shown, almost any employee can be indicted. In that case, an employee who claimed that he did not even possess the authority of a foreperson was indicted and convicted of the homicide.¹⁴⁷ A corporation, however, possesses no fifth amendment right against self-incrimination.¹⁴⁸ Therefore, this privilege must be asserted through the individuals.

In addition, the charged corporation probably will wish to have all civil litigation¹⁴⁹ postponed until the criminal case is finalized. Generally, courts will allow such a postponement "when the interests of justice seem to require such action."¹⁵⁰ Certain evidence may not be discoverable in the criminal context, but may be required to be disclosed under the civil discovery process. In this situation a stay order is appropriate.

Once charged with a corporate homicide, the corporation must seek out any available defenses. One possible defense is the "powerless to prevent defense." The defense would have to be adopted from a federal regulatory criminal case.¹⁵¹ In *United States v. Park*,¹⁵² the chief executive officer of a corporation was personally charged with violating the Federal Food, Drug, and Cosmetic Act.¹⁵³ The United States Supreme Court indicated that "[t]he theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that the defendant was 'powerless' to prevent or correct the violation."¹⁵⁴ In this way, the Supreme Court provided a defense for an agent who is not morally

144. U.S. CONST. amend. V.

145. *United States v. Kordel*, 397 U.S. 1, 8, (1969), *cert. denied*, 400 U.S. 821 (1970).

146. *Film Recovery*, No. 83-11091.

147. See Comment, *supra* note 9, at 1431. *Film Recovery* has not yet been decided by the Illinois Appellate Court. Telephone interview with Cook County Clerk of Courts Office (March 7, 1987).

148. *Kordel*, 397 U.S. 1; *Wilson v. United States*, 221 U.S. 361 (1911).

149. In Wisconsin, if the person killed is an employee of the corporation, Worker's Compensation is the exclusive remedy and therefore other tort actions are not available to the decedent's estate. WIS. STAT. § 102.03(2) (1985-86). If the decedent is not an employee, the heirs may bring a civil suit. The party convicted will be subject to collateral estoppel in a subsequent civil trial. *Haring v. Prosis*, 462 U.S. 306 (1983); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984).

150. *Kordel*, 397 U.S. at 12 n.27. The government may also obtain a stay order. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

151. *Park*, 421 U.S. 658.

152. *Id.*

153. 21 U.S.C. § 331 (1982).

154. *Park*, 421 U.S. at 673.

blameworthy for the offense. If the corporation can show that, as a whole, it was "powerless to prevent" the homicide, the state criminal courts may also adopt this defense.

Another, and more substantial defense, is that the Occupational Safety and Health Act of 1970¹⁵⁵ (OSHA) preempts state prosecutorial activity in the area of worker safety. This argument has never been raised at the appellate level in any state.¹⁵⁶

OSHA was promulgated by Congress in an attempt to secure a safe and healthy working environment for all workers.¹⁵⁷ Generally, when OSHA was created, it preempted state involvement in the area of worker safety.¹⁵⁸ However, OSHA specifically states that if no federal standard is in effect concerning an area of worker safety, the state agencies and courts have regular jurisdiction over the area.¹⁵⁹ OSHA also provides a method by which the individual states can gain control of a safety or health issue to which there is a federal standard in effect.¹⁶⁰ If a state "desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . [the state] shall submit a State plan for the development of such standards and their

155. Occupational Safety and Health Act, Pub. L. No. 91-596, § 2(a) *et seq.*, 84 Stat. 1590, 29 U.S.C. 651 *et seq.* (1982).

156. A similar argument was raised at the trial court level when Ford Motor Company was charged with reckless homicide in 1979. Ford was charged after three teenage girls burned to death in a Ford Pinto. Ford allegedly knew the cars to be dangerous but marketed them anyway. When the local prosecutor brought criminal charges, Ford moved to dismiss the case on preemption grounds. Ford maintained that the National Traffic and Motor Vehicle Safety Act was the sole regulation concerning vehicle safety and that it preempted state criminal prosecutions in the same area. The trial court overruled the motion to dismiss and the case went to trial. The jury acquitted Ford Motor Company and, therefore, the state prosecutor lacked standing to appeal this issue to a higher court. Maakestad, *State v. Ford Motor Co.: Constitutional, Utilitarian and Moral Perspectives*, 27 ST. LOUIS U.L.J. 857 (1983).

