ARTICLES

Foreword: Justice and the Problem of Unsafe Work .................................................. Joseph A. Kinney 1

Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives that Influence Employer Decisions to Control Occupational Hazards .............. William J. Maakestad and Charles Helm 9

The Problems with Using Common Law Criminal Statutes to Deter Exposure to Chemical Substances in the Workplace ......................... Thea D. Dunmire 53

When It Is Not an Accident, But a Crime: Prosecutors Get Tough with OHSA Violations .......... Ira Reiner and Jan Chatten-Brown 83


The High-Risk Occupational Disease Notification and Prevention Act: A Good Proposal that Should Be Enacted into Law ...................... David L. Mallino 119

Criminal Enforcement of OSHA: Employers' Rights at Risk ................................ Stephen A. Bokat 135

Preemption: A Union Lawyer's View ................................................................. George H. Cohen 153

The Occupational Safety & Health Act: Is It Time for Change? ................................ Sy Holzman 177

TNS, Inc. and OCAW: Labor Section 502 and Workplace Safety ................................ John W. McKendree 195
COMMENT


NOTES

Public Sector Agency Shop Agreements in the Sixth Circuit After Tierney v. City of Toledo .James D. Allen 235

Narrowing the Scope of the Discretionary Function Exception: The Food and Drug Administration Faces Tort Liability in Licensing and Releasing the Sabin Oral Polio Vaccine—Berkovitz v. United States ................................. Mark B. Gelbert 265
EDITOR’S PREFACE

Perhaps the most difficult task of any law review is to meet its publication schedule. Close behind, however, is the task of pulling together a successful symposium issue. Like a garden that will bear nourishment, a good symposium must be painstakingly planned, tended regularly, and nurtured with utmost care. This issue on workplace safety has been no exception.

The seed was planted a year ago in the office of Mark M. Stavsky, who with Professor David Elder has served long and well as faculty advisor to the law review. Professor Stavsky’s specialty is criminal law, and he had taken note that prosecutions for workplace safety violations were stirring debate across the country. Professor Stavsky also was influential in bringing one of our authors, William J. Maakastad, to the Northern Kentucky campus as a special lecturer on corporate criminal liability. This issue has proven to be Professor Stavsky’s farewell gift to the law review because he has stepped down as faculty advisor to pursue other scholarly interests.

The workplace safety idea was nurtured by Glenn Rudolph, who was last year’s research editor. Mr. Rudolph was working for a Cincinnati manufacturer, Senco, and was particularly interested in the implications of prosecutions and regulations on small companies. Mr. Rudolph’s contacts with some of the nation’s top experts on workplace safety formed the core of this issue. He now serves as clerk to U.S. District Judge William O. Bertelsman, Eastern District of Kentucky.

Yet, none of these ideas or contacts would have come to fruition without the help of William Knoebel, last year’s editor-in-chief. Mr. Knoebel laid a solid foundation for production and follow-through that enabled the current staff to publish a memorable first issue. He also instilled among us a standard of professionalism and forethought that should endure for years. Mr. Knoebel now practices law in Florence, Kentucky.

To all of these people, I extend my humble thanks and wish all of life’s best.

—R. Stephen Burke
Editor-in-Chief
The problem of unsafe work is gaining more attention, as well it should. Injuries, by any measure, are clearly increasing. The United States, compared with other industrialized nations, has a poor safety record. Traditional remedies such as workers' compensation, civil litigation, regulation, and insurance have not, in the minds of many experts, provided a sufficient response to the problem of worker injury and disease.

The impressive and balanced group of writers for this journal examine recent responses to the problem of worker injury and illness, including the use of criminal penalties and new methods...
of providing information to workers who have been exposed to hazardous chemicals.

Prosecution for management decisions or behavior leading to death or aggravated injury to workers is a particularly timely and important subject. Our society would prefer that market responses, such as insurance, naturally remedy problems. Indeed, our society resisted safety and health regulation until 1969 when Congress, after a march on Washington by coal miners, passed the Mine Safety and Health Act. A year later, Congress enacted the Occupational Safety and Health Act (OSHA) — legislation that determined minimal standards for safety and health in U.S. workplaces.

Our workplace safety laws have not produced satisfactory results. While worker injury and fatality rates declined through most of the 1970s, it became clear by the mid-1980s that many workers were increasingly at risk of injury or death. On the surface, national statistics showed modest progress. But underneath the surface was a painful reality: Traditional responses were not working for construction, steel, heavy manufacturing, and other high-risk workers. National statistics looked better only because of a massive transfer of 14 million jobs from the high-risk sector (whose workers were four times more likely to die on the job) to the low-risk service sector of our economy.4

The federal administration during the past eight years failed to achieve an effective level of regulation. The federal government reduced the number of job-safety inspectors by nearly one-third. The few workplace safety criminal prosecutions brought by the Department of Justice during the 1970s slowed to a trickle in the 1980s. Indeed, the Justice Department successfully prosecuted only two employers even though 80,000 workers lost their lives at work and another 560,000 died from occupational disease.5

The Labor Department’s Inspector General in recent years doc-

5. See J. HOLZHAUER & J. KINNEY, SAFETY AT BAY — THE FAILURE OF THE DEPARTMENT OF JUSTICE TO PROSECUTE CRIMINAL OSHA CASES (National Safe Workplace Institute, June 6, 1987), and NATIONAL SAFE WORKPLACE INSTITUTE, ENDING LEGALIZED WORKPLACE HOMICIDE... BARRIERS TO JOB SAFETY PROSECUTION IN THE U.S. (July 15, 1988). Other organizations, including at least four law reviews and a congressional subcommittee, have released reports or held conferences, none of which revealed new or important information not previously made public by NSWI.
umented the federal government’s retreat from safety, showing what a poor job OSHA has done in targeting employers for inspections. The Inspector General’s report revealed that OSHA had even done a poor job in targeting inspections for employers with significant histories of fatal accidents.\(^6\)

In 1986, I lost my youngest brother to a workplace accident. Paul had been working on a scaffold that collapsed. He died on July 7 in Denver, never having regained consciousness. I investigated the facts surrounding his death. I was shocked by the number of OSH Act violations and by the facts that the U.S. Occupational Safety and Health Administration ignored in its investigation. OSHA fined my late brother’s employer $800 for eight serious violations — a fact I learned only after filing a Freedom of Information Act request and waiting for months.

The story of my brother’s death can help illustrate the problem and highlight the need for innovative and effective responses to worker safety problems. The OSH Act, as currently enforced, encourages a societal acceptance of worker death and injury. This accommodation occurs because the weak sanctions imposed by government legitimize safety violations by encouraging public acceptance of existing sanctions as an effective response to the problem. The legitimization occurs because busy citizens want to believe that government is effective.

When government is less than tough, it unwittingly encourages marginal actors to take risks they would not take if government sanctions were appropriately severe. In effect, lax enforcement not only endangers workers, it also penalizes safe employers. Because of OSHA’s weak job safety and health enforcement, we are forced to turn to more effective approaches to remedy shortcomings and to ensure justice. Existing law is limited. Workers’ compensation, called the “exclusive remedy” to worker injury, almost never replaces more than two-thirds of a worker’s historic wage and provides particularly small remedies in cases of death and traumatic injury. Litigation is, at best, a limited and indirect remedy because lawsuits are almost always filed against property owners or product manufacturers, not employers.

This brings us to the local prosecutor’s role. More prosecutors now recognize that the typically relied-upon remedies are inef-

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fective in deterring excessive and needless accidents and exposures (including fatalities) or in meeting the needs of justice. In many cases, the only realistic remedy is the application of state criminal statutes for homicide, aggravated battery, and assault.

The most famous case in which criminal statutes were used was People v. Film Recovery Systems. The case, brought by then-Cook County State’s Attorney Richard Daley, resulted in the second-degree murder convictions of three of the firm’s executives as well as penalties against the corporation for acts that led to the cyanide poisoning of Stefan Golab. Mr. Golab’s death attracted nationwide publicity and presented a stark contrast between the weak penalties that are typically imposed by OSHA and those that could be brought by local prosecutors.

The Film Recovery case gained attention because of the harsh manner in which Mr. Golab was killed and the stiff penalties imposed by the trial judge. Long before Mr. Golab died, Ira Reiner, the Los Angeles County District Attorney, was investigating and prosecuting job-related homicides. Mr. Reiner has put together, with the assistance of Jan Chatten-Brown, the most comprehensive job-safety prosecution program in the United States that features immediate investigation of all job deaths. In fact, Reiner’s program is more comprehensive than any program run by the federal government.

Still, Daley’s tough action made other prosecutors take note. Prosecutors who have distinguished themselves in this area include Kenneth Oden (Travis County, Texas), E. Michael McCann (Milwaukee), Elizabeth Holtzman (Brooklyn), and others. While Film Recovery set the standard, another case brought by Daley, People v. Chicago Magnet Wire Corp., would be as important. Unlike Film Recovery, Chicago Magnet Wire involved allegations of aggravated battery rather than homicide. While Film Recovery and Chicago Magnet Wire were similar in that both centered on the workplace and involved acts against human beings, there was one notable difference: OSHA had a legal obligation to investigate

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8. The ground-breaking work of these prosecutors, along with Ira Reiner of Los Angeles, will go down in legal history. Prosecutors who bring such cases endure enormous resistance from several sectors of society.
Film Recovery Systems because of Mr. Golub's death. Because Chicago Magnet Wire did not involve a fatality or four or more injuries that required emergency medical treatment, OSHA did not have an obligation under the OSH Act to inspect the company.⁹

It is logical, reasonable, and necessary that Daley prosecuted both Film Recovery and Chicago Magnet Wire. Many of those who helped write the OSH Act in 1970 have stated clearly that Congress envisioned that the OSH Act would establish minimum standards to help begin the process of creating and implementing a regulatory system that would ensure greater safety and health for America's workers. The OSH Act's passage began the second wave of worker safety reform legislation in the United States. The first wave of reform was workers' compensation laws, first passed in 1911. Opposition to passage of the OSH Act came, in part, from those who claimed that it was the proper role of state government to protect workers. As a result of this argument, the OSH Act contained a section permitting states to establish their own programs with approval from the Secretary of Labor.¹⁰ Congress' decision to include an opportunity for state government enhanced rather than detracted from the options that states, including those states without programs, have for addressing crimes related to safety and health at work.

As we can see from the scholarship in this journal and articles elsewhere,¹¹ there has been a sharp battle over the issue of whether the OSH Act preempts state criminal prosecution of employers when egregious, known safety violations cause serious injury or death. As high courts in Illinois, Michigan, and Wisconsin¹² have so convincingly ruled, Congress did not intend the OSH Act to preempt states from fulfilling their duties and obligations.

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⁹. OSHA had investigated Chicago Magnet Wire during a period that coincided with Cook County's criminal investigation. Likewise, OSHA investigated Film Recovery after the death of Stefan Golab. In both cases, OSHA found serious violations and imposed modest fines.


¹¹. For the best treatment of this issue by a newspaper, see Roel, OSHA Cases: Prosecution Turning into Frustration, Newsday, July 29, 1988. The law review articles on preemption have firmly rejected the claim.

It is important to note that the wisdom of judges in Illinois, Michigan, and Wisconsin has been affirmed by the Department of Justice. While the department has not filed an amicus brief, a senior-level official informed a congressional committee that Justice did not believe that the OSH Act preempted local prosecutors. While this action lacked the formality of a brief, there is no question that this Justice spokesperson had prior approval of senior officials, likely including the Attorney General, in making such a determination.  

