INDIRECT CRIMINAL CONDUCT OF CORPORATE OFFICERS—LAW IN SEARCH OF A FAIR AND EFFECTIVE STANDARD OF LIABILITY

I. Introduction

Recently, as a result of growing public distrust of business organizations, a trend toward increasing individual accountability for corporate crimes has emerged. The practical difficulty in this area, however, is identifying an individual possessing corporate control as the criminal actor when he is the controlling impetus behind the criminal conduct—authorizing, supporting or consciously ignoring employees who perform the direct criminal acts—but is not himself the direct actor. Unfortunately, evidence of his indirect participation in the criminal activity is often hidden beneath multiple layers of corporate decision-making. What is needed, therefore, is a standard by which liability may be imposed upon those officers with the responsibility and power to prevent illegal conduct.

This casenote examines the evolution of individual criminal accountability in the corporate sector. Parts II and III discuss the scope and limitations of personal accountability as defined by legislation and case law. Part IV discusses federal barriers to state prosecutions of crimes in the workplace. Part V offers standards designed to help judges, prosecutors, and corporate managers determine when and how corporate officers may be held liable for indirect criminal conduct.


3. Id. A direct actor—an individual who physically performs the criminal activity—cannot escape liability by pleading that he acted in the name of or for the benefit of a corporation. This defense has long been rejected by the common law. See 1 W. Blackstone, Commentaries* 476; Model Penal Code § 2.07(6)(a) (1962).

II. The Scope of Individual Liability of Corporate Managers for Indirect Criminal Conduct

A. The Strict Liability Exception

Moral culpability must usually be proven before criminal liability is imposed. However, a few federal statutes, most significantly the Food Drug and Cosmetic Act (FDCA), have been interpreted to create a strict liability standard for the criminal conduct of corporate officers. Under a strict liability standard, criminal intent is irrelevant; causation and occurrence of the prohibited act are all that need be proven in order to establish liability.

The United States Supreme Court first recognized the possibility of criminal prosecution under the FDCA without proof of intent or participation in the wrongful activity in United States v. Dotterweich. Dotterweich was the president of Buffalo Pharmaceutical Company. Both he and the company were charged with violating the FDCA by marketing misbranded and adulterated drugs. Although Dotter-

ter not an essential element under the Refuse Act of 1899), aff’d, 482 F.2d 439 (7th Cir.), cert. denied, 414 U.S. 909 (1973).
7. Note, supra note 2, at 667 (citing Morissette v. United States, 342 U.S. 246 (1952); United States v. Balint, 258 U.S. 250 (1922)). In Morissette, the United States Supreme Court explained the public policy behind the strict liability standard as applied to public welfare offenses:

Many violations of such [public welfare] regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. . . . [W]hatever the intent of the violator, the injury is the same and the consequences are injurious or not according to fortuity. . . . The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.

Morissette, 342 U.S. at 255-56.
8. 320 U.S. 277 (1943).
9. Id. at 278. 21 U.S.C. § 331(a) (1938) prohibits “[t]he introduction or delivery for introduction into commerce of any . . . drug, . . . or cosmetic that is adulterated or misbranded.” Id.
he had no personal connection with the shipments in question, he had general authority over the corporation's business and had given general instructions to fill orders received from physicians. The jury acquitted the company and convicted Dotterweich on all counts.

The Court stated that "[t]he offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely to put into the stream of interstate commerce adulterated or misbranded drugs." Accordingly, the Court held that the FDCA "dispenses with the conventional requirement of criminal conduct—awareness of some wrongdoing. In the interest of the larger good, it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to public danger." Recognizing the highly factual nature of the determination of personal liability, the Court expressly declined to define the class of employees in the "responsible relation" category. The Court therefore left unresolved the scope of the legal duty imposed on corporate officers.

In United States v. Park, the United States Supreme Court clarified the questions left unresolved in Dotterweich by espousing two principles for assessing the criminal responsibility of indirect actors under strict liability standards. To be liable, the indirect actor must first occupy a position of "responsibility and authority" with regard to the criminal act or transaction. Secondly, the defendant must

12. Id. at 284.
13. Id. at 281 (citations omitted).
14. Id. at 285. Justice Frankfurter, who authored the majority opinion, believed that such matters should be left to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries . . ." Id.
15. See Comment, supra note 4, at 612; Brickey, Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View, 35 Vand. L. Rev. 1337, 1347-57 (1982).
17. Note, supra note 5, at 1262.
18. Park, 421 U.S. at 672-73. An illustration may be helpful to clarify this concept. For instance, the vice-president in charge of production could not be held accountable for a strict liability offense in the sales division, but he may be held liable for a violation in his own division even if he was absent from the plant when it occurred. See, e.g., United States v. Shapiro, 491 F.2d 335, 337 (6th Cir. 1974) (per curiam) (co-owner violated Food, Drug & Cosmetic Act by producing cookies under unsanitary conditions, even though, at time of inspection, equitable title to
have had the power to prevent the criminal occurrence through the exercise of the "highest standard of foresight and vigilance." 19 Park thus permits a defendant to avoid liability if he can prove that, despite his exercise of extraordinary care, he was unable to prevent the violation. 20

Park, the president of Acme Markets, Inc., was tried and convicted of criminal negligence for causing the adulteration of food in violation of section 331(k) of the FDCA. 21 The government charged that Park and the company had caused interstate food shipments, stored in Acme’s Baltimore, Maryland, warehouse, to have been exposed to rodent contamination. 22 Acme pleaded guilty to each count of the information. Park pleaded not guilty. 23

Park’s defense at trial was that “although all of Acme’s employees were in a sense under his general direction, the company had an ‘organizational structure for responsibilities for certain functions’ according to which different phases of its operation were ‘assigned to individuals who, in turn, have staff and departments under them.’ ” 24 He argued that these subordinates were responsible for the failure to fulfill the duties delegated to them. 25

The trial judge instructed the jury that it could find the defendant guilty if it found, beyond a reasonable doubt, that Park’s position in the corporation was one of “authority and responsibility in the

the company had passed); Golden Grain Macaroni Co. v. United States, 209 F.2d 166, 168 (9th Cir. 1953) (absence of president and general manager from premises was not a valid defense). 19. See Park, 421 U.S. at 673.

20. Note, supra note 6, at 1263-64. A successful impossibility defense would require proof that the corporate executive identified conditions which might lead to a violation, acted forcefully to remedy them, or implemented alternative ones if remedial remedies were unsuccessful. Id. See, e.g., United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir.), cert. denied, 429 U.S. 828 (1976) (holding that an instruction on the defense of impossibility was inappropriate where defendants had failed to consider alternative remedies).

21. Acme Markets is a national food chain with over 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses. Park, 421 U.S. at 660.


23. Park, 421 U.S. at 660.

24. Id. Park had received two direct communications from the Food and Drug Administration regarding the unsanitary conditions at the Baltimore, Maryland plant. Id. at 660-62.

25. Id. at 661.

26. Id. at 663.

27. Id. at 663-64.
business of Acme Markets,” and that Park had a “responsible relation to the situation, even though he may not have participated personally.” The jury found Park guilty as charged.

The Fourth Circuit reversed Park’s conviction on the ground that the jury instructions had not correctly stated the law as articulated in *Dotterweich.* The court construed the instructions as implying that Park could be convicted on the mere showing that he was president of the company. The Supreme Court reversed and reinstated Park’s conviction, maintaining that the instructions were appropriate in the circumstances. Recognizing that the concept of having a “responsible share” in a transaction, or bearing a “responsible relation” to the prohibited act, “imparts some measure of blameworthiness,” the Court held that:

the government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent’s authority and the statute furnishes a sufficient causal link.