157. 29 U.S.C. § 651(b) (1982). A preliminary provision of OSHA states:

The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, 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 . . .

Id.

158. OSHA, a federal law, preempts state law in accord with the supremacy clause of the Constitution; *see also* Stanislowski v. Industrial Comm'n, 99 Ill. 2d 36, 457 N.E.2d 399 (1983).

159. 29 U.S.C. § 667(a) (1982).

160. *Id.* at § 667(b).

enforcement.”¹⁶¹ The state plan must be at least as effective as the federal plan.¹⁶²

Given these limitations of OSHA, it appears that state prosecutors should only be allowed to charge corporations with homicides in a few situations. A corporate homicide charge would be allowed if the death is caused by a lack of safety in an area in which no federal standard has been promulgated. For example, if a death was the result of being exposed to an element to which there is no federal standard, the local prosecution would not be preempted.¹⁶³ On the other hand, a state homicide prosecution would not be allowed if the death was caused by an improperly shored trench. The charge would not stand because a federal standard specifically addresses the proper trench-shoring requirements.¹⁶⁴ Given the above provisions, OSHA would generally preempt local prosecutions because of the extensive standards promulgated under OSHA.¹⁶⁵ However, there is one additional provision of OSHA which deserves mention and gives support for the proposition that corporate homicide charges are *not* preempted by OSHA.¹⁶⁶ Section 653(b)(4) states:

Nothing in this chapter shall be construed to supercede 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.¹⁶⁷

Thus, this statute raises an issue whether Congress intended to include liability for corporate homicide when it stated that “this chapter shall [not] be construed to supercede the common law or statutory . . . liabilities of em-

161. *Id.*

162. *Id.* at § 667(c)(6); *see also* *United Air Lines, Inc. v. Occupational Safety and Health Appeals Bd.*, 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982).

163. *See* *Smith v. Western Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982) where the court allowed an employee's petition for an injunction to prevent the employer from exposing him to tobacco smoke because OSHA provided no standards as to tobacco smoke, and therefore, did not preempt the state common law duty to provide a safe place to work with respect to tobacco smoke.

164. OSHA Safety and Health Regulations for Construction, 29 C.F.R. § 1926.652 (1986).

165. *See, e.g.*, *Cook County v. Chicago Magnet Wire Corp.*, 152 Ill. App. 3d 726, 504 N.E.2d 904 (1987) (where the Illinois Court of Appeals held that state criminal prosecution against a corporation for aggravated battery and reckless conduct was preempted by OSHA).

166. 29 U.S.C. § 653(b)(4) (1982).

167. *Id.*

ployers"¹⁶⁸ when there is a death of any employee. This question has been unanswered by any appellate court.¹⁶⁹

The tone of the statute appears to address only common law or statutory duties and liabilities in the civil context. Furthermore, the abundant inequities require that the states be required to enact a state plan before allowing corporate homicide prosecutions. To this point, only large metropolitan area district attorneys' offices have instituted a staff to investigate corporate homicides. In effect, this means that it is more probable for a corporation in a county which has a corporate homicide investigation staff to be charged, whereas the same corporate conduct in an adjacent county without such a staff will probably escape criminal liability. To assure uniform application of criminal statutes to corporations, states should only be allowed to charge corporations if there is a state-wide agency responsible for the investigation of the accident/crime scene. The concentration of corporate homicide experts in one centralized state agency would not only provide greater efficiency and more expertise, but would also eliminate the problem of duplication of services among the counties. This agency could report its findings to the district attorney's office. The district attorney could then make a decision whether to prosecute on the factual situation contained in the agency's report.

VI. CONCLUSION

Corporate homicide charges are a novel but expanding trend. The question requiring immediate judicial attention is whether OSHA preempts these charges. When this question is answered, the arguments will be aimed directly at the state statutes. With current state homicide statutes, as history already has shown, there will be varying state court decisions, which should prompt legislative action to clear the areas of dispute.¹⁷⁰ Only when these areas are affirmatively addressed by the courts and legislatures, will corporate homicide be a fully recognized crime. It is then that corporate homicide charges and convictions will be most effective in deterring corporate criminal conduct.

PATRICK J. SCHOTT

168. *Id.*

169. *See supra* note 155.

170. For an analysis of proposed federal legislation, see Radin, *supra* note 5, at 68-74.