From my point of view, there is only one legitimate public policy objection related to the preemption debate. The objection, raised by Thea Dunmire in this journal, is the fear that local prosecutors will respond to political considerations rather than the needs of justice or sound public policy in prosecuting employers. Unfortunately, Ms. Dunmire apparently overlooked a sizeable body of evidence concerning this question. Prosecutors in California have brought more than 300 criminal cases. I am not aware of a single case in which defendants have charged malicious prosecution or abuse of process.  

Ms. Dunmire may have done readers a favor. Her scholarship reveals the pervasive anti-worker bias in our legal system. Most significant decisions by government, at any level, that offer the promise of protecting workers from injury or illness are decided in the interest of employers, which clearly has been the case with hazard notification legislation. We have government that is often unwilling to make sound laws, unwilling to regulate and enforce laws, and unwilling to ensure just compensation for the injured. In our society, we are determined to avoid even the most modest changes that will promote safety and health of workers. In many all-too-painful ways, we have not progressed beyond the days of the mentality of slaveowners. We, at all costs, must resist the most modest efforts to challenge power, position, and prestige.

13. The letter was addressed to the Hon. Thomas Lantos, Chairman, Subcommittee on Employment and Housing, House Government Operations Committee, from the Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice. It is reprinted in Bureau of National Affairs, Occupational Safety & Health, Seven Critical Issues for the 1990s at B3-B6 (1989).
14. The author has been in communication with numerous officials in California state government, including the Senate and General Assembly, on this subject.
All this is not to say that criminal prosecution is the only tool for responding to unsafe work. Criminal prosecutions are appropriate in a limited category of particularly egregious cases. Workers need better equipment, more information and education, and the right to wisely participate in the world of work — including the right to refuse hazardous tasks when safer work methods are available. Criminal prosecution after the fact is hardly a complete answer for a worker who has been seriously injured or killed. We, as a society, need enlightened and effective regulation and enforcement, insurance that is experienced-based, and a legal system that is realistic and responsive to problems. Likewise, we need to encourage cooperation rather than confrontation between employers and workers. Also, we need to employ creative and energetic minds that anticipate and resolve problems at the earliest possible time. Hence, prosecution is but one of many tools that can be used to achieve a safer, healthier, and more just society. The writers and editors of this journal are to be commended for their commitment and willingness to discuss the critical issues that are raised in this debate.
PROMOTING WORKPLACE SAFETY AND HEALTH IN THE POST-REGULATORY ERA: A PRIMER ON NON-OHSA LEGAL INCENTIVES THAT INFLUENCE EMPLOYER DECISIONS TO CONTROL OCCUPATIONAL HAZARDS

William J. Maakestad* and Charles Helm**

There was another interesting set of statistics that a person might have gathered in Packingtown — those of the various afflictions of the workers... [E]ach one of these lesser industries was a separate little inferno, in its way as horrible as the killing-beds, the source and fountain of them all. The workers in each of them had their own peculiar diseases. And the wandering visitor might be sceptical about all the swindles, but he could not be sceptical about these, for the worker bore the evidence of them about on his own person — generally he had only to hold out his hand.

—The Jungle (1906)1

The dozen or so meatpackers that prepare nearly three-fourths of the beef and pork served on America's tables have raised the production quotas of their workers over the last 15 years to increase profits and squeeze out smaller competitors. This pressure for speed has caused an unparalleled elevation in time lost to injuries ... [and] subjected workers to what can be excruciatingly painful hand, wrist and arm injuries caused by the chopping, pulling and cutting motions they must repeat all day — for some workers as many as 10,000 times — every workday.

—The Chicago Tribune (1988)2

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2. Drew, Meat Packers Pay the Price, Chicago Tribune, Oct. 23, 1988, § 1, at 1. This article was the first in an exhaustive series on health and safety hazards in the meat-packing industry. The series ran daily from Oct. 23-26 and concluded on Oct. 30.
At John Morrell & Co.'s Sioux Falls, S.D., meatpacking plant, management was slapped with a $4.3 million OSHA fine. The citation says the company willfully ignored so-called cumulative trauma disorders — a condition that occurs when workers' wrists virtually wear out from repetitive motion on high-speed assembly lines.... In February, months after the citation was issued, Jim Siemonsma, who had wrist surgery on both hands in the early 1980s, needed additional surgery on his hand. Doctors operated at 9:30 a.m. Monday, and he was back at his same job at 6:30 a.m. Wednesday — stitches, bandages and all — scooping ice into boxes, closing the lids and pushing them into another machine.


I. INTRODUCTION

One of the notable literary events of 1988 was the publication of the first annotated edition of The Jungle, Upton Sinclair's novel depicting the dangerous, unsanitary, and deceitful practices carried on in the turn-of-the-century meatpacking houses.⁴ First published serially in newspapers during 1905 and in book form in 1906, The Jungle remains a quintessential example of muckraking journalism with historical as well as visceral impact, having sparked a sensational public controversy that contributed to the passage of the Pure Food and Drug Act of 1906 and reduced meat consumption in the United States for several years.⁵ Yet, eight decades later, all would still not be well in the meatpacking industry.

On October 28, 1988, the Occupational Safety and Health Administration (OSHA) fined John Morrell & Co., a large Cincinnati-based meatpacking firm, $4.3 million — the largest penalty ever assessed in the federal agency's 17-year history.⁶ OSHA's four-month investigation found that nearly 40 percent of Morrell's workers sustained "serious and sometimes disabling" hand and arm injuries between May 1987 and April 1988, and that as early

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⁴ See supra note 1.
⁶ See supra note 2, at 1 and 12.
as 1984 management had been aware of the causes and remedies concerning the disorders. OSHA further alleged that instead of responding to its safety and health problems, the company pressured employees to continue working on the production line. In a scenario that recalls *The Jungle*, 63 workers who had undergone surgery were returned to the line only 1.1 days after they underwent surgery, on the average.\(^7\)

The Morrell case represented the second substantial fine for "willful" violations — the most serious of three levels available under the Occupational Safety and Health Act of 1970\(^8\) — assessed against meatpacking firms in 1988. In May, OSHA levied a $3.1 million fine against IBP Inc., the nation’s largest meatpacker, for exposing 20 percent of its workers to repetitive motion, or cumulative trauma, injuries.\(^9\) Yet the IBP and Morrell fines represented OSHA’s first significant enforcement efforts concerning actual safety violations (as opposed to recordkeeping offenses) during the eight years of the Reagan administration — despite the fact that 1986 Bureau of Labor statistics showed that meatpacking firms had the highest rate of occupational injuries of all industries.\(^10\)

While 1988 drew attention to the serious problems faced by workers in the meatpacking industry, several events occurring three years earlier had focused significant attention on occupational safety and health issues more generally. First, the Bureau of Labor Statistics, in its annual report for 1985, cited some alarming statistics: During the previous year, the number of occupational deaths had jumped 21 percent and injuries had risen 13 percent.\(^11\) The substantial increase in workplace death and injuries stunned many within the ranks of government, labor and management, especially since it followed several years of slow but steady improvement. Even *The Wall Street Journal* concluded

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7. *Id.* The report also noted that from 1973 to 1986, the number of workers decreased while the average number of lost workdays went from 136.6 to 238.4 per hundred workers. Also cited were federal statistics indicating that approximately one in three production line slaughterhouse workers get hurt each year.
that "cost cutting and less stress on safe practices explain[ed] the higher rate of accidents." 12

The second event was the publication of the U.S. Government Office of Technology Assessment's (OTA) 1985 report, Preventing Illness and Injury in the Workplace. 13 The nonpartisan report, which had been commissioned by both the House Committee on Energy and Commerce and Senate Committee on Labor and Human Resources, provided detailed analyses of three central workplace health and safety issues: identification of occupational hazards; development of control technologies for reducing or eliminating workplace hazards; and the incentives and imperatives that influence decisions to control hazards. The OTA concluded that while some progress has been made, American workers are entitled to far greater improvement in these safety and health matters than had occurred in recent years. The report offered a detailed agenda of 31 reform proposals designed to improve workplace safety and health as quickly and cost-effectively as possible. 14

A June 1985 verdict in a controversial Illinois criminal trial was the third occupational safety-related event that drew national attention. In People v. Film Recovery Systems, 15 three executives of Film Recovery Systems, an Illinois corporation that extracted silver from used photographic and x-ray film, were found guilty of murder for causing the death of a worker through hazardous workplace conditions — the first such verdict in U.S. history. The Cook County judge who presided over the eight-week bench trial sentenced each executive to 25 years in prison after finding that the employees — almost exclusively illegal Mexican and Polish immigrants who neither spoke nor wrote English — were willfully deceived about the hazards of working with cyanide, supplied with virtually none of the safety equipment required by law, and provided with a woefully inadequate ventilation system. In the wake of this landmark decision reports of similar inves-

12. Id.
14. Id. at 25-40.
tigations and prosecutions in other parts of the country proliferated.\textsuperscript{16}

These three events, along with still fresh memories of other highly symbolic events such as Union Carbide's Bhopal disaster\textsuperscript{17} and Manville's asbestos debacle,\textsuperscript{18} combined to raise the public consciousness — and the political stakes — concerning workplace safety. Following nearly any publicized tragedy today, it is not unusual for the subsequent media and political attention to be paid exclusively to federal regulatory policy — in the case of a workplace tragedy, to the standard-setting, inspection, and enforcement policies of OSHA. Yet while OSHA's policies certainly influence levels of workplace safety and health in this country, there is by no means a consensus that they exert the greatest influence.\textsuperscript{19} The 1985 OTA report identified six factors other than OSHA that motivate businesses to adopt workplace safety and health controls: (1) the employer's enlightened self-interest; (2) information on workplace hazards and controls; (3) financial and tax incentives; (4) workers' compensation and insurance; (5) tort liability; and (6) collective bargaining and individual rights.\textsuperscript{20} Individually and collectively, these factors provide companies with incentives (or disincentives) to invest in control strategies and technologies.

There are at least three rationales for focusing on non-OSHA legal factors as we approach the 1990s. First, the decline of OSHA as an effective regulatory agency during the 1980s has

\textsuperscript{16} See BNA, Prosecuting Workplace Injuries and Death: Trends and Analysis, at 1-24 (1989). After Film Recovery Systems, according to this BNA White Paper, criminal charges may have been filed against employers as a result of workplace injuries or deaths in as many as 17 states. See also Metz, Death by Oversight, Student Law., Sept. 1988, at 13; Minter, Are Prosecutors Stepping In Where OSHA Fears to Tread?, Occupational Hazards, Sept. 1988, at 101-103; Kahn, When Bad Management Becomes Criminal, Inc. Mar. 1987, at 46-50; McClory, Murder on the Shop Floor, Across the Board, June 1986, at 24; Kendall, Criminal Charges on the Rise for Workplace Injuries, Deaths, Occupational Hazards, Dec. 1985, at 49-53.

\textsuperscript{17} See, e.g., L. Everest, Behind the Poison Cloud: Union Carbide's Bhopal Massacre (1985).

\textsuperscript{18} See, e.g., P. Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial (1985).

\textsuperscript{19} See, e.g., C. Noble, Liberalism at Work: The Rise and Fall of OSHA (1986); L. Bacow, Bargaining for Job Safety and Health (1980). Both political and economic arguments are raised in support of each authors thesis that OSHA may be neither the most influential nor efficient force in determining levels of workplace health and safety.