Thus, the Court established a parallel between the concepts of responsibility and power. If a defendant has the power to prevent or correct violations of the FDCA, then he is in a position of “responsibility” within the meaning of *Dotterweich.*

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28. *Id.* at 665 n.9. “On cross-examination, [Park] conceded that providing sanitary conditions for food offered for sale to the public was something that he was ‘responsible for in the entire operation of the company,’ and he stated that it was one of many phases of the company that he assigned to ‘dependable subordinates.’” *Id.* at 664.

29. *Id.* at 666.


31. *Id.* at 841-42.

32. *Id.*

33. United States v. Park, 421 U.S. 658 (1975). See also Comment, supra note 4, at 614.


36. *Id.* Park was relied on in United States v. Starr, 535 F.2d 512 (9th Cir. 1976), where the court rejected the defendant’s argument that he was justified in
Park suggests that the absence of participation in or personal knowledge of the criminal act are not defenses in prosecutions under the FDCA, but in United States v. United States Gypsum Co., the Court distinguished Park, and stated that proof of intentional wrongdoing was required before criminal liability would be imposed under the Sherman Act. The Court emphasized that, with regard to criminal liability, strict liability was the exception, not the rule. The Gypsum Court therefore limited the strict liability exception to sanitation problems in the food industry. In light of Gypsum, it cannot be assumed that imposing strict liability under a public welfare-type statute will become the theoretical foundation for expanding criminal liability to corporate officials.

B. Specific Intent Crimes

Although it is clear that any superior who commands or authorizes a crime is liable as a principal, some affirmative participation must be proven in order to convict a corporate officer. The courts have firmly established that participation may be proven by evidence that the corporate manager himself authorized the criminal act. Courts have also held that proof of a corporate manager's delegating to the janitor the duty to amend violations arising from mouse infestation in the plant. The court concluded that since the defendant had the ultimate responsibility for maintaining a sanitary warehouse, he had a responsibility to check the janitor's progress toward correcting the condition. Id. at 514-16.

38. The Gypsum Court clearly mandated proof of moral culpability for criminal violations if the use of such sanctions was to "square with the generally accepted function of the criminal law." Id. at 442.
41. Comment, supra note 4, at 618. See also Brickey, supra note 15, at 1359.
42. See Comment, supra note 4, at 618.

When a corporation is merely an individual's alter ego, courts have found it even more appropriate to hold the individual liable. See, e.g., State v. Picheco, 2 Conn. Cir. Ct. 584, 203 A.2d 242 (1964) (defendant, as president, treasurer, manager, and majority shareholder, convicted of keeping his shop open in violation of Sunday laws); Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944) (defendant, who completely controlled and dominated incorporated night club, convicted of involuntary manslaughter when a fire in the night club resulted in the death of patrons due to the number and condition of safety exits).

44. Comment, supra note 4, at 606 (citing Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689 (1930)).
45. E.g., United States v. Precision Medical Laboratories, Inc., 593 F.2d 434 (2d Cir. 1978) (owner knowingly authorized employees to sign false Medicaid and
knowledge of and failure to curtail criminal conduct is sufficient to hold the manager liable. The nature of the corporate structure makes such knowledge difficult to prove. A number of cases have attempted to resolve this evidentiary problem. In United States v. Laffal, the Municipal Court of Appeals for the District of Columbia sustained the conviction of the president and chief executive officer of an incorporated restaurant for the crime of maintaining a disorderly house, even though direct proof of the officer's personal participation in the illegal activity was not available. The court noted that the general rule prohibited imposing criminal liability on an officer for a corporate act performed by an agent not acting under the officer's direction or permission. However, the court found ample support for the principle that

the directing heads of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether or not these directing heads personally supervised the particular acts done or were personally present at the time and place of the commission of these acts.

The court found it fair to infer that the president, as chief executive officer of the corporation, was acquainted with the conduct of the business of the corporation. Because the corporation, in the conduct of its business, was keeping a disorderly house, "there was probable cause to believe that its president knew of it and either procured it to be done, or permitted it to be done or did nothing to prevent it." 49

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Medicare claims); United States v. Berger, 456 F.2d 1349 (2d Cir.) (upholding conviction for willful evasion of corporate income tax of president and chief executive officer of corporation who instructed bookkeeper to remove invoices of foreign subsidiary which enjoyed favorable tax position), cert. denied, 409 U.S. 892 (1972); Meredith v. United States, 238 F.2d 535 (4th Cir. 1955) (upholding conviction of bank employee who instructed subordinates to make false entries in bank records).


47. 83 A.2d 871, 872 (D.C. Cir. 1951).


49. *Id.* at 872 (citations omitted).

50. *Id.*

51. *Id.*
In *State ex rel. Kropf v. Gilbert*, the Wisconsin Supreme Court inferred specific intent from the defendants' acquiescence in the performance of a crime within their realm of authority. The *Gilbert* court held that knowledge or authorization of the criminal activity could be inferred from the officers' roles in the operation of the business. Reports issued to board members at meetings regarding the criminal activity, and the failure of the directors to prevent the crime, supported such an inference. The court did note, however, that a corporate officer could not be charged with a crime solely by reason of his official supervisory powers. The court stated that a corporate officer is chargeable with such knowledge to the extent that he in fact knew of the illegal conduct, because he acted, or at his direction others acted, or because such actions were brought to his attention.

A court may be willing to infer actual knowledge to prevent an officer from hiding within the corporate bureaucracy. *Laffal* and *Gilbert* are the most commonly noted authorities for the proposition that a corporate officer's knowledge of a crime can be inferred from

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52. 213 Wis. 196, 198, 251 N.W. 478, 480 (1933). Many commentators support the position that a corporate official acts with specific intent when he knows of a crime within his realm of authority but, by failing to act to prevent it, acquiesces in the performance of the crime. See *supra* note 46. One commentator expressed the theory behind liability for acquiescence in the following way:

Outside the context of a corporation, the law has been reluctant to impose criminal liability for knowing of a crime and failing to prevent it. But a corporate official knows that subordinates within his realm of authority are engaged in illegal activity, his toleration of the conduct is more than a failure to act. By not controlling his subordinates, the official knowingly permits his authority to be used in the commission of a crime.

Note, *supra* note 6, at 1268.

53. *Gilbert*, 213 Wis. at 223, 251 N.W. at 488. The defendants in *Gilbert* were charged with fraudulent conversion.

54. *Id.*

55. *Id.* at 217, 251 N.W. at 486.

56. *Id.*

57. In *Raleigh v. United States*, 351 A.2d 510 (D.C. Cir. 1976), the Court of Appeals for the District of Columbia held that actual knowledge could be inferred from an officer's relationship with the corporation. In upholding the defendant's conviction, the court noted that a copy of the corporation's annual report listed the defendant as president, treasurer, and as one of the corporation's directors. Moreover, the defendant maintained an office at the corporation's hotel and visited it frequently. The court stated that "[t]hese facts, coupled with the undisguised and recurrent use of his hotel by prostitutes and their customers, provided sufficient proof that Raleigh knew the nature of the activities conducted at the Raleigh House." *Id.* at 512.
his involvement and acquiescence in corporate affairs. The Laffal decision, however, must be considered in light of the fact that the corporate officer in that case was shown to be intimately involved in the corporation's activities. Thus, Laffal may be applicable only to cases involving small, closely held corporations, rather than to larger corporations, private or public.