\textsuperscript{20} See supra note 13, at 19.
been well documented. As one of the primary targets of deregulation early in the Reagan administration, OSHA's resources were cut drastically. For instance, between 1980 and 1987, the number of inspectors was cut by 25 percent, leaving about 1,000 inspectors to police nearly five million American workplaces. At the same time, citations and penalties were dropping precipitously, in some accounts by nearly 50 percent. And in 1985, the General Accounting Office reported that OSHA's rule-making process had come to a standstill and recommended that the Labor Department appoint a special committee to determine how to revive this crucial function. That the agency's ability to carry out its standard-setting, inspection, and enforcement mandates was severely crippled by deregulation is also supported by the bipartisan OTA report, as many of its 31 recommended reforms pertain to shortcomings in the agency's performance. Additionally, plaintiff's lawyers pressing for increased tort liability of employers and state's attorneys seeking serious workplace-related criminal charges against managers have indicated that they are at least partly motivated by the same condition: a regulatory void that has developed due to the decreasing watchfulness by OSHA.

Second, apart from the severe resource and political constraints imposed during the Reagan administration, there are several inherent structural limitations to OSHA's regulatory effectiveness. For instance, one leading regulatory expert has observed that OSHA's centralized "command and control" strategy, created by congressional mandate, essentially requires the agency to be omniscient and omnipresent — an impossible task in an area

22. See supra note 10.
25. See supra note 13, esp. 33-36.
representing such a tremendous diversity of both problems (occupational hazards) and places (work environments). From this perspective, criticisms of OSHA's slowness of standard-setting, infrequency of inspections, and small size of fines may be misdirected in the long run, since: (1) uniform standards result in inefficient allocation of hazard-abatement resources; (2) regulations cannot be written with enough specificity for five million workplaces; (3) even a larger staff of good inspectors could not observe more than a small percentage of workplaces annually; and (4) fines alone do not create necessary incentives for workers and management. As a result of these limitations, all supplemental and alternative safety incentives must be explored.

Finally, there is the moral perspective. Given that both the existence and quality of human life is at stake, there simply could not be a clearer moral imperative to consider, implement, and enforce all appropriate legal mechanisms — regulatory and non-regulatory, public and private, civil and criminal — in order to ensure "job safety for everyone, with no one left out."

Christopher Stone has written that the law generally seeks to accomplish one or both of two divergent, but not mutually exclusive, goals: whereas the distributive goal seeks to allocate losses fairly when they occur in society, the reductive goal seeks to reduce the incidence of harm in the first place. With respect to workplace deaths, injuries, and illnesses, what Stone terms the distributive goal — making fair compensation to workers who suffer losses due to work-related activity — is designed to be sought primarily (though not exclusively) through the operation of state workers' compensation laws.

While indispensable to any sense of workplace justice, the distributive goal is really secondary to the reductive: efficiently reducing the number of workplace deaths is obviously preferable

27. See L. Bacow, supra note 19, at 14.
28. Id. at 49-50.
29. "Job safety for everyone, with no one left out" is a signature phrase of the National Safe Workplace Institute, one of the newest yet most influential occupational health and safety monitoring agencies in the United States. The independent Chicago-based organization issues periodic reports on a wide range of workplace safety-related matters.
to efficiently paying death benefits. This article is intended to be a primer on the three most important non-OSHA legal mechanisms which currently serve this reductive goal by providing employers with incentives to run safe workplaces (or disincentives to running unsafe workplaces): (1) workers’ compensation; (2) tort liability; and (3) criminal prosecution.\(^{31}\) While workers’ compensation and tort liability are legal mechanisms that have traditionally influenced certain managerial safety decisions, the prosecution of businesses and their managerial agents for workplace-related crimes has only recently become a more significant legal presence.

Two caveats should be noted. First, many legal mechanisms (especially in the realm of civil law) concurrently serve both reductive and distributive goals. While this article’s primary focus concerns when and how the law (outside OSHA regulation) works toward the reductive goal of fewer workplace accidents, the following discussions will occasionally address the distributive (or compensatory) needs of workers as well. Second, just as OSHA’s regulatory effectiveness has been the subject of vigorous debate, questions have also been raised about the relative merits of each of the three legal mechanisms examined in this article. Thus, references to empirical studies that have actually tested the effectiveness of a particular mechanism in reducing the toll of workplace accidents have been cited when available. In addition, the article’s concluding section shifts the paradigm of analysis and suggests that any further reform of legal mechanisms must be considered in the context of larger social and cultural determinants of safe workplace environments.

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\(^{31}\) In addition to OSHA regulation, the other, primarily non-legal mechanisms recognized by the OTA report — collective bargaining, information and educational programs, and employers’ enlightened self-interest — are also beyond the scope of this article. Additionally, while laws creating financial and tax incentives could encourage employers to invest in worker health and safety, no such laws currently exist. A government loan program for small businesses once provided funds for occupational health and safety improvements, but was abolished in 1981. Other approaches — such as investment tax credits, accelerated depreciation allowances, and direct subsidies — have been used to encourage investment in environmental protection, but not for occupational safety and health controls. See OTA, supra note 13, at 20.
II. WORKERS' COMPENSATION

A. History and Background of Workers' Compensation

The industrial revolution of the 19th century in Europe and the United States saw a significant increase in occupational accidents. From the very beginnings of these economic and social changes, courts in America have played a major role in labor and management relations, one that often confounded employee efforts at receiving compensation for injuries on the job. *Priestly v. Fowler* and *Farwell v. Boston & Worcester R.R. Corp.* established the so-called "unholy trinity" of employer defenses:

Sued by an injured employee, an employer could defend himself by claiming that the employee had assumed the risks of possible injury by agreeing to work, that the employee himself had been negligent, or that the true fault lay with another employee. The employer was expected to take the care of a reasonably prudent man to provide a safe workplace. The employers' responsibilities increased as the job grew more hazardous and when the employees were young and ill-trained.

While judges tended to be suspicious of employee claims and sensitive to employers' property rights throughout the 19th century, the balance began to tilt toward the employee as factories grew larger and owners more aloof in relations with their employees. During the Populist and Progressive eras, the image of the entrepreneur also began to change, and juries became more reluctant to find employees contributorily negligent. The tort law solution to accident cases was increasingly criticized by

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35. 45 Mass. (4 Met.) 49 (1842). See Friedman, supra note 34, at 409-10.
both sides. From the perspective of the employers, workers were beginning to win large settlements; from the perspective of the employee, the number of workplace accidents that led to compensation was still quite small. And even when the rulings were favorable, the compensation varied dramatically from case to case and was rendered on a very uncertain time line—from several months to several years. Long delays, the absence of legal counsel and difficulties in speaking English frequently led workers to settle out of court for very modest amounts.

Workers' compensation, the oldest social insurance program in the United States, was begun in 1911. Management and labor somewhat grudgingly accepted a system that offered each some pluses and minuses. For management, workers' compensation put a lid on accident costs and served to mollify their "Robber Baron" image. For workers, management was held liable irrespective of fault with an award that, while modest, was both certain and timely. On the down side, it meant that the employee settled the claim without further recourse to the courts, and possibly for considerably less than under the tort system.

The United States lagged behind most industrialized countries in initiating and developing workers' compensation. While 45 states succeeded in passing a workers' compensation program between 1911 and 1920, benefits, the structure of the administering agencies, and the breadth of coverage varied greatly. Almost from the beginning, workers' compensation failed to live up to the inflated hopes that had been placed in it. The Progressive reformers who had shepherded the program through Congress argued that it would be "self-administering"—a matter of administrative decisions rendered by experts, free of the need for litigation or policy choices. Problems soon arose with regard to the delays in granting benefits, the size of the benefits, the coverage of employee groups, and the number of weeks of eligibility. By the mid-1970s almost 20 percent of all workers' compensation claims were litigated and as much as 17 percent of the cost of the program was for adjudicating claims.

40. Id. at 262-63.
41. Id.
42. Id. at 260. It would not be until 1949 that every state had adopted a workers' compensation system.
43. DARLING-HAMMOND & KNIESNER, supra note 32, at xiv; R. Conley & J. Noble,
There has been considerable variation in the programs during the almost 80 years of its history. But, even while litigation has increased since the early 1970s, there has been an across-the-board expansion of benefits in all states and a growing uniformity in the amount and extent of coverage. During the late 1960s and early 1970s, states feared that workers’ compensation programs would pass into federal hands.\(^{44}\) As a result, legislation was passed in all states in order to bring their programs in accord with the 19 recommendations of the 1972 Report of the National Commission on State Workmen’s Compensation Laws.\(^{45}\) For example, with regard to benefits:

\[\text{[In 1972, the unweighted average weekly maximum benefit for temporary total disability was $72. In July 1987, it was $331. In 1972, only fourteen states had automatic escalation provisions to keep benefit levels in line with wage levels. In 1986, forty-two states had such provisions. Moreover, all states now have, as a matter of statutory wording, full coverage of occupational diseases and unlimited medical benefits.} \(^{46}\]\n
Between the late '60s and early '80s the employers' contribution to workers' compensation has gone from one to two percent of payroll, with $3 billion paid out in benefits in 1970 compared to $13.4 billion paid in 1980.\(^{47}\) The workers' compensation program is a typical American answer — one social insurance program among many, funded in a variety of ways and delicately balanced between state and federal authority — to a series of social problems that have confronted all Western industrialized countries in the 20th century.

While the federal government has periodically made some moves in the direction of federalizing workers' compensation, it

\[^{44}\text{Berkowitz, Survival of Workers’ Compensation, supra note 36, at 274.}\]
\[^{46}\text{Larson, Tensions of the Next Decade, in NEW PERSPECTIVES IN WORKERS’ COMPENSATION 21-22 (J. Burton ed. 1988).}\]
\[^{47}\text{Berkowitz, Survival of Workers’ Compensation, supra note 36, at 275.}\]
remains a system of individual state-run programs with many of the attendant variations in coverage one expects under federalism. One of these is in the type of insurance carriers for workers’ compensation, varying among private insurance companies, state-insured plans, and self-insured businesses and industries.\textsuperscript{48} The present state workers’ compensation system covers about 90 percent of all American workers, with most states excluding agricultural workers and restricting or limiting the coverage of household workers (three states still allow workers to waive coverage).\textsuperscript{49} Workers’ compensation generally provides medical benefits for eligible workers who suffer a work-related injury or illness, plus cash benefits for lost earnings and rehabilitation services.\textsuperscript{50} Workers’ compensation covers all medical expenses connected with an injury and pays roughly two-thirds of a worker's weekly wages (determined by schedule that specifies minimum and maximum amounts).\textsuperscript{51} The most frequent claims are for short periods of disability where the worker is expected to fully recover and return to work. The most highly litigated and costly claims under workers’ compensation are awards for “permanent partial disability,” where the injury is permanent but the worker could still return to the workforce (usually in a different capacity).\textsuperscript{52} The increased litigation in the area of permanent partial disability has weakened the original purpose of the program — to provide prompt and certain recovery.\textsuperscript{53}

Workers’ compensation continues to evolve in its distributive goals and responsibilities. It is now, however, only one of a host of programs that provide compensation for workplace injuries and illnesses.\textsuperscript{54} While it still plays an important role in disability claims — 16 percent of cash benefits — it pales in comparison with Social Security Disability Insurance (SSDI), which accounts

\textsuperscript{48} Research Report, supra note 43, at 15.
\textsuperscript{49} Id. at 16.
\textsuperscript{50} Lampman & Hutchens, The Future of Workers’ Compensation, in New Perspectives in Workers’ Compensation 133 (J. Burton ed. 1988).
\textsuperscript{53} Butler & Worrall, supra note 51, at 581-82.
\textsuperscript{54} Lampman & Hutchins, supra note 50, at 114.
for more than 50 percent of cash claims for disability;\textsuperscript{55} there is also supplemental security income (SSI), temporary disability insurance, veteran's compensation and group disability benefits. From this article's perspective, however, the most significant difference between workers' compensation and programs like SSDI is that the latter's function is almost exclusively distributive (or compensatory). Workers' compensation has tried to serve both distributive and reductive goals — the former providing compensation for workers and the latter by providing safety incentives through "experience rating," or linking the size of insurance premiums to the safety record of the factory. It is this reductive goal that justifies our attention to workers' compensation in this article.


As the name workers' compensation suggests, the first priority of the system is compensating workers for occupational injuries and illnesses. From the program's inception, however, it was also meant to provide an economic incentive to employers to create a safer work environment. The National Commission on State Workmen's Compensation Laws in 1972 reaffirmed that "the encouragement of safety is one of the basic objectives of a modern workers' compensation system."\textsuperscript{56} It has been repeatedly affirmed by other government agencies, including the Intradepartmental Workers Compensation Task Force (1977) and Interagency Task Force on Workplace Safety and Health (1978).\textsuperscript{57}

The basic system links premium payments to a firm's accident record. The smaller firms, with approximately 15 percent of all employees, are "manually rated," whereby the accident premium reflects the norm for all firms in the same line of business. The larger firms, with the remaining 85 percent of all employees, are "experience rated," with the amount of the premium tied to the accident history of the particular firm.\textsuperscript{58} The economic logic

\textsuperscript{55} Burton, \textit{Introduction to New Perspectives in Workers' Compensation} 13 (J. Burton ed. 1988).
\textsuperscript{56} National Commission, supra note 45, at 72.
behind experience rating is straightforward. With the size of the firm's premium tied to both the level of benefits paid to workers and, more importantly, the accident history of the firm, the employer has an economic incentive to control safety and health hazards in the workplace. Since all firms must make some allowance for workers' compensation, insurance premiums should become just one more cost incidental to doing business. Ideally, it also should be to the competitive advantage of one firm to adopt safety and health control technologies and strategies (where preventive costs do not exceed compensatory costs), and thus lower one of the firm's incidental costs.

The majority of attempts to measure the reductive impact of workers' compensation on workplace injuries have focused on the variations between the level of benefits and injury rates within the workers' compensation system. James Chelius provides one of the few attempts to compare the earlier tort system with workers' compensation. The period of analysis was 1900 to 1940, and, using admittedly rough econometric techniques, Chelius compared the relationship between the machinery death rate and the liability arrangement (negligence versus strict liability). Given the extended time period for his analysis (40 years), by necessity he had to control for the effect of additional factors that might have influenced the death rate — factors such as medical advances in the care of injuries, fluctuations in the business cycle, or exposure to machinery relative to the size of the population.

With due allowance for the problems in any such analysis, his "results clearly indicate[d] that the death rate declined after workers' compensation was instituted as the remedy for accident costs." As Chelius acknowledges, his figures do not show that workers' compensation is the optimal solution to reduce risk, only that it seemed to better serve the goal of occupational safety than the tort system—at least as measured by the death rate.

The economic literature offers numerous attempts to measure the incentive effects of experience rating and the level of benefits

61. Chelius, supra note 37, at 76.
62. Id. at 44.
under workers' compensation.\textsuperscript{63} In the ideal economic world, where labor can move freely between jobs and perfect information flows between employers and employees, wage differentials would adjust to the level of risk.\textsuperscript{64} Workers and employers would then make the appropriate trade-offs between risk and salary.\textsuperscript{65} The employer would need to consider the replacement and retraining costs of the injured worker, and the employee would need to consider whether the wage differential for hazardous work really compensated for the danger involved.

The empirical findings comparing wage-risk differentials and workers' compensation incentives are mixed at best. As to the wage-risk differential, there is evidence that workers are aware of occupations by their level of danger,\textsuperscript{66} but more importantly, there is some correlation between salary and the danger of occupation. One leading economic researcher contends that even with a workers' compensation system, the wage differential is the predominant incentive mechanism fostering health and safety in the American economy.\textsuperscript{67} Other studies have partly corroborated his findings showing a correlation between higher wages and workplace fatalities.\textsuperscript{68} However, the central question which none of these studies adequately addresses is whether the market is fully compensating the workers for the level of danger they might face, and whether the market really provides adequate incentives to the employer to reduce workplace accidents.\textsuperscript{69}


\textsuperscript{64}The point of reference for this discussion is Adam Smith's theory of wage-risk calculations in hazardous jobs. See, e.g., W. Viscusi, Reforming OSHA Regulation of Workplace Risks, in REGULATORY REFORM: WHAT ACTUALLY HAPPENED 237 (L. Weiss & M. Klass eds. 1986); Duncan & Holmlund, Was Adam Smith Right After All? Another Test of the Theory of Compensating Wage Differentials, 1 J. LAB. ECON. 366-79 (1983).

\textsuperscript{65}Chelius, supra note 37, at 6-8.

\textsuperscript{66}Viscusi, supra note 64, at 239.

\textsuperscript{67}Id. at 240.


\textsuperscript{69}Ehrenberg, supra note 63, at 79.
As to the first query, it is hard to answer whether a higher wage differential is an adequate trade-off for the threat of an injury or even fatality. In a less-than-perfect world, the level of information, particularly with respect to toxic chemicals, is woeefully inadequate. Thus, workers frequently make trade-offs on an uniformed basis. It is also likely that demographic factors such as age, education, and family background further complicate risk-choice calculations for the economic or rational man. The point here is not whether workers and employers might prove willing to make such wage-risk calculations, but whether it can be shown that workers are fully compensated for the risk and danger they have chosen to expose themselves to.

The empirical evidence for the incentive effects of experience rating and the level of benefit outlays under workers' compensation is no more satisfactory. The great majority of studies have focused on the level of benefits and its correlation to claims frequency, with "principal, and virtually unanimous, finding of this research over different time periods and specifications [being] that injury rates or claims frequency vary directly with WC benefits." Simply put, when workers' compensation benefits rise, there is a corresponding increase in the claims-filing rate of workers. Yet problems arise in trying to interpret these findings. One reading is that higher benefits supposedly lead workers, confident that insurance will cover the resulting injury, to be more careless on the job. But, just as logically, the correlation might be the result of increased reporting of injuries congruent with higher benefits. Even more perversely, the causal relation might be improperly specified, perhaps because higher injury rates are the cause of higher benefits rather than the reverse. The larger point here is that our present data will not allow us to disentangle the causal relations between higher benefits and injury rates.

Rather than measuring the role of experience rating in lowering the injury rate, the studies summarized to this point have focused on benefit levels and the rate of injury. There have been only two studies that have tried to directly measure the relation between experience rating and injury rates. In the first study,

70. Worrall & Butler, supra note 58, at 103.
72. Ehrenberg, supra note 63, at 91.
Chelius and Smith contrasted small, manually-rated firms with large, experience-rated firms. The experience-rated firms each had more than 1,000 employees, so that full weight would be given to firm-specific losses irrespective of the industry (manually-rated) norms; the assumption is that for experience-rated large firms, the incentive should be more focused — and thus more reductive — to its particular accident and injury history. Nonetheless, their finding was that experience rating had "no observable effect on employer behavior" in attempting to reduce injuries.73

In the second study, John Ruser in 1985 reexamined the Chelius and Smith hypothesis on the relationship between experience rating and injuries. His data sampled 25 U.S. industries during 1972-1979.74 Contrary to Chelius and Smith, Ruser found a:

statistically significant relationship between the establishment size and the incidence of injuries. This is consistent with the hypothesis that there are economies of scale in the production of safety and that a higher degree of experience rating leads to lower injury rates.75

Perhaps the most judicious statement after reviewing this empirical literature is to acknowledge the measurement problems, assert the need for further study and, for the interim at least, reaffirm the reductive incentive claim of workers' compensation. Experience rating and the increased cost of workers' benefits send the right signals to employers and employees. As one report concluded, "the basic argument favoring extension of experience rating [as an employer incentive] is that any incentive promoting greater safety consciousness is desirable, even if the extent to which experience rating actually reduces accidents cannot be here specified."76

C. Occupational Disease Under Workers' Compensation: A Bridge Yet to be Crossed

If one must exercise caution in making any affirmative claims about the incentive effect of workers' compensation on workplace


75. Id. at 498-99.

accidents, its effect on occupational disease is considerably less circumspect. Workers' compensation is far more effective in fairly distributing losses in "blood trail" injuries than for occupational diseases, where the etiology is causally far more complex. Furthermore, there are no indications of any kind that workers' compensation plays any reductive role with respect to occupational diseases.  

Workers' compensation programs began as a means by which to deal with industrial accidents, and most specifically excluded occupational diseases from their purview; it was not until the New Deal and an increasing number of claims for silicosis that occupational disease began to be covered by state workers' compensation programs. The accident-orientation of workers' compensation is still very much in evidence in the numerous eligibility requirements that an occupational disease victim must traverse, and there is little recognition of the differences between an occupational disease and an injury:

Accidents are dramatic, time-definite, discrete events for which a clear and immediate relationship exists between an on-the-job occurrence and an injury. On the other hand, diseases develop and manifest themselves over time, and their origins are often much less obvious.  

In a number of states, workers must demonstrate that just as an accident occurred at a particular workplace, a disease was contracted at a particular location and is "peculiar to the worker's occupation" — not one of the "ordinary diseases of life." Such requirements of direct and specific causation exclude compensation and weaken employer incentive to affirmatively address certain health hazards.  

Additional serious problems face claimants concerning proof of causality. Many of these diseases take years before their symptoms appear; in the meantime, the employee might have changed jobs several times or led an unhealthy life outside work. There

77. DARLING-HAMMOND & KNIESNER, supra note 32, at 56-62. See generally Schroeder, Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Disease, 49, vol. 4 LAW & CONTEMP. PROBS. 151, 156 (Autumn 1986).  
80. Schroeder, supra note 77, at 157.
are also considerable gaps in scientific knowledge about the toxicity of many chemicals. At least 80 percent of the 48,000 chemical substances in industrial use have no toxicity information available.\textsuperscript{81} Just as there are extensive gaps in the level of our information about the toxic substances that employees are exposed to, there is considerable variation in the estimated number of annual fatalities from occupational disease. Peter Barth, in one of the most recent and exhaustive studies of this question, takes issue with the frequently quoted Department of Labor figure of 100,000 occupational disease fatalities per year, which he asserts is vastly understated.\textsuperscript{82} However, he agrees with most analysts that whatever the size of the problem, workers' compensation has not found a solution either at the distributive or reductive level.\textsuperscript{83} For example, a federal study of workers' compensation completed in 1980 found that:

[W]hile only ten percent of accident claims were contested, that figure ballooned to sixty percent of all occupational disease claims, and ninety percent of all dust disease claims. As a result, the system that was supposed to provide speedy compensation as the workers' quid pro quo to relinquishing tort actions has taken on many of the trappings of common law litigation — retention of lawyers, delays, cost, and compromise.\textsuperscript{84}

One measure of this failure of workers' compensation is that according to one estimate by the Department of Labor only three percent of those with an occupational disease actually draw on the workers' compensation program.\textsuperscript{85} With respect to some diseases, such as black lung, the state workers' compensation systems have simply ceded all responsibility to the federal government to set up an industry-specific special fund.\textsuperscript{86} This


\textsuperscript{82} Barth, \textit{supra} note 78, at 15-17.

\textsuperscript{83} Id. at 186-87; Landrigan, \textit{supra} note 81, at 4-5; \textit{Compensating Victims}, \textit{supra} note 79, at 925.