Gilbert stands for the proposition that a corporate official acts with specific intent when he knows of a crime within his realm of authority but, by failing to act to prevent it, acquiesces in its performance. Gilbert, however, recognizes the inherent limitation of such a theory of liability. A corporate officer will not be held criminally liable for acts of the corporation performed by other officers or agents, absent proof of his knowledge of the illegal conduct. Moreover, knowledge will not be inferred merely on the basis that an officer has supervisory powers within the corporation.

One court, however, has stated that a corporate manager may be held criminally liable for the commission of an "intent" crime because of failure to fulfill an affirmative duty to supervise. In United States v. Andreadis, the Second Circuit upheld a jury conviction of the president of the Drug Research Corporation for knowingly using false advertising in an attempt to defraud customers. The court held that although the government did not prove that Andreadis specifically directed the advertising agency to advertise the factually false claims, the jury could infer that Andreadis knew the claims were

58. Comment, supra note 4, at 608.
59. Top officials in large corporations have too little time to learn of all that goes on at lower levels of the company. See A. Downs, Inside Bureaucracy 143 (1966) (Under the "law of diminishing control," the larger an organization becomes, the weaker is the control over its actions exercised by those at the top.).
60. See supra note 52.
61. See, e.g., Stock v. State, 526 P.2d 3 (Alaska 1974) (president of corporation that owned and operated a trailer court not criminally liable merely because he was an officer or agent of the corporation); Blacketer v. State, 485 P.2d 1069 (Okla. Ct. App. 1971) (officer not criminally liable for acts of corporation performed through other officers or agents); State v. Flake, 83 S.D. 655, 165 N.W.2d 55 (1969) (officer of corporation not liable for the acts of the corporation performed through other officers or agents unless such acts are done by his authority or permission or with his knowledge and acquiescence).
63. Andreadis hired an advertising agency to promote a weight reduction drug. Id. at 366 F.2d at 430. The drug, Regimen, purportedly permitted weight reduction in the absence of dieting. Id. The government established that the "no diet reducing" claim was factually inaccurate and that the agency knew it to be so. Id.
false since he reviewed and approved the advertising campaigns.\textsuperscript{64} Thus, the conviction was upheld because Andreadis acquiesced in the criminal activity.\textsuperscript{65}

In dicta, the court offered an alternative basis for its view that a person in Andreadis' position should not be able to insulate himself from liability.\textsuperscript{66} The court stated:

\begin{quote}
We would hold, if it were not so clear that we need not reach the point, that Andre had some affirmative duty to insure the claims that the agency made [about] his product that he had arranged to have advertised by the agency, were true. A person in Andre's shoes, having failed totally to discharge this responsibility in even the slightest measure, should not be able to escape the consequences of his inattention.\textsuperscript{67}
\end{quote}

In light of Andreadis' alternative basis for liability, it may be argued that the showing of indirect participation necessary to uphold a conviction could be established by the failure of a corporate officer to fulfill his supervisory duty coupled with his power to prevent the misconduct. The strength of this proposition, however, is diminished by the failure of any court to impose criminal liability on an individual corporate defendant for an omission of duty.\textsuperscript{68} Rather, the courts have held that imposing criminal sanctions in the absence of any requisite mental element is incompatible with the basic requirements of Anglo-American jurisprudence.\textsuperscript{69}

### III. Recent Developments

The trend toward increased personal accountability in the corporate sector, as evidenced by the courts' willingness to infer specific

\textsuperscript{64} Id.

\textsuperscript{65} See Comment, supra note 4, at 619. See also supra notes 52-61 and accompanying text.

\textsuperscript{66} Andreadis, 366 F.2d at 430.

\textsuperscript{67} Id.


\textsuperscript{69} See Comment, supra note 4, at 619-20. See generally Sayre, \textit{Mens Rea}, 45
intent in certain circumstances when an officer's direct participation cannot be proven, was substantially curtailed by the New York Court of Appeals decision in People v. Warner-Lambert Co. In Warner-Lambert, six workers died and over fifty were injured as the result of a massive explosion and fire at Warner-Lambert's Freshen-Up Gum manufacturing plant in Long Island City, New York. The corporation and four of its officers were indicted for second-degree manslaughter and criminally negligent homicide. Nine months earlier, Warner-Lambert's insurance carrier had advised the company that the magnesium stearate (MS) dust condition in the Freshen-Up Gum production area presented an explosion hazard, and recommended that Warner-Lambert install exhaust vents and modify its electrical equip-

Harv. L. Rev. 974, 988 (1932) (development of the concept of criminal intent); Wasserstrom, Strict Liability in the Criminal Law, 12 Stan. L. Rev. 731 (1960) (discussion of strict liability in criminal law).


71. Id. at 300, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.

72. The individual defendants were the vice-president in charge of manufacturing, the director of corporate safety and security, the plant manager, and the plant engineer. Id. See also Note, Corporate Criminal Liability for Employees—Endangering Activities, 18 Colum. J.L. & Soc. Probs. 39, 44 (1984) (suggesting that but for the inclusion of the four individual defendants, the New York Court of Appeals might not have dismissed the indictment).

73. The New York law states: "A person is guilty of manslaughter in the second degree when . . . [h]e recklessly causes the death of another person . . . ." N.Y. Penal Law § 125.15 (McKinney 1975). "Recklessly" is defined as follows: "[A] person acts recklessly . . . when he is aware of and consciously disregards a substantial and unjustifiable risk . . . ." Id. § 15.05(3).

74. "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person." Id. § 125.10. Criminal negligence is defined as follows: "[A] person acts with criminal negligence . . . when he fails to perceive a substantial unjustifiable risk . . . ." Id. § 15.05.

75. Part of the Freshen-Up Gum manufacturing process entailed passing filled ropes of gum through a bed of magnesium stearate (MS), a dry, dust-like lubricant; then into a die-cut punch (a Uniplast machine) which was sprayed with a cooling agent (liquid nitrogen), where the gum was formed into square tablets. Warner-Lambert, 51 N.Y.2d at 300, 414 N.E.2d at 662, 434 N.Y.S.2d at 161. The process dispersed MS dust into the air, which accumulated at the base of the Uniplast machine and overhead pipes. Id. Some also remained suspended in the atmosphere. In bulk, MS will only burn or smolder if ignited. If suspended in the air in sufficient concentration, however, the dust poses a substantial risk of explosion if ignited. At the time of the explosion, the employees were removing settled MS dust from the base of an operating machine and overhead pipes. A spark of unknown origin caused an explosion around the operating machine, followed almost immediately by a second, much larger explosion. Id. at 299-301, 414 N.E.2d at 661-62, 434 N.Y.S.2d at 160-61.
ment. Instead, the four indicted officers participated in a management decision to eventually change the manufacturing process in an attempt to eliminate the dust altogether. At the time of the explosion, the modification had been accomplished with respect to only one of six MS producing machines.

In holding that there was insufficient evidence to convict the defendants, the court said that

[although [the defendants] were aware that there was a broad, differentiated risk of an explosion in consequence of ambient magnesium stearate dust arising from the procedures employed in [Warner-Lambert’s] manufacturing operations, the corporate and individual defendants may nonetheless not be held liable, on the theory of either reckless or negligent conduct, for the deaths of employees occasioned when such an explosion occurred where the triggering cause thereof was neither foreseen nor foreseeable.

The court held that because the evidence did not establish the specific chain of events that triggered the explosion, the defendants could not have foreseen the cause of death. Thus, the defendants’ actions were not, as required for imposing criminal liability, “a sufficiently direct cause of the ensuing death.”