\textsuperscript{84} Schroeder, \textit{supra} note 77, at 157-58.


pattern is likely to continue as the federal government increases its understanding of the dangers of occupational hazards and the limits of present compensatory systems.\textsuperscript{87}

Another response to the failure of disease coverage has been an attempt to return to private suits (especially, as in the case of asbestos, class actions) in civil court. However, as noted infra in Part III, the exclusivity rule bars most suits against employers.\textsuperscript{88} Yet continued pressure by the private bar to forge a more responsive legal approach in the courts may eventually pressure workers' compensation programs to react and reform. In the words of one leading commentator, "litigation is frequently used as a vehicle for clarifying and then translating changes in societal views into an eventual renegotiation of public policy."\textsuperscript{89} In any event, how best to deter and compensate for occupational diseases will likely remain at the center of controversy for workers' compensation for well into the next century.

\textbf{D. A Postscript: The Educative Role of Workers' Compensation}

Because the reductive function of workers' compensation is served primarily through experience rating, there is a tendency to dismiss the important educative role played by the workers' compensation insurance carriers. Indeed, for many employers, these insurers are the primary source of information concerning new developments in both health and safety problems and control mechanisms: "Representatives of insurance companies visit more plants than OSHA is able to inspect, and many employers, especially small firms that lack full-time health and safety personnel, rely on the advice of their insurer's loss-control specialists."\textsuperscript{90} Whether provided by the government or private sector, such information can lead to the voluntary implementation of changes, and may represent one of the most vital, efficient components of a company's overall health and safety strategy.

Yet it is fruitless to argue the virtues of one reductive approach over another. Significant improvements in occupational safety and health will depend on a variety of approaches, including the

\textsuperscript{87} Berkowitz, \textit{supra} note 86, at 178-79.
\textsuperscript{88} See generally \textit{infra} Part III text and accompanying notes.
\textsuperscript{89} DARLING-HAMMOND & KNIESNER, \textit{supra} note 32, at 32.
\textsuperscript{90} OFFICE OF TECHNOLOGY ASSESSMENT (OTA), \textit{Preventing Illness and Injury in the Workplace}, Summary 99th Cong., at 32 (April 1985).
incentives offered by the subject of the following section: employer exposure to civil liability in tort.

III. CIVIL LIABILITY IN TORT

Classically, tort liability for personal injury and wrongful death serves both the reductive and distributive functions of law by assessing damages against those responsible for the harm, thus encouraging accident prevention and minimizing overall social costs. As noted in the previous section, for a time the tort-based system of liability that preceded workers' compensation satisfied intuitive notions of fairness by linking compensation to fault and encouraging loss prevention by penalizing employers who did not adequately protect their workers, but the inefficiencies and inequities of the adversarial approach eventually led to its replacement by state workers' compensation laws.91

The basic premise behind workers' compensation is the trade-off between employees getting prompt and certain compensation and their giving up the right to sue. In New York Central R.R. Co. v. White, which upheld the constitutionality of the workers' compensation system, the Supreme Court justified the abrogation of common law rights on both sides — the employees' right to sue vis-a-vis the employers' right to be held liable only for cause — by citing three factors: the special nature of the employment relationship, society's interest in its smooth operation, and the reciprocal advantages substituted for those rights.92

The practical consequences of this quid pro quo, then, is that filing a workers' compensation claim is ordinarily the exclusive remedy available to employees or their survivors for injuries, illnesses or deaths arising out of and in the course of employment. This exclusivity rule was unaffected by the passage of the OSH Act in 1970, though for a time it was unclear whether the language of the Act would expand workers' rights to file suit. In two leading decisions, Byrd v. Fieldcrest Mills, Inc.93 and Skidmore v. Travelers Insurance Co.,94 the courts held that the federal OSH Act neither created any new private rights of action nor permit-

91. See generally Darling-Hammond & Kniesner, supra note 32, esp. 3:12. See also Chelius, supra note 37.
92. 243 U.S. 188 (1917).
93. 496 F.2d 1323 (4th Cir. 1974).
ted private suits based on its provisions when state workers' compensation laws applied. Nonetheless, the exclusivity rule is not absolute. Most states recognize four exceptions to the exclusivity rule, each of which would allow a worker to seek compensatory and possibly punitive damages from his or her employer: (1) the disability is not compensable under the workers' compensation statute; (2) federal law provides for dual recovery from workers' compensation and tort claims; (3) the employer occupies a "dual capacity" status; and (4) the employer has committed an intentional tort rather than negligence. The remainder of this section discusses the nature and extent of each exception in light of recent case and statutory law developments.

The first exception allows a tort action to lie when the disability is not compensable under the state statute, normally for one of two reasons: either (a) the injury occurred outside the scope of employment but resulted from the employer's negligence, as in a case where the employee is off-duty but injured by the employer's negligence, or (b) the injury or illness, as a matter of law, is considered not to have arisen out of employment, as in the case of an occupational disease not covered by the compensation statute. However, judicial decisions and statutory provisions which construe compensation acts liberally so as to favor coverage have generally led to narrow application of this exception.

The second exception exists when federal law specifically authorizes recovery under both workers' compensation statutes and

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95. See Darling-Hammond & Kniesner, supra note 32, at 39-40. It should be emphasized that this discussion is limited to exceptions allowing tort claims against employers only. For example, while there have been many developments in the area of third-party liability (especially for product liability), a discussion of them is simply beyond the scope of this article. For a thorough discussion of many of the relevant issues pertaining to third-party liability, see generally Weisgall, Product Liability in the Workplace: The Effects of Workers' Compensation on the Rights and Liabilities of Third Parties, 1977 Wis. L. Rev. 1035.


tort law. Under the Federal Employer’s Liability Act (railroad workers)\textsuperscript{99} and The Jones Act (seamen),\textsuperscript{100} workers retain the right to file negligence actions \textit{in addition to} workers’ compensation claims. Again, since only a very small percentage of the workforce is affected by these statutes, this exception is limited in scope.

The third exception applies when an employer has a “dual capacity” relationship with the employee. For this exception to the exclusivity rule to apply, a second relationship, distinct from the employment relationship, must exist; the decisive test is whether the “non-employer” aspect of the employer’s activity creates obligations different from those inherent in the employment relationship.\textsuperscript{101} Most dual capacity cases involve employers who manufacture the tools or equipment used by their employees, thus opening the door to suits grounded in product liability theory.\textsuperscript{102} In recent years, the dual capacity exception has also been applied where the employer offers medical care that is negligently administered.\textsuperscript{103} While potentially broader in scope than the two exceptions noted above, many courts have restricted dual capacity to exceptional cases in non-traditional industrial settings.\textsuperscript{104}

Historically there have been relatively few successful challenges to the limited scope of these first three exceptions, thus preserving employers’ substantial insulation from tort liability.\textsuperscript{105} There have been some recent indications, however, that courts may be more willing to increase the interface between tort liability and the workplace by allowing plaintiffs’ claims grounded in the fourth exception to exclusivity — intentional tort.

\textsuperscript{100} 46 U.S.C. § 688 (1982).
\textsuperscript{103} See, e.g., Stevens v. County of Nassau, 56 A.D.2d 866, 392 N.Y.S.2d 332 (1977) (hospital employee injured on job and was negligently treated in own hospital’s emergency room); D’Angona v. County of Los Angeles, 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980) (same as above, except illness rather than injury).
\textsuperscript{105} See Rust, New Tactics for Injured Workers, 73 A.B.A.J. 72 (Oct. 1, 1987). See also DARLING-HAMMOND & KNIESNER, supra note 32, at 38-42.
Until 1978, every state required proof that the employer actually intended to injure or kill the worker before the fourth exception — intentional tort — would allow a claim to be filed in civil court, where compensatory and even punitive damages could be sought. Such cases were extremely rare. But in Mandolidis v. Elkins Industries, Inc., the West Virginia Supreme Court departed from settled doctrine by adopting a significantly broader definition of intentional tort — one that dimmed the bright line between reckless and intentional conduct and increased employers' exposure to civil liability.

The complaint alleged that Mandolidis was injured by an unguarded table saw and that (a) his employer knew it violated state and federal safety laws and had been cited previously by OSHA; (b) other workers had been injured by unguarded saws; (c) Mandolidis had complained about the condition and then was threatened with discharge; and (d) another employee has been sanctioned for refusing to use unguarded equipment. The majority allowed the common law suit to proceed, holding that "when death or injury results from willful, wanton, or reckless misconduct such death or injury is no longer accidental in any meaningful sense of the word, and must be taken as having been inflicted with deliberate intention for the purposes of the workmen's compensation act."

In explaining why the suit should be allowed, the court offered a plain public policy:

The workmen's compensation system completely supplanted the common law tort system only with respect to negligently caused industrial accidents, and employers and employees gained certain advantages and lost certain rights they had heretofore enjoyed. Entrepreneurs were not given the right to carry on their enterprises without any regard to the life and limb of the participants in the endeavor and free from all common law liability.

Despite outcries from business, other chinks in the protective armor of exclusivity appeared as plaintiffs' lawyers across the country sought to extend Mandolidis. To date, several state

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108. Id. at 914.
109. Id. at 913 (emphasis in original).
courts have established similar precedents in cases involving egregious employer misconduct. For example, between 1982 and 1984 the Ohio Supreme Court decided three cases on exclusivity and intentional tort, each progressively expanding workers' common law remedies in civil court. Blankenship v. Cincinnati Milacron Chemicals, Inc.,\textsuperscript{110} Nayman v. Kilbane,\textsuperscript{111} and Jones v. VIP Development Co.\textsuperscript{112} collectively went beyond Mandolidis in affecting three important changes in Ohio workers' compensation law: (1) the scope of intentional tort was enlarged to include an employer's misconduct that was "substantially certain" to threaten harm to employees, even if it was unintentional; (2) injured employees were entitled to "double recovery," meaning both workers' compensation and civil damages; and (3) workers' compensation benefits were not required to be offset against any tort damage award.\textsuperscript{113}

South Dakota, Louisiana, and Texas courts have also modified their tort-exclusivity precedents. In a 1983 case, VerBouwens v. Hamm Wood Products,\textsuperscript{114} the South Dakota Supreme Court replaced its actual intent requirement with a "substantial certainty" standard virtually identical to Ohio's. Similarly, Louisiana courts now recognize workplace intentional torts when the plaintiff can prove that the employer either intended to injure or believed that the result was "substantially certain to follow from what he did."\textsuperscript{115} Additionally, the Texas Supreme Court has held that only "heedless and reckless disregard" — not actual intent — was required under a statute that allows heirs to recover damages if an employer's willful act or gross negligence causes the employee's death.\textsuperscript{116}

As a result of the asbestos litigation that has been pervasive in their jurisdictions during the past decade, California and New

\textsuperscript{111} 1 Ohio St. 3d 269, 439 N.E.2d 888 (1982).
\textsuperscript{112} 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
\textsuperscript{113} See generally Ballam, \textit{International Torts in the Workplace: Expanding Employee Remedies}, 25 \textit{Am. Bus. L. J.} 63 (1987), esp. 66-87. Ballam notes that Ohio was the only state that allowed double recovery without requiring the workers' compensation payment to be offset against any tort recovery.
\textsuperscript{114} 334 N.W.2d 874 (S.D. 1983).
\textsuperscript{116} See Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981).
Jersey have also reconsidered their exclusivity rules. The supreme court of each state has upheld the appropriateness of tort liability when employers fraudulently conceal medical records that show employees are suffering from asbestos poisoning. However, the 1980 California case, *Johns-Manville Products Corp. v. Superior Court*, and a 1989 New Jersey case, *Millison v. E.I. du Pont de Nemours & Co.*, drew an important distinction between causing and aggravating occupational diseases. Both decisions concluded that had the complaint alleged only that employees contracted the disease because the employer (a) concealed the hazardous condition, (b) failed to supply protective equipment, and (c) violated government regulations, workers' compensation would have remained the plaintiffs' exclusive remedy; however, if the allegation of concealment kept employees on the job unaware and prevented them from receiving treatment — thus aggravating the disease — that was sufficient to state a cause of action. In short, the courts reasoned that the fraudulent concealment which aggravated the disease was an unassumed risk, distinct from the job-related hazard that caused the disease, and thus provided sufficient cause to take the case out of workers' compensation.