In reaching its holding, the Warner-Lambert court relied on and clarified its previous holding in People v. Kibbe. In Kibbe, the court

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76. Id. at 301, 414 N.E.2d at 662-63, 434 N.Y.S.2d at 161-62.
77. Id.
78. Id.
79. Id. at 298, 414 N.E.2d at 661, 434 N.Y.S.2d at 160.
80. Id. at 306, 414 N.E.2d at 666, 434 N.Y.S.2d at 165. The prosecution in Warner-Lambert argued that “but for” causation was all that was required for the imposition of criminal liability. Thus, the prosecution contended that because there was evidence of a foreseeable and indeed foreseen risk of an MS explosion, and because of the defendants’ failure to remove the MS dust, defendants should be held criminally liable. The chain of physical events by which the explosion was set off, the prosecution argued, was a matter of total indifference. The court rejected this contention and, instead, required that the chain of physical events be foreseeable in order to impose liability. Id. at 305-06, 414 N.E.2d at 665-66, 434 N.Y.S.2d at 164-65.
held that if there was proof beyond a reasonable doubt that the defendants should have foreseen "the ultimate harm" which resulted from their acts, the defendants' actions would be a sufficiently direct cause of the death.83 Kibbe, however, left unresolved whether "ultimate harm" meant the occurrence of death itself or the particular manner in which death occurred.84 In Warner-Lambert, the court clearly held that "ultimate harm" means the particular way in which death occurs.85

Warner-Lambert imposes an additional causation requirement by demanding that the precise chain of events which lead to an accident must be foreseeable,86 a major setback for the trend toward increased personal accountability in the corporate sector. In practice, corporate managers are often detached from, or ignorant about, specific manufacturing operations.87 Therefore, proving beyond a reasonable doubt that the defendants foresaw or should have foreseen the actual cause of death may be difficult, if not impossible.88

Most recently, however, in the case of People v. Film Recovery Systems, Inc.,89 officers, high level managerial employees, and the corporation itself were indicted and found guilty of the murder of an employee who died as a result of unsafe working conditions.90 The

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Henderson v. Kibbe, 431 U.S. 145 (1977). In Kibbe, the defendants were convicted of murder when they abandoned their intoxicated robbery victim on a dark highway, on a cold winter night, without his shoes or eyeglasses. The victim was struck and killed by a passing truck. Id. at 409-11, 321 N.E.2d at 774-75, 362 N.Y.S.2d at 849-51.

83. Id. at 412, 321 N.E.2d at 774-75, 362 N.Y.S.2d at 851.
84. See Note, supra note 2, at 672.
85. See id.
86. See id. at 658-59. The ultimate harm must be something reasonably related to the acts of the accused. Id.
87. See id. at 659. The author notes that large multistate corporations with numerous products and manufacturing facilities are likely to employ high level personnel who cannot possibly have knowledge of all the technical and manufacturing details. Id. See generally Comment, supra note 35.
88. See Note, supra note 2, at 659. The author notes that Warner-Lambert is significant because it practically precludes the application of the New York homicide statutes to corporate agents. Id. Furthermore, because the Warner-Lambert standard is narrow, the risk of liability will be low. In all but the rarest instance, corporations and individuals will be cloaked in a shield of immunity. Moreover, the standard will not deter corporations and corporate individuals from engaging in criminal conduct. Because the risks of apprehension cannot outweigh the economic gains of noncompliance, profit maximizing corporations will likely ignore the criminal law. See Comment, Corporations Can Kill Too: After Film Recovery, Are Individuals Accountable for Corporate Crimes?, 19 Loy. L.A.L. Rev. 1411, 1439 (1986).
89. Nos. 83-11091, 84-5064 (Cook County Cir. Ct. of Ill., June 14, 1985).
90. Report of Proceedings at 5, People v. Film Recovery Sys., Inc., No. 83-
case involved Film Recovery Systems, Inc., a small suburban Chicago company that extracted silver from x-ray and old photographic film through a standard process called cyanide leaching.\(^91\) To extract the silver, workers placed the film in a vat containing a solution of sodium cyanide and water. The leached remnants were then transferred to a second, electroplating vat that separated the silver.\(^92\) Working with the sodium cyanide solution\(^93\) imposed the risk of inhaling poisonous gas.\(^94\) To prevent the danger, similar companies installed hooded vents over each vat which removed the poisonous gas from the plant.\(^95\) Film Recovery, however, used a ceiling exhaust system.\(^96\)

In July 1981, an insurance inspector informed Film Recovery that the ceiling exhaust system did not remove the contaminated air, but merely circulated it around the plant.\(^97\) In August 1982, a representative of the company that supplied Film Recovery with first aid kits visited the plant.\(^98\) She noticed an overpowering ammonia-like odor that burned her eyes, throat, and nose.\(^99\) She also observed that the sodium cyanide vats were overflowing and the floor was covered with crystal-like chips.\(^100\)

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) [hereinafter Report of Proceedings, Film Recovery]. There is no reported or unreported opinion for People v. Film Recovery. The facts of the case are available to the public through the Report of Proceedings, newspaper articles, and legal articles.

92. *Id.*
93. Film Recovery used Cyanogran brand sodium cyanide manufactured by E. I. du Pont de Nemours & Co., Inc. to reclaim silver. Attached to each container of Cyanogran was a warning label that, in English, read: “Poison. Danger! May be fatal if inhaled, swallowed or absorbed through skin. Contact with acid or weak alkalies liberates a poisonous gas . . . . Do not breathe dust or gas. Do not get in eyes, on skin, or clothing.” See Comment, *supra* note 88, at 1426 (citing Siegel, *Murder Case a Corporate Landmark*, L.A. Times, Sept. 15, 1985, pt. I, at 8, col. 4).
94. *Id.* An additional danger was posed by cyanide-contaminated water from open vats which splashed on the plant’s floor. Furthermore, employees wore improper respirators: face masks designed to prevent employees from inhaling particulates when the real danger was inhaling poisonous gas. *Id.*
95. Siegel, *supra* note 93, at 8, col. 4.
96. *Id.*
97. *Id.* at 8, col. 5.
98. *Id.*
99. *Id.* The first aid representative experienced breathing difficulty and nausea. *Id.* The representative’s symptoms were consistent with those normally associated with cyanide exposure. Cyanide exposure can cause lassitude, headaches, insomnia, vertigo, palpitations, skin eruptions, and eye and ear disturbances. Skin contact may cause rashes and itching. 7 *Traumatic Medicine and Surgery for the Attorney* 579-80 (P. Canter ed. 1962).
100. See Comment, *supra* note 88, at 1426.
In December 1982, Stefan Golab, a Polish immigrant, began working at Film Recovery, pumping and stirring the sodium cyanide solution inside the vats. Shortly thereafter, he began to experience headaches, nausea, and vomiting. On February 4, after becoming sick on the job, Golab brought an interpreter to the plant to ask the plant manager to provide Golab with work away from the vats. The plant manager said that he would try to help, but on the next workday Golab was again assigned to the vats.

On February 10, 1983, Stefan Golab collapsed and died of acute cyanide poisoning. As a result, a grand jury indicted, among others, the president of Film Recovery, the plant manager, and the assistant plant manager for murder. The grand jury also indicted Film Recovery for involuntary manslaughter. Additionally,

101. Film Recovery's labor force consisted mainly of Polish and Mexican employees, most of whom were working illegally and did not speak or read English. See Spiegel, supra note 91.

102. See supra note 88, at 1427.

103. Id.

104. Id.

105. Id.

106. Report of Proceedings, Film Recovery, supra note 90, at 5. According to the toxicologist's report, Golab had a blood cyanide level of 3.45 micrograms per milliliter—a lethal amount. Id. at 6.