Two basic questions are presented concerning the erosion — which has been driven primarily by state court decisions over the past decade — of the traditional exclusive remedy doctrine: (1) Will the erosion continue?, and (2) Should it continue? While it is impossible to tell just how many other state appellate courts will decide the issue, the likelihood of a continuing stream of exclusivity challenges is high. Apart from the demands of distributive justice, plaintiffs' lawyers have two strong economic incentives to continue the assault. First, even the most generous workers' compensation benefits represent only a fraction of what might be recovered in tort damages; second, fees for representing a worker in workers' compensation are often prescribed by statute or by the courts at a percentage well below the standard

117. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).
tort contingency fee. Still, the likelihood of continued challenges reveals nothing about the likelihood of successful challenges.

As reflected in Mandolidis and its progeny, the argument favoring a more liberal interpretation of intentional tort liability has been simple and direct: denying common law suits in cases of wanton, willful or reckless employer misconduct is unjust and counterproductive to workplace safety. From both a moral and economic perspective, the law simply should not treat employers' reckless disregard for the health and/or safety of their workers the same as an accident. Unlike the possibility of punitive damages in tort, currently most workers' compensation schedules provide for no additional recovery for wanton or willful behavior, no matter how outrageous. As a result, workers' compensation provides employers with virtually no incentives of any kind to refrain from such conduct.

Yet the long overdue remedial steps taken by the courts in such states as West Virginia and Ohio since 1978 have been pruned back significantly by legislation. In 1983, the West Virginia legislature responded to Mandolidis by adopting a statute which specifies that the specific intent requirement of intentional tort cannot be satisfied by proof of "willful, wanton, or reckless misconduct" or "negligence, no matter how gross or aggravated." While the statute allows for intentional tort liability without a strict showing of actual intent, the worker now bears the difficult burden of proving that "the employer intentionally and knowingly exposed the employee to an unsafe working condition that presented a high degree of risk and that specifically violated a state or federal safety statute or regulation." And in 1986, following the Blankenship-Nayman-Jones trilogy of deci-

121. See Rust, supra note 105, at 73. Under some workers' compensation schedules, a worker may qualify for up to $10,000 for the loss of an eye, while the same case in tort could bring $100,000; additionally, some state statutes set lawyers fees as low as 10 percent, while the standard tort contingency fee is one-third.

122. A few state statutes, including California's, contain a penalty multiplier that can increase a workers' compensation award by up to 50 percent under aggravated circumstances. Yet ceilings are placed on these penalties — California's is $10,000 — that may render their deterrent effect virtually worthless. Given that the awards are often small to begin with, a 50 percent increase thus may well be minimal. See Wilkinson, supra note 101, at 91. The California penalty multiplier is found in Cal. Lab. Code § 4553 (West 1985).


sions, the Ohio legislature reversed the gains workers had made regarding access to civil court for intentional torts. The legislature reestablished the requirement of proof that the employer acted with "deliberate intent" to harm the employee, and thus rejected the Ohio Supreme Court's holding that intent can be inferred when the employer knew that harm was substantially certain to occur.125

Reducing the scope of intentional tort in this way has profound implications for the law's reductive function as it would operate in the real world of business, which is populated not by malicious thugs but by cost-conscious managers:

When employers provide unsafe working conditions in order to cut costs, their specific motive in doing so is to increase overall profits, not to injure their employees. Under the standard employed by the Ohio Supreme Court, employers so obsessed with cost-cutting that employee safety is jeopardized can be held accountable, but under the legislative definition no such accountability exists.126

Such legislative reversals are likely due to political pressures engendered by the extreme sensitivity of business to increased tort liability exposure. While there are no studies indicating whether there was an actual increase in the costs to businesses, there is evidence that the number of tort suits filed in West Virginia rose dramatically after Mandolidis.127 With workers' compensation costs already a significant factor in many new or relocating companies' decisions about where to locate, businesses — and legislators — in states with Mandolidis-like policies may conclude that they are placed at a competitive disadvantage vis-a-vis states with the traditional exclusivity barriers to tort liability. As has been observed elsewhere, this political dilemma renders state-by-state reform impractical and thus necessitates either federal intervention and/or uniform model legislation.128 To date, however, neither has received serious attention.

125. See Ohio Rev. Code Ann. § 4121.80(G)(1) (Baldwin 1988). It should be noted that not all reversals of worker gains have occurred as a result of legislative action. For example, two recent California Supreme Court decisions, Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987), and Jones v. Kaiser Indus., 43 Cal. 3d 552, 737 P.2d 771, 237 Cal. Rptr. 568 (1987), effectively restrict the limited workplace tort opening provided by Johns-Manville.
128. See generally Ballam, supra note 113, esp. 89-92. See also Amchan, supra note 106, esp. 694-96.
The increase in workplace tort litigation has not been — and will never be — a panacea for the limitations of the workers' compensation system. But frequent litigation is often symptomatic of a dysfunctional system, and a growing number of state courts have determined that workers' access to the civil courts should be expanded — especially when it will serve the public interest by encouraging employers to be as sensitive to employee safety as they are to profits.\textsuperscript{129} While frequent litigation may create some problems and uncertainty in the short run, in the long run it may help to establish new boundaries leading to a more proactive workers' compensation system.

IV. CRIMINAL PROSECUTION

The most dramatic response to the \textit{de facto} deregulation of workplace safety in the 1980s has been the relatively small but increasing number of highly visible criminal prosecutions of corporations and their managerial agents for workplace deaths and injuries.\textsuperscript{130} While prosecutions at both the state and federal level for environmental and especially financial crimes had become fairly common by the mid-1980s, it took the guilty verdicts in \textit{People v. Film Recovery Systems},\textsuperscript{131} Illinois' celebrated "corporate murder" case, to raise the stakes with regard to crimes against worker safety.

Film Recovery Systems, a suburban Chicago corporation, extracted silver from used photographic and x-ray film by means of a process that involved vats of a sodium cyanide solution. The

\textsuperscript{129} This section (Part III) of the article has focused almost exclusively on the reductive function of workers' compensation as it currently applies to intentional torts. As noted in Part II, workers' compensation may also have significant shortcomings in efficiently serving its \textit{distributive} goals — especially with regard to occupational illness and disease. Thus, it appears likely that any reform movements seeking greater access to the civil courts will need to respond to both the distributive and reductive failures of workers' compensation.


company's workforce consisted primarily of Mexican and Polish immigrants who were working illegally and spoke little or no English. On February 10, 1983, Stefan Golab, a 61-year-old Polish immigrant, died of acute cyanide poisoning while on the job. After an investigation by the Cook County State's Attorney's Office, a grand jury indicted Film Recovery Systems and a subsidiary corporation for involuntary manslaughter. It also indicted five corporate officers for murder under an Illinois statute that defines the crime as knowingly committing acts that "create a strong probability of death or great bodily harm."\(^{132}\) After an eight-week bench trial in 1985, both corporations and three of the five officers were found guilty of all charges.\(^{133}\) The judge concluded that the employees were willfully deceived about the hazards of working with cyanide, supplied with virtually none of the safety equipment required by law, and provided with a woefully inadequate ventilation system for the 140 vats of cyanide crowded into the warehouse. Each executive was sentenced to 25 years in prison, while the corporations were each fined $24,000.\(^{134}\) The convictions remain on appeal.\(^{135}\)

Christopher Stone has observed that in seeking to achieve its reductive goals, the law must distinguish between two types of behavior:

[The] reductive goal itself has different aspirations in different areas of conduct. On the one hand, there is behavior so disfavored — murder, for example — that we want to eliminate it entirely, without giving the actor an option of maintaining or decreasing the level of harmful conduct, depending on his willingness and ability to pay the damages. I will call this conduct "absolutely

\(^{132}\) ILL. REV. STAT. ch. 38, paras. 4-6 (1985).

\(^{133}\) One defendant was never successfully extradited from the State of Utah, despite numerous personal appeals by Illinois Governor James Thompson; a second defendant had the charges against him dropped at the close of the prosecution's case.

In addition to murder, each defendant was charged with 14 counts of reckless conduct in connection with burns and other injuries suffered by workers other than Stefan Golab.

\(^{134}\) The individual defendants were also fined $10,000 each, and the corporations $10,000 each for manslaughter and $1,000 for each of the 14 counts of reckless conduct. The sentencing occurred on July 1, 1985.

disfavored conduct."
On the other hand, there is behavior that law disfavors, but feels it cannot absolutely eliminate without risking social losses that could, in some cases, exceed the gains. This I call “qualifiedly disfavored conduct.”

With *Film Recovery*, a fundamental, symbolic shift can be said to have had occurred: knowingly or recklessly maintaining unsafe workplaces, previously thought of as qualifiedly disfavored conduct, had clearly been re-labeled by an Illinois court as absolutely disfavored. As a result of the tremendous publicity it generated, *Film Recovery*, (though just one Illinois trial judge’s verdict) had an immediate impact on the scope, if not the exercise, of prosecutorial discretion nationwide. Behavior that had previously been called just “bad business,” and would have led to only a workers’ compensation claim, civil suit, or regulatory action, could now be labeled a violent criminal act.

To explain further this important change in consciousness, one might consider an analogy to homicide prosecutions of drunk drivers who have recklessly caused a fatal accident. Owning and operating a business, like owning and operating a motor vehicle, is a socially encouraged and beneficial behavior. Likewise, running most businesses, like driving cars or trucks, is regulated primarily by a set of essentially civil and/or administrative rules. Virtually no moral opprobrium is risked: if you violate a rule, you normally pay the fine (or damages, if you cause harm by your negligence) and go on your way. Yet when a driver deviates so far from acceptable standards of driving that it takes a life and shocks the conscience of the community, it is seen as quite proper for a prosecution to take place; simply asking that the damages be paid will not be viewed as a sufficient response. A similar approach is now being taken with respect to business: There are certain activities that are just too objectionable to allow them simply to be taxed and paid for, and recklessly exposing workers to unnecessary safety and health risks is now among them.

A number of commentators have recognized that nearly all of these workplace prosecutions have been occurring in state rather

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than federal courts. The remainder of this section will first examine the reasons why the responsibility of using criminal sanctions to deter employer misconduct in the workplace has been assumed primarily by state prosecutors, and then discuss whether such prosecutions will likely continue.

There are currently three federal laws with provisions that impose criminal liability on employers (individuals and organizations) for willfully violating safety standards and/or endangering workers:

1) The Occupational Safety and Health Act (29 U.S.C. § 651 et seq.)
Applies to any employer who willfully violates a specific OSHA standard that results in an employee's death. Maximum penalty: $10,000 plus six months imprisonment, doubled for subsequent offenses.

2) The Federal Mine Safety and Health Act (30 U.S.C. § 801 et seq.)
Applies to any mine operator who willfully violates a mandatory health or safety standard or knowingly violates or refuses to comply with any FMSHA order. Maximum penalty: $25,000 plus one year imprisonment, $50,000 and five years for subsequent offenses.

3) The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.)
Applies to any marine employer covered by the act who willfully violates or fails to comply with any LHWCA provisions. Maximum penalty: $3,000 per violation.

The following discussion focuses solely on the OSH Act's criminal provision for two reasons: first, a far greater variety and number

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138. There are currently no federal homicide or generally applicable reckless endangerment statutes. But see infra note 165.

139. See 29 U.S.C. § 666(e) (1970) (liability provisions); 29 U.S.C. § 660 (penalty provision). The Criminal Fine Enforcement Act of 1984 raised the stakes, however. A corporation may now be fined up to $500,000 for an OSHA violation, individuals up to $250,000; maximum prison terms remained the same. 18 U.S.C.A. § 3571 (1987). It should be noted, however, that civil sanctions are provided for violations which do not lead to death of an employee.


of employers and workers are covered by OSHA provisions than by the relatively narrow FMSHA or LHWCA. Second, no studies are available on the number of prosecutions under either FMSHA or LHWCA. According to studies released within the past year by the independent National Safe Workplace Institute\(^\text{142}\) and the House Committee on Government Operations,\(^\text{143}\) the OSH Act's criminal provision has virtually atrophied. As the House report concluded:

OSHA's record with respect to seeking criminal penalties for workplace safety violations and fatalities is dismal.... Since its creation by Congress in 1970, OSHA has referred only 42 cases to the Justice Department for possible criminal action. Only 14 of those cases were prosecuted, resulting in 10 convictions, but no jail sentences. No one has ever spent a day in jail for violating the OSH Act.\(^\text{144}\)

Another telling statistic is the existence of only one reported appellate decision involving a criminal conviction in the nearly 20-year history of the agency.\(^\text{145}\) Many reasons have been offered to explain this inattention, but one commentator may have caught the essence of the political reality in concluding:

Effective strategies designed to serve the often competing interests of the corporation, its workers, and the public are more likely to be found in persuasive techniques than in punishment. Nevertheless, inducements to compliance are usually ignored as policy alternatives in favor of unenforced laws passed as legislative show pieces and disguised as punishment.\(^\text{146}\)

Whatever the explanation, it is clear that a regulatory vacuum

\(^{142}\) See generally Nat'L Safe Workplace Inst., Ending Legalized Workplace Homicide (July 15, 1988).


\(^{144}\) Id. at 4. But see Hagedorn and Gayelin, Settlement in Tax-Shelter Scam Is Expected To Be Cleared by Court, Wall St. J., Sept. 19, 1989, at B, which reports that a corporate president in South Dakota will become the first executive sentenced to jail under the OSH Act.

\(^{145}\) U.S. v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975). It should be noted also that in 1988 there were at least 78 professionals in the federal government with full-time responsibilities for investigating and prosecuting environmental crimes compared to zero staff professionals for OSHA prosecutions. See Nat'L Safe Workplace Inst., supra note 142, at 7.

has developed with respect to federal workplace prosecutions — one that has cut across administrations ever since the OSH Act became law, two years into Richard Nixon's first term in office.

But ultimately the law, like nature, abhors a vacuum. The number of state prosecutors bringing criminal charges — including assault with reckless endangerment,¹⁴⁷ battery,¹⁴⁸ and manslaughter¹⁴⁹ — has increased dramatically since Film Recovery was decided four years ago.¹⁵⁰ District attorneys in several major cities, including Los Angeles, New York, Milwaukee, Austin, and Chicago, have established special offices to investigate and prosecute workplace-related crimes.¹⁵¹ State prosecutors in California have been especially active: Since 1973, more than 250 prosecutions have occurred there, with 112 successful prosecutions between 1980 and 1988.¹⁵²

Yet, most state prosecutors still face significant obstacles in taking on corporate defendants in workplace cases, and it is unlikely that there will ever be an explosion of such cases. Investigatory, evidentiary and especially resource constraints naturally affect prosecutors, who must decide whether to commit the substantial human and economic resources that are often needed to prosecute such cases.¹⁵³ Indeed, many of the early workplace laws passed by stated legislatures at the turn of the century were enforced through the use of criminal sanctions, yet


¹⁴⁸. See, e.g., People v. Chicago Magnet Wire, supra note 130 (workers poisoned through exposure to a wide variety of toxic chemicals). See also infra note 160 and accompanying text.


¹⁵⁰. A recent Bureau of National Affairs study reported that at least 14 states have either filed criminal charges against employers as a result of workers fatalities or injuries, or have introduced workplace criminal liability legislation. See BNA, PROSECUTING WORKPLACE INJURIES AND DEATH: TRENDS AND ANALYSIS 6-9 (1989).

¹⁵¹. Id. at 1-25. See also Metz, Death by Oversight, STUDENT LAW., Sept. 1988, 13; Minter, Are Prosecutors Stepping In Where OSHA Fears to Tread?, OCCUPATIONAL HAZARDS, Sept. 1987, at 101-103.

¹⁵². HOUSE COMM. ON GOV'T OPERATIONS, supra note 143, at 4. For an analysis of the deterrent effect of the use of workplace criminal sanctions in California, see NAT'L SAFE WORKPLACE INST., supra note 142, at 15.

¹⁵³. See generally Maakestad, States' Attorneys Stalk Corporate Murderers, 56 BUS. & SOC'Y REV. 21-25 (Winter 1986). Generally, state and local prosecutors have far fewer resources with which to investigate and prosecute corporate and white collar crime cases than U.S. attorneys.
eventually fell into disuse because of such constraints. Similar constraints exist today. For example, a recent study indicated that while more than 80 percent of California district attorneys believed that workplace-related prosecutions were now within the proper jurisdiction of their office, the most significant limiting factor in their decision whether to proceed on a corporate criminal case was the level of resources available to them. Yet, prosecutors face resource allocation issues every day, and such considerations serve the essential functions of screening out marginal cases and limiting abuse of prosecutorial discretion.

Some critics have questioned the wisdom of using the threat of criminal sanctions as an incentive for employers by arguing that increased use of criminal sanctions may cause safety- and health-related recordkeeping to suffer for fear of leaving a paper trail, make businesses less cooperative with regulatory agencies for fear of revealing incriminating information, and even create a disincentive to trying new workplace safety approaches for fear of exposing the company to criminal liability. Clearly, criminal prosecution of employers for workplace deaths and injuries should be viewed neither as a preferred approach to what could be more efficiently addressed by private civil suits, nor as a substitute for active promulgation and vigorous enforcement of OSHA standards. But with the exclusivity rule's restrictions on private civil actions and a regulatory void in both administrative and criminal enforcement of the OSH Act, no other meaningful legal deterrent to egregious, employee-endangering misbehavior currently exists. Thus, it is doubtful that workers would be the primary beneficiaries of returning virtual legal immunity to employers. Criminal sanctions can play an important and effective role in deterring irresponsible business decisions, especially since managers may be among the most deterrable individuals in society.

156. Dunmire, A Misguided Approach to Worker Safety, CRIM. JUST., Summer 1988, at 44.
157. See generally supra Part III.
158. See, e.g., Braithwaite & Geis, ON THEORY AND ACTION FOR CORPORATE CRIME
The most serious threat to the continued viability of state workplace prosecutions involves an unresolved constitutional issue: whether the federal OSH Act preempts states from bringing criminal charges against corporations and their managerial agents for workplace-related offenses. There are no federal precedents which directly address the issue, and only two state supreme courts have decided the matter. In cases decided only months apart in 1989, both the Illinois and Michigan Supreme Courts held unanimously that states are not preempted from conducting workplace prosecutions. In reinstating criminal indictments brought by local prosecutors against both corporate and individual defendants, each state's highest court relied primarily on the express language of the OSH Act and analogous but non-authoritative precedents to reach their identical conclusions. Even though the Supreme Court has recently denied certiorari in the Illinois case, given the public policy significance of the issue and the dearth of precedent in the area, such a preemption case remains a strong candidate for U.S. Supreme Court review. There would appear to be no middle ground on the issue: Should the Michigan decision be affirmed by the Supreme Court, it

CONTROL, 28 CRIME & DELINQ'CY 292 (April 1982), esp. 300-305. The authors argue that business offenders are far more deterrable than street criminals for two reasons: They are not committed to crime as a way of life, and their offenses are quintessentially rational rather than expressive or impulsive. For a compilation of case studies testing this hypothesis, see generally B. FISSE & J. BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983).


161. The key provisions were 29 U.S.C. § 667(a) (1982) ("Nothing in this Act shall prevent any State ... from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no [OSHA] standard is in effect") and 29 U.S.C. § 653(b)(4) (1982) ("Nothing in [the Act] shall be construed to supersede or in any manner ... 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").

162. The most relevant precedent for each court was Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), where the Supreme Court rejected preemption by the Atomic Energy Act in a civil case involving punitive damages.
would probably be seen as a green light for additional workplace prosecutions nationwide; if reversed, it would likely toll the death knell for such cases.\textsuperscript{163} In the meantime, there are similar pre-emption cases that have been appealed in at least three other states.\textsuperscript{164}

Should the preemption argument ultimately fail and federal prosecutorial policy remain unchanged,\textsuperscript{165} state workplace prosecutions will not likely proliferate, but they will persist. With regard to the legal environment, at least 24 states have passed broadly drafted corporate criminal liability statutes, which provide for prosecutions of corporations and their managerial agents

\textsuperscript{163}. After conducting hearings on the matter, a House Committee formally recommended that "OSHA should take an official position on the preemption question and should issue a policy statement [to the effect] that Federal OSH Act, as written, does not preempt the use of historic police powers by the States to prosecute employers for acts against their employees . . ." \textsc{House Comm. on Gov't Operations, supra} note 143, at 5.

Less than two months later, a letter sent to the Chairman of the House Committee by a Department of Justice Assistant Attorney General (with supervisory responsibilities for prosecutorial policy) concluded that DOJ saw "nothing in the OSH Act or in its legislative history which indicates that Congress intended criminal penalties provided by the Act to deprive employees if the protection provided by State criminal laws of general applicability." Letter from Thomas M. Boyd to Tom Lantos (Dec. 9, 1988) (reprinted in \textsc{BNA, Occupational Safety \& Health: 7 Critical Issues for the 1990s} at B3-B6 (1989).


\textsuperscript{165}. While a turnaround in federal prosecutions of workplace cases appears unlikely, it would not be impossible — particularly if new legislation expands the scope of current criminal workplace liability. For example, Rep. John Conyers, D-Mich., will be introducing legislation that would make it a federal crime, punishable by a fine of $250,000 and jail sentence of 10 years, for managers who knowingly fail to inform appropriate agencies and affected employees about hazards in the workplace. The bill has failed each year since 1986, but allegedly has picked up significant support since then due to the increased attention being given to workplace safety. Telephone interview with Julian Epstein, legislative assistant (Dec. 15, 1988).

It is also possible that a recent Resource Conservation and Recovery Act amendment, 42 U.S.C. § 6928(e), may lead to increased workplace prosecutions. The "knowing endangerment" provision makes it a crime to place another person in imminent danger of death or serious bodily harm through transporting, treating, storing, disposing, or exporting hazardous waste. While it is not specifically directed to the employment relationship, one of the first convictions under the law involved a corporate employer who endangered three employees at a drum recycling plant. United States v. Protex Industries, 874 F.2d 740 (10th Cir. 1989). \textit{See also supra} note 145.
under the state criminal code, while several other states have judicially sanctioned such prosecutions. With regard to the social environment, studies show that the American public now condemns corporate crimes — particularly those with physical costs — far more severely than ever before. As a result, prosecutors are increasingly willing to use the criminal law as a means of expressing community moral outrage against companies that endanger human life by transgressing boundaries of acceptable risk.