107. People v. O'Neil, No. 84-5064 (Cook County Cir. Ct. of Ill., indictment filed Apr. 1984) consolidated with People v. Film Recovery Sys., Inc., No. 83-11091 (Cook County Cir. Ct. of Ill., June 14, 1985) [hereinafter Indictment, O'Neil, and Indictment, Film Recovery, respectively].

108. Steven J. O'Neil was the president of Film Recovery Systems, Inc. and a sister corporation, Metallic Marketing Systems, Inc. O'Neil and B.R. Mackay & Sons, Inc. of Salt Lake City were the only shareholders of Film Recovery. Comment, supra note 88, at 1425.

109. Charles Kirshbaum, the plant manager, was hired by O'Neil in 1981. Kirshbaum had spent the previous two years working for another silver reclamation company that used the same cyanide-leaching process as Film Recovery. Id.

110. Daniel Rodriguez, an illegal alien who spoke English and Spanish, was employed as foreman and assistant plant manager at Film Recovery. Id.

111. Indictment, O'Neil, supra note 107, slip op. at 1.

112. Indictment, Film Recovery, supra note 107, slip op. at 1. Film Recovery's sister corporation, Metallic Marketing Systems, Inc., and B.R. Mackay & Sons, Inc., a shareholder of both corporations, were also indicted for involuntary manslaughter. Id. Illinois defines involuntary manslaughter as: "A person who intentionally 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). In accordance with § 9-3, the court found both Film Recovery Systems, Inc. and Metallic
all defendants were indicted on fourteen counts of reckless conduct.113

With respect to the individual murder114 defendants, the prosecution had to prove that the individuals acted without lawful justification, with criminal intent, and that the defendants' acts created a strong probability of death or great bodily harm to the victim or another individual.115 After the prosecution presented its case, the defendants moved to dismiss, claiming that as a matter of law no case had been made against them.116 The defense relied on the causation standard set forth in Warner-Lambert,117 and claimed that the triggering cause of Stefan Golab's death was "neither foreseen nor foreseeable."118 The judge119 ordered the trial to continue.120

After a two-month trial, Judge Banks found the president, plant manager, assistant plant manager, Film Recovery, and a sister com-

Marketing Systems, Inc. guilty of involuntary manslaughter and 14 counts of reckless conduct. See Comment, supra note 88, at 1430-31.

113. Indictment, O'Neill, supra note 107, slip op. at 1; Indictment, Film Recovery, supra note 107, slip op. at 1. See also Comment, supra note 88, at 1428.

114. Illinois defines murder as: "(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death . . . . (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another . . . ." Ill. Stat. Ann. ch. 38, § 9-1 (Smith-Hurd 1979).

115. Comment, supra note 88, at 1429. Illinois law provides that conduct of an individual on behalf of a corporation subjects that person to criminal liability as though the conduct was performed on the individual's own behalf. Id. at 1430 (citing Ill. Stat. Ann. ch. 38, ¶ 5-5 (Smith-Hurd 1972)) which provides:

**ACCOUNTABILITY FOR CONDUCT OF CORPORATION**

(a) A person is legally accountable for conduct which is an element of an offense and which, in the name or on behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf.

(b) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation.


118. Siegel, supra note 116, at 8, col. 1.

119. The defendants opted for a bench trial before Judge Ronald J.P. Banks instead of a jury trial. See id.

120. After the prosecution presented its case, Judge Banks dismissed Gerald R. Pett, a vice-president of Film Recovery, from the case. Siegel, supra note 93, at 9, col. 2.
pany, Metallic Marketing Systems, guilty of all charges.\textsuperscript{121} He made the following findings: (1) Stefan Golab died of acute cyanide toxicity;\textsuperscript{122} (2) the "conditions under which the workers in the plant performed their duties [were] totally unsafe";\textsuperscript{123} (3) the "defendants were totally knowledgeable in the dangers which are associated with the use of cyanide";\textsuperscript{124} (4) Steven J. O'Neil (the president), was "in control and exercised control over both Film Recovery System and Metallic Marketing Systems before and after the death of Stefan Golab";\textsuperscript{125} (5) conditions at the plant which caused sickness and injury to workers constituted reckless conduct;\textsuperscript{126} (6) Stefan Golab was murdered;\textsuperscript{127} (7) defendants created the conditions in the plant by omission and commission;\textsuperscript{128} (8) the defendants were "either officers or high managerial personnel" of both Film Recovery Systems and Metallic Marketing Systems;\textsuperscript{129} and (9) that the statement, "a corporation cannot be convicted of a crime because [the corporation] has no mind and it cannot therefore have a mental state in order to infer knowledge on a corporation," is totally erroneous.\textsuperscript{130}

Judge Banks' decision included no citation to precedent.\textsuperscript{131} However, Judge Banks stated that

\textsuperscript{121} Report of Proceedings, Film Recovery, supra note 90, slip op. at 11. Judge Banks delivered the guilty verdict from the bench on June 19, 1985. Id.

\textsuperscript{122} Id., slip op. at 5. This finding was based on the testimony of the medical examiner, workers, insurance inspectors, Occupational Safety and Health Administration inspectors, Environmental Protection Agency inspectors, and police officers. Id., slip op. at 5.

\textsuperscript{123} Id. This finding was based on the fact that Film Recovery's plant lacked sufficient safety equipment, that safety instructions were not issued to workers, that the workers were not properly warned of the dangers of working with cyanide, and that not all of the workers were capable of reading the warning signs written in English and Spanish. Id., slip op. at 6-7.

\textsuperscript{124} Id., slip op. at 7-8. This finding was based on workers' testimony that defendants knew that workers were becoming nauseated and vomiting. O'Neil, the president of Film Recovery, testified that he knew of the hazardous nature of cyanide. Kirshbaum, the plant manager, had seen workers vomiting. Moreover, he wore different safety equipment than the workers and had read the warning labels on the Cyanogran containers. Rodriguez, the assistant plant manager and foreman, testified that he knew workers got sick at the plant and that he had also read the warning label. Id., slip op. at 8.

\textsuperscript{125} Id., slip op. at 8-9.

\textsuperscript{126} Id., slip op. at 9.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id.

\textsuperscript{131} Comment, supra note 88, at 1433.
[t]he mind and mental state of a corporation is the mind and mental state of the directors, officers and high managerial personnel because they act on behalf of the corporation for both the benefit of the corporation and for themselves; and if the corporation’s officers, directors and high managerial personnel act within the scope of their corporate responsibilities and employment for their benefit and for the benefit of the profits of the corporation, the corporation must be held liable for what occurred in the work place.132

The individual defendants were sentenced to concurrent terms of twenty-five years on the murder count and one year on each of the reckless endangerment counts and were each fined $10,000.133 Film Recovery and Metallic Marketing Systems were fined a total of $48,000.134 The defendants have appealed.135

The conviction of the individual defendants in Film Recovery "indicates a new perception of corporate criminality—one less forgiving of excesses arising from so-called bad management."136 However, observers still await the decision of the appellate court. If the court adopts the Warner-Lambert standard which requires dismissal if the triggering cause of harm was "neither foreseen nor foreseeable,"137 the defendants’ quest for reversal will probably be unsuccessful.138 To succeed under Warner-Lambert, the defendants will have to show that it was neither foreseen nor foreseeable that Stefan Golab would die from cyanide inhalation.139 The defendants might argue

133. Spiegel, supra note 91, at 48, 50.
134. Id.
135. Id.
136. Id. at 50. Other recent cases illustrate the "new perception" of corporate criminality. See, e.g., State v. Autumn Hills Convalescent Nursing Home, No. 85-CR-2526 (Bexar Cty. Ct. of Tex., Apr. 2, 1986) (dismissed because of hung jury) (Nursing home, individuals, and five current and former employees were charged with murder by neglect of an elderly patient. Individual defendants included the corporation’s president, vice-president, and other high level personnel.); People v. Massio, No. A780779 (Los Angeles Mun. Ct., Mar. 26, 1986) (corporation and its president charged with involuntary felony manslaughter following the suffocation of employee while he was drilling elevator shaft, with evidence showing that he had no safety harness).

See also generally Middleton, Prosecutors Get Tough on Safety, Nat’l L.J., Apr. 21, 1986, at 1, col. 1.
139. Id.
that Golab triggered his own death by not following safety procedures,140 but this argument will probably fail because Judge Banks found that the corporation did not give its employees adequate safety instructions or equipment.141 The defendants may also argue that Film Recovery's exhaust system's failure to remove the cyanide gas from the air was the triggering cause of Stefan Golab's death, but this argument should also fail because of the earlier notice provided by the insurance inspector.142 Thus, it appears Film Recovery is an exceptional case that is consistent with the restrictive Warner-Lambert foreseeability standard.

If the appellate court declines to adopt the Warner-Lambert standard, the court should adopt a standard which fairly and effectively imposes criminal liability on corporate officers. However, the problem, once again, is proof. Film Recovery was a prosecutor's dream.143 Not only was the criminal conduct dramatic, but the defendant corporate officers were close—spatially and bureaucratically—to the workers.144 In the typical case, there is much more structural buffering. Decision-makers may be thousands of miles away from where the decision will have its effect.145 Therefore, proving a corporate officer possessed the requisite criminal intent necessary for a conviction is difficult. Moreover, corporate officers may take pains not to learn of subordinates' criminal activity once they recognize that ignorance precludes liability.146 In response to these problems, commentators persuasively continue to urge the imposition of criminal liability for specific intent crimes on those corporate individuals who possess the responsibility and power to prevent illegal activity on the basis of an omission of a supervisory duty.147

IV. Special Problems for Workplace Crimes

In addition to the problem of proving the specific intent of a corporate officer, a barrier that state prosecutors now face in the

140. Id. at 1438.
141. Id. Although Film Recovery posted warning signs, they were written in English and Spanish only, which Polish workers like Stefan Golab were unable to read. Id.
142. Id.
143. Spiegel, supra note 91, at 50.
144. Id.
145. Id.
146. See supra notes 43-69 and accompanying text.
147. Note, supra note 6, at 1269.
148. See supra notes 62-69 and accompanying text.
149. Comment, supra note 4, at 622. See also Note, supra note 2, at 667.
area of workplace crimes is that the Occupational Safety and Health Act of 1970\textsuperscript{150} (OSHA) may preempt criminal prosecutions if based on conditions in the workplace. In the recent case of \textit{People v. Chicago Magnet Wire Corp.},\textsuperscript{151} the First District Appellate Court of Illinois affirmed the dismissal of indictments against Chicago Magnet Wire and five of its officials, ruling that OSHA preempted Illinois from applying its criminal law to conduct involving federally regulated occupational safety and health issues within the workplace.\textsuperscript{152}

Chicago Magnet Wire and the individual defendants had each been charged with multiple counts of aggravated battery,\textsuperscript{153} reckless conduct,\textsuperscript{154} and conspiracy to commit aggravated battery\textsuperscript{155} for allegedly subjecting their employees to toxic chemicals.\textsuperscript{156} The defendants filed a joint motion to dismiss and the trial court dismissed all charges, finding that OSHA preempted the action.\textsuperscript{157} Affirming the trial court's decision on appeal, the appellate court noted that there were certain instances where a state agency could assert ju-

\begin{itemize}
\item \textsuperscript{150} 29 U.S.C. §§ 651-68 (1982).
\item \textsuperscript{151} 157 Ill. App. 3d 797, 510 N.E.2d 1173 (1987).
\item \textsuperscript{152} Id. at 802, 510 N.E.2d at 1176.
\item \textsuperscript{153} One set of aggravated battery indictments charged a violation of Ill. Rev. Stat. 1985, ch. 38, para. 12-4(a), and alleged that Chicago Magnet Wire and the individual defendants, while acting in their official capacity, exposed the named employees to numerous federally regulated substances in the workplace; failed to provide necessary safety instructions and equipment and health monitoring systems in the workplace; and provided inadequate ventilation in the workplace and maintained dangerously overheated working conditions while the employees were exposed to the federally regulated substances. The named employees alleged that as a result of these acts, the defendants violated their duty to provide a safe workplace for employees and caused great bodily harm to the named employees with the conscious awareness that a substantial probability existed that their acts would cause great bodily harm. The second set of aggravated battery indictments alleged that Chicago Magnet Wire and the individual defendants knowingly committed acts which would cause the named employees to take by deception, and for other than medical purposes, federally regulated substances. The indictments alleged that such acts harmed the employees in violation of Ill. Rev. Stat. 1985, ch. 38, para. 12-4(c). \textit{Chicago Magnet Wire}, 157 Ill. App. 3d at 798-99, 510 N.E.2d at 1174.
\item \textsuperscript{154} The reckless conduct charges alleged that the defendants grossly deviated from the standard of care which a reasonable employer would exercise in conducting the business of coating wire and thereby violated their duty to provide a safe workplace in violation of Ill. Rev. Stat. 1985, ch. 38, para. 12-5. \textit{Chicago Magnet Wire}, 157 Ill. App. 3d at 798-99, 510 N.E.2d at 1174.
\item \textsuperscript{155} The conspiracy indictment charged Chicago Magnet Wire and the individual defendants with conspiring against the named employees with the intent to commit aggravated battery in violation of Ill. Rev. Stat. 1985, ch. 38, para. 8-2(a). \textit{Chicago Magnet Wire}, 157 Ill. App. 3d at 798-99, 510 N.E.2d at 1174.
\item \textsuperscript{157} \textit{Chicago Magnet Wire}, 157 Ill. App. 3d at 799, 510 N.E.2d at 1174.
\end{itemize}
risdiction over an occupational safety or health issue. For instance, pursuant to section 667(a)\textsuperscript{158} of the Act, a state agency may assert jurisdiction if there is no federal standard in effect at that time.\textsuperscript{159} Additionally, pursuant to section 667(b),\textsuperscript{160} a state may submit its own enforcement plan to the United States Secretary of Labor for approval.\textsuperscript{161} In the absence of an approved state plan, however, the court ruled that state laws related to working conditions regulated by OSHA are preempted.\textsuperscript{162}

The state did not argue that it was not obligated to comply with section 667(b) by developing a state plan to prosecute defendants under state criminal laws.\textsuperscript{163} Rather, the state contended that any preemptive effect of sections 667(a) and (b) were limited to state administrative schemes which duplicated OSHA’s regulation of health and safety standards.\textsuperscript{164} The state urged that the prosecutions at issue were therefore not preempted because they were based on the application of general criminal laws rather than on the enforcement of specific workplace health and safety regulations.\textsuperscript{165}

\textsuperscript{158} 29 U.S.C. § 667(a) (1970) provides:
(a) Assertion of State standards in absence of applicable Federal standards
Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

\textsuperscript{159} Chicago Magnet Wire, 157 Ill. App. 3d at 800, 510 N.E.2d at 1175.

\textsuperscript{160} 29 U.S.C. § 667(b) (1970) provides:
(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards
Any state which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

The court noted that the preemptive effect of § 667(b) was recognized by the Illinois Supreme Court in Stanislavski v. Industrial Comm’n, 99 Ill. 2d 36, 39-40, 457 N.E.2d 399, 401 (1983), where the court stated that under OSHA, "the only method by which a State may assume responsibility for development and enforcement of safety and health standards with respect to which Federal standards have been adopted is through an approved State plan under the Act." Chicago Magnet Wire, 157 Ill. App. 3d at 800, 510 N.E.2d at 1173.

\textsuperscript{161} Chicago Magnet Wire, 157 Ill. App. 3d at 800, 510 N.E.2d at 1175. Illinois submitted a state plan, but it was withdrawn on June 30, 1975. \textit{Id.}

\textsuperscript{162} \textit{Id.} at 801, 510 N.E.2d at 1176.

\textsuperscript{163} \textit{Id.} at 800, 510 N.E.2d at 1175.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.} In support of its assertion that Congress explicitly intended to leave
Rejecting the state’s argument, the court stated:

The determinative factor is not whether the State is seeking to enforce a criminal law of general application rather than specific workplace health and safety regulations but what conduct the State is seeking to regulate. The State would not be foreclosed from applying its criminal laws in the workplace if the prosecutions charged the defendants with crimes not involving working conditions. The conduct the State seeks to regulate here, however, as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA.¹⁶⁶

The court concluded therefore that the trial court had properly found that the prosecutions were preempted.¹⁶⁷

The court did note that the state had expressed valid concerns about the effects of preemption on the state’s ability to control the activities of employers.¹⁶⁸ The court believed, however, that Congress intended that criminal sanctions should not be imposed for activities preexisting state criminal laws undisturbed, the state relied on § 653(b)(4) of the Act which provides:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or effect 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.


The court, however, found that § 653(b)(4) does not permit the State to prosecute conduct or conditions in the workplace under State criminal laws insofar as the conduct or conditions are regulated by OSHA. The court stated:

The courts which have interpreted section 653(b)(4) have consistently found that the purpose of this section was to preserve the existing private rights of injured employees relative to workman’s compensation, State tort law, and other common law remedies against employers but not to create any additional civil remedies in favor of employees.


¹⁶⁶. Chicago Magnet Wire, 157 Ill. App. 3d at 801, 510 N.E.2d at 1176 (citations omitted).
¹⁶⁷. Id.
¹⁶⁸. Id. at 802, 510 N.E.2d at 1176.
involving workplace health and safety except in highly limited circumstances\textsuperscript{169} and that health and safety requirements should be established through standard-setting which would provide employers with clear and detailed notice of their legal obligations.\textsuperscript{170} The court stated that the

Illinois view that employers may be held criminally liable for workplace injuries or illness, regardless of their compliance with OSHA standards, would lead to piecemeal and inconsistent prosecutions of regulatory violations throughout the States, a result that Congress sought to preclude in enacting OSHA.\textsuperscript{171}

\textit{Chicago Magnet Wire} is a major setback for state prosecutors in their crusade against corporate officials for workplace accidents and deaths. Although the case will be appealed,\textsuperscript{172} the preemption defense is now likely to be a critical obstacle in gaining convictions against employers throughout the country.\textsuperscript{173} Even if a state could prove the requisite criminal intent on behalf of the officer, if the conduct is federally regulated by OSHA, the state may be precluded from prosecuting.\textsuperscript{174}

V. PROPOSALS

Whether or not the preemption defense is successful in preventing state prosecutions throughout the country, proving knowledge on behalf of corporate officers remains a critical problem in gaining convictions on both the state and federal levels. Clearly, the law should not permit a corporate executive to avoid criminal liability

\textsuperscript{169} OSHA contains a provision for criminal penalties of not more than six months imprisonment and/or a fine of not more than $10,000 for a willful violation that causes the death of an employee. \textit{See} 29 U.S.C. § 666(e) (1982). Note, however, that the Criminal Fine Enforcement Act of 1984 has increased the maximum criminal fines available for all federal criminal offenses. \textit{See} Pub. L. No. 99-905, 18 U.S.C.A. §§ 3565-4214 (1984).

\textsuperscript{170} \textit{Chicago Magnet Wire}, 157 Ill. App. 3d at 802, 510 N.E.2d at 1176.

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} The Cook County state’s attorney has filed notice that he will appeal the \textit{Chicago Magnet Wire} ruling. 16 \textit{NATIONAL SAFETY COUNCIL—OSHA UP TO DATE} 1 (Sept. 1987) (No. 10) [hereinafter \textit{NATIONAL SAFETY COUNCIL}].

\textsuperscript{173} Prosecutors across the country had been awaiting the \textit{Chicago Magnet Wire} ruling because it was the first time a state appellate court was to rule on the presumption defense. Middleton, \textit{supra} note 155, at 1, col. 1.

\textsuperscript{174} Questions about federal preemption dominate oral argument in the \textit{Film Recovery} appeal. \textit{NATIONAL SAFETY COUNCIL}, \textit{supra} note 172, at 1.
by hiding "behind a veil of claimed ignorance."\textsuperscript{175} What is needed, therefore, is an effective standard which alleviates the problem of proving that an officer knew of his subordinates' criminal conduct, but does not make demands upon the officers that are unrealistic in light of their inevitable isolation from the mechanics of daily business operations.\textsuperscript{176}

Several commentators have called on legislators to enact an intermediate standard, one between "strict liability" and "specific intent," which would extend liability to corporate officers who contribute indirectly to criminal conduct but whose knowledge of the crimes actually committed cannot be proved.\textsuperscript{177} Such a standard would hold corporate superiors legally responsible when the crime results from improper supervision or failure to institute necessary safeguards.\textsuperscript{178} Two intermediate standards have been proposed: negligent supervision and reckless supervision.\textsuperscript{179} To compensate for the lesser degrees of blameworthiness which these standards require, violations would only be misdemeanors.\textsuperscript{180}

The negligent supervision standard imposes criminal liability on an officer for failing to take reasonable steps to prevent an offense when "he knew or should have known of a substantial risk that the illegal act was occurring or would occur within his realm of authority."\textsuperscript{181} Under this standard, a corporate officer would not only be criminally liable for failing to prevent a crime that he knew about; he would also be liable whenever he should have known about the crime.\textsuperscript{182} Accordingly, the standard is a more effective deterrent.\textsuperscript{183}

\textsuperscript{175} Comment, supra note 35, at 89.
\textsuperscript{176} Id.
\textsuperscript{177} See Note, supra note 6, at 1270.
\textsuperscript{178} Id. The author recognizes that courts cannot increase the level of deterrence by removing the knowledge requirement from specific intent statutes. Rather, courts are bound by the intent requirements prescribed by the legislatures. Thus, the author postulates that only the legislature can extend liability to an officer who has no knowledge of the actual crimes committed. Id. at 1269-70.
\textsuperscript{179} Id. at 1270. See generally Davids, Penology and Corporate Crime, 58 J. Crim. L. C. & P.S. 524, 530 (1967); Comment, supra note 4, at 622-24; Note, supra note 2, at 680-84.
\textsuperscript{180} See Note, supra note 6, at 1270.
\textsuperscript{181} Id. at 1270-71.
\textsuperscript{182} See id. at 1271. Commentators who endorse the negligent supervision standard employ the tort standard of the reasonably prudent person, both to determine when an official should have known of the risk of planned or ongoing activity and to assess what constitutes sufficient preventative action. Id.
\textsuperscript{183} There is little doubt that corporate criminal conduct is deterred by criminal
than the narrower specific intent standard because it eliminates the officer’s incentive to remain ignorant of subordinates’ illegal activity.184

Although the negligent supervision standard extinguishes an officer’s defense of ignorance, the standard poses substantial problems with regard to fair notice185 and over-deterrence.186 Under this standard a supervisor would have difficulty determining exactly what he must do to protect himself from criminal liability.187 Moreover, over-deterrence might be the natural result of cautious supervisors using excessive controls to ensure compliance with an ambiguous standard.188 Corporate efficiency is likely to decline if supervisors choose not to trust their subordinates but rather to devote substantial time to overseeing them to prevent illegal activity.189

The second intermediate standard proposed, the “reckless supervision” standard, imposes criminal liability on a corporate manager if he recklessly permits a crime to occur in his realm of authority.190

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184. See note, supra note 6, at 1271.
185. Id. The author cites Kadish, supra note 183, at 432, in support of this proposition. See also Note, supra note 6, at 1271 n.148.
186. Note, supra note 6, at 1271.
187. Id.
188. Id. To simplify the task of supervision and to minimize criminal liability, superiors might so routinize the activities of subordinates as to inhibit job performance and result in a decline in creativity and efficiency. Id. But see Note, Decisionmaking Models and the Control of Corporate Crime, 85 Yale L.J. 1091, 1127 (1976) (illustrating the benefits of routine procedure in the delegation of authority).
189. See Coffee, Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 63 Va. L. Rev. 1099, 1138-39 (1977) (supporting the proposition that direct communication with lower level subordinates would overload top officials with information).
190. The reckless supervision standard was proposed in the revised version of the Proposed Federal Criminal Code adopted by the Senate in 1978. Note, supra note 6, at 1272.
Recklessness involves a conscious disregard of a substantial risk of the occurrence of illegal activity. A superior may be liable for a crime under the reckless supervision standard only if he actually knew, not merely should have known, of a substantial risk of illegal activity within his realm of authority. Liability would he imposed if a corporate manager knew of facts creating a substantial likelihood of illegal conduct and did not inquire further, or if he knew of a hazardous condition and failed to take remedial action.

The reckless supervision standard presents substantially the same problem as do other standards which demand proof of actual knowledge: when liability is based on knowledge of an activity or condition, superiors have a disincentive to obtain such information. One commentator suggests that this problem is less severe under a reckless supervision standard than under the specific intent standard, since superiors cannot avoid learning of hazardous conditions as easily as they can avoid specific information that a crime is occurring or planned. Although this is true to some extent, the reckless supervision standard will likely only affect lower level managers who are closest to the crime. A high level corporate official may still consciously avoid learning of conditions that would lead him to suspect that a substantial risk of illegal activity exists.

Perhaps the best way to affect those who establish corporate

Section 403(3) of the Proposed Federal Criminal Code provides:
A person responsible for supervising particular activities on behalf of an organization who, by his reckless failure to supervise adequately those activities, permits or contributes to the commission of an offense by the organization is criminally liable for the offense, except that if the offense committed by the organization is a felony the person is liable under this subsection only for a Class A misdemeanor.

191. See Note, supra note 6, at 1272.
192. Id.
193. See Comment, supra note 4, at 623. For instance, if a vice-president of sales knew that his sales managers met regularly with competitors, he would be reckless not to inquire into the possibility that they were fixing prices. If the supervisor discovered from his investigation that price-fixing was occurring, he would be guilty of acquiescence if he failed to take steps to stop this antitrust violation. Note, supra note 6, at 1273. The author of that Comment notes that the reckless supervision requirement of proof of actual knowledge is similar to inferring knowledge from acquiescence in the criminal activity, although less specific information in the hands of the corporate officer would be necessary to convict. Id.
194. See Note, supra note 6, at 1274.
195. Id.
policy but attempt to use the corporate bureaucracy to shield themselves from criminal liability is, as one commentator suggests, to define clearly the duties of all corporate personnel, outlining their roles for ensuring corporate compliance with the law. Accordingly, when a duty is imposed on a business organization, the president or chief executive officer would be obliged to implement the necessary systems within the organization to ensure compliance. The president or chief executive officer would be criminally liable "only to the extent that he failed to establish a system which could reasonably be expected to produce the required result."

A requirement of knowledge and individual responsibility would be inherent in such a system because the system would delineate what each individual would be expected to know and do. The president or chief executive officer would not be liable for crimes that he was not aware of except to the extent that his system did not have a reasonable means of providing feedback communication. Liability would be imposed on corporate officers to the extent that they did not act upon knowledge provided by the system. Similarly, employees would be liable to the extent that they did not carry out their defined functions within the system.

By clearly defining the duties of all corporate personnel, the problems of fair notice and over-deterrence are eliminated because each individual would know precisely what he must do to protect himself from criminal liability. Moreover, once the system is implemented, ignorance at any level in the corporate hierarchy is no excuse. Therefore, a negligent or reckless supervision standard may

196. See Comment, supra note 35, at 90.
197. Id. The author suggests that since corporate management has the expertise to ensure that things get done within the corporation, the law should utilize this expertise to its advantage by requiring that the role of each person within the corporation for ensuring compliance be defined by management itself. Id.
198. Id.
199. Id.
200. Id. The author of that Comment notes that reasonableness in each case would be determined according to the facts at hand. Merely giving instructions to take preventative measures, without any follow-up, would not be considered reasonable measures. Id.
201. Id.
202. Id. The author notes that many firms have already undertaken similar measures in response to increasingly tough enforcement of antitrust laws. For example, some firms have begun to educate their sales personnel about the requirements of the antitrust laws and have issued strict directives requiring compliance. Id. Some corporations have begun instituting tools such as periodic newsletters
successfully be applied to any officer who does not act on information provided to him by the system.

VI. Conclusion

Corporate criminal conduct is not uncommon. Yet those corporate individuals with the power and responsibility necessary to prevent corporate crimes often go unpunished. The scope of recent decisions allows corporate officers to hide within the complex decision-making process of the corporate structure. The general rule still stands: a corporate officer will not be criminally liable for acts of the corporation, performed through other officers or agents, who are not acting under his direction or with his permission.203 Thus, a corporate officer may escape criminal liability as long as he remains ignorant of criminal activity occurring within his realm of authority.

The recent decision in Film Recovery, however, may be a breakthrough with respect to increased accountability of corporate officers. The appellate court is urged to adopt a fair and effective standard of liability which will not allow corporate officials to escape liability by remaining ignorant. The standard should extend liability to those who have the responsibility and power to prevent illegal conduct.

Although some commentators suggest the adoption of an intermediate standard of liability which would relax the intent requirements for crimes which traditionally require specific intent, such a standard alone would affect only those managers closest to the crime. If, however, corporations are required to implement communication feedback systems in which the duties of all corporate personnel are defined, an intermediate standard may successfully be applied to all levels of the corporate hierarchy. Because a corporate officer could be held liable for not acting on information provided by the system, remaining ignorant would only increase the risk of criminal liability. With such a system, liability would undoubtedly fall upon the corporate individual with the responsibility and power to prevent the illegal conduct. Moreover, the implementation of an effective standard would allow the corporate structure to be used to encourage lawful conduct rather than providing a barrier to proving the indirect criminal conduct of corporate offenders.

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and regularly scheduled meetings between high-ranking executives and lower level managers. McAdams & Tower, supra note 1, at 81.

203. Comment, supra note 4, at 624.