V. OCCUPATIONAL SAFETY AND HEALTH FOR THE NEXT DECADE: GUINEA PIGS AND "BLUE MEN"

Workers have long served as unwitting "guinea pigs," providing useful toxicological data which helped to protect the public. The effects of most environmental pollutants, such as carbon monoxide, lead, mercury and also most human carcinogens, were first detected in workmen; the in-plant environment is a concentrated toxic microcosm of that outside.

... The demand of labor to participate actively in protecting the health and safety of workers is basic and inalienable and cannot be sacrificed to economic interests.

Clearly the reductive legal mechanisms detailed in this article will remain at the center of U.S. occupational health and safety policy. But just as changes in the social and economic environment resulted in the workers' compensation program at the turn of the century, the OSH Act in 1970, and increased criminal prosecutions in the 1980s, the present shifts and strains in our economy are leading to a new mix of forces in the field of occupational safety and health. During the past 15 years, we


167. Id. California, which has judicially approved a wide range of corporate criminal prosecutions, has criminal code legislation pending (The California Corporate Criminal Liability Act: Penal Code proposed § 387) that would create the most extensive workplace liability scheme in the nation should it become law.


have seen a decline in U.S. industrial productivity and a concomitant weakening of our trade position. In the areas of semiconductors, computers, consumer electronics, steel, chemicals, machine tools and automobiles, American companies have either ceded the market entirely to their competitors or have lost a major share of that market to foreign competitors.\textsuperscript{170} In many sectors of the American economy, we have seen the decline of the manufacturing industries and the growth of the service sector, often in conjunction with the cutting of payrolls and employees to make plants more efficient. These changes in the workplace will have real implications for the structure of the workplace and for the incentives shaping occupational safety and health during the coming decades.\textsuperscript{171}

One of the more hopeful consequences of the shift from a manufacturing- to service-oriented economy is a likely decline in injuries, since manufacturing jobs traditionally have been associated with the highest injury rates.\textsuperscript{172} But the variables operating here are more complex than a simple shift in the occupational makeup of the American workforce. The real questions center on the mix of economic strategies, chosen by American companies from a wide range of options, and the type of industrial strategy developed by the American government to confront these global challenges.\textsuperscript{173} Much of the literature diagnosing the ailments of


\textsuperscript{171} For an analysis of the changes the American economy is undergoing, see L. THUROW, THE ZERO-SUM SOLUTION: BUILDING A WORLD-CLASS AMERICAN ECONOMY (1985); ZUCKER, THE REINDUSTRIALIZATION OF AMERICA (1982); OFFICE OF TECHNOLOGY ASSESSMENT, supra note 13; J. ZYSMAN, GOVERNMENTS, MARKETS AND GROWTH: FINANCIAL SYSTEMS AND THE POLITICS OF INDUSTRIAL CHANGE (1983); T. KOCHAN, H. KATZ & R. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1986); R. REICH, THE NEXT AMERICAN FRONTIER: A PROVOCATIVE PROGRAM FOR ECONOMIC RENEWAL (1983); E. VOGEL, COMEBACK: CASE BY CASE: BUILDING THE RESURGENCE OF AMERICAN BUSINESS (1985); B. BLUESTONE & B. HARRISON, THE DEINDUSTRIALIZATION OF AMERICA (1982); J. ZYSMAN & L. TYSON, AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION: GOVERNMENT POLICIES AND CORPORATE STRATEGIES (1983); S. COHEN & J. ZYSMAN, MANUFACTURING MATTERS: THE MYTH OF THE POST-INDUSTRIAL ECONOMY (1987); DERTOUZOS, supra note 170. These works offer considerable variation, both in terms of their analysis of the American economy and in the sort of changes that the authors feel will be needed to remain competitive in the world market. There is, however, a general consensus that the American economy is in the midst of quite profound changes.

\textsuperscript{172} Burton, Introduction, in NEW PERSPECTIVES IN WORKERS’ COMPENSATION 16-17 (J. Burton ed. 1988).

\textsuperscript{173} For a discussion of industrial policy — government policies to facilitate growth
the American economy has tended to stress the need to rebuild our industrial base and improve our productivity. But in many of the comparisons drawn between the American, Japanese, and German economies over these issues, one common refrain emphasizes the need for a different human resource strategy in the workplace. In one study, the authors offer a telling anecdote:

[T]he manager of a high-fashion denim mill in Bergamo, Italy... visited a denim manufacturer in Texas. At the Texas plant, the workers' faces were so blue from denim dust that they could not be identified. "I have no blue workers!" the Italian manager exclaimed. "The union wouldn't let me get away with it. I have had to invest in air-cleaning systems that remove all that dust. And it's far better for us that we've done this. We operate better in a cleaner plant. Most important, you can't hope to get real cooperation from "blue men." "

174

As set forth in a host of recent works on the American economy, the basic components of this human resource strategy in labor-management relations can be summarized as follows:

1. The U.S. workforce is poorly educated and has consistently scored low in comparative tests with other industrialized countries. There is a need to improve our primary and secondary educational institutions, particularly in the area of the sciences and mathematics.

175

2. On-the-job training by American industry is a very low priority. Workers are not seen as a valuable resource that must be continually trained to compete in an international market.

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3. American workers are frequently seen "as expendable cogs in corporate machinery," and as a result, there is little employee

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174. See Dertouzos, supra note 170, at 17-18.

175. Id. at 81-92; Reich, supra note 171, at 213-16; Vogel, supra note 171, at 12, 228, 255-58. For a rather depressing comparison of the preparation of American students in the sciences with students in other industrialized countries, see Walch, U.S. Science Students Near Foot of the Class, 239 Sci. 1237 (March 11, 1988).


177. Zucker, supra note 171, at 58.
loyalty or commitment to the company. In contrast to Japan, job security is a low priority in most American companies.\textsuperscript{178}

4. Union-management relations remain heavily adversarial. Many American companies are still not reconciled to working with union employees and do not recognize the "rights of workers to unionize and to participate in enterprise decision making."\textsuperscript{179}

5. Labor and management relations are hierarchical and authoritarian, with detailed job classifications and top-down direction from management: "I'm paying you, and you come to work and do what I say!"\textsuperscript{180} The economic challenges that we now face require a skilled workforce accepted on a more equal footing and integrated into the company's decision-making process.

In short, our competitive economic situation requires "levels of commitment, responsibility, and knowledge on the part of the workforce that cannot be obtained by compulsion or cosmetic improvements in human/resources policies."\textsuperscript{181}

If we are to regain our productive edge and remain competitive with Pacific-rim and European companies, there is a need for fundamental changes in workplace relations. If these changes are made, they could have profound implications for occupational safety and health. At perhaps the most basic level, as companies reinvest in new plants and machinery, safety equipment designed into the initial construction becomes considerably more cost-effective.\textsuperscript{182} Hence, there is an opportunity to improve safety by literally building it into the industrial base. At the human-relations level, trust between managers and employees cannot thrive in an environment of deception about hazardous chemicals in the workplace or inflexible responses to safety considerations.\textsuperscript{183} If labor-management relations are to be characterized by cooperation, commitment and flexibility, workers must be respected and acknowledged as the valuable resource that they are. A workforce

\textsuperscript{178} Id. at 58, 98; REICH, supra note 171, at 220-21; THUROW, supra note 171, at 170-78.

\textsuperscript{179} DERTOZOS, supra note 170, at 98-99; ZUCKER, supra note 171, at 63-72; THUROW, supra 171, at 128-131.

\textsuperscript{180} ZUCKER, supra note 171, at 69; REICH, supra note 171, at 106-111; DERTOZOS, supra note 170, at 122-24.

\textsuperscript{181} DERTOZOS, supra note 170, at 124; ZUCKER, supra note 171, at 68-69; H. Shimada & J. MacDuffie, "Industrial Relations and Humanware" Working Paper (Sloan School of Management, Mass. Instit. of Tech. 1987).

\textsuperscript{182} OFFICE OF TECHNOLOGY ASSESSMENT, supra note 13, at 24-25.

\textsuperscript{183} ZUCKER, supra note 171, at 68.
that is more skilled and better educated will demand a larger voice in their work environment and expect their life and health to be respected to a greater extent than previous generations of workers. Some movement in this direction has already occurred, as safety and health issues have become a more central component of many collective bargaining agreements.\(^{184}\)

Of course, the law will continue to play an important role. Several recent statutory developments and court decisions have established some legal protections for workers that might help to foster the values of this human resources strategy. During the 1970s, the “right-to-know” movement — drawing from environmentalists, workers, and health activists — pushed for laws requiring the disclosure of toxic substances in the work environment.\(^{185}\) Corporate leaders opposed such disclosures, arguing that it would increase confusion in collective bargaining and expose trade secrets.\(^{186}\) Industry eventually supported a compromise, the Hazard Communication Act,\(^{187}\) in the hope of preempting state and local regulations. The HCA, promulgated by OSHA in November of 1983, requires employers to inform workers about a wide range of occupational risks.\(^{188}\)

In line with this expanded self-monitoring role, employees are also seeking a more expanded right to refuse hazardous work. This new employee right would narrow the traditional employment-at-will doctrine, which allows an employee to be discharged “for good cause, for no cause or even for cause morally wrong.”\(^{189}\) Yet, the protection afforded by this “right to refuse” currently remains limited. While there is some statutory support for the right to refuse hazardous work under the National Labor Relations Act (protecting “concerted activity” on behalf of safety

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\(^{184}\) N. Ashford, Crisis in the Workplace: Occupational Disease and Injury: A Report to the Ford Foundation 493 (1976).


\(^{188}\) S. Hadden, Read the Label: Reducing Risk by Providing Information 113-18 (1986).

considerations)\(^{190}\) and OSH Act (protecting rights when "real danger of death or serious injury" exists),\(^{191}\) the courts have generally been restrictive in their interpretation of these statutory protections.\(^{192}\) Critics have argued that without either legislatively broadening these statutory protections or judicially creating a public-policy-based exception to employment-at-will, the right to refuse hazardous work will likely remain relatively ineffectual in most states.\(^{193}\)

The change to a human-resources strategy in labor-management relations is one possible scenario that American business might follow.\(^{194}\) But productivity gains can also be achieved, at least in the short run, by cutting back on the workforce, making more use of overtime, and speeding up the assembly line. In knowledge-intensive industries, these strategies are unlikely to succeed, but in low-skilled, mass-production industries, they have proven to be effective in improving productivity — but only at great human cost. As The Wall Street Journal recently reported, such gains in productivity have resulted in a substantial increase in workplace accidents this decade, with disabilities continuing to escalate into the late 1980s.\(^{195}\) As reflected in the passages at the outset of this article, short-term, retrograde productivity strategies have allowed Dickensian conditions in workplaces like meatpacking houses to persist.

It is far too soon to tell just what business and economic strategies will be followed to improve American productivity, but they could have profound implications for workplace safety and health. At the same time, it is clear that the legal mechanisms...
discussed in this article — along with improved OSHA regulation — will need to contribute even more incentives to employers to resist the temptation to think “safety last” in their attempts to increase productivity and improve competitiveness.
THE PROBLEMS WITH USING COMMON LAW
CRIMINAL STATUTES TO DETER EXPOSURE TO
CHEMICAL SUBSTANCES IN THE WORKPLACE

Thea D. Dunmire*

I. INTRODUCTION

"Why shouldn’t someone who poisons employees be subjected
to criminal sanctions? Isn’t that murder too?” Stated that way,
the answer to these questions seems obvious. Poisoning someone
is murder and the just punishment is jail. Yet before accepting
this conclusion, it is worthwhile to examine if there are differ-
ences between “criminal poisoning,” the crime familiar to mystery
novel readers, and death or illness caused by occupational expo-
sure to chemical substances. The possible distinction between the
two is the primary issue to be explored in this paper.

Another issue to be explored is the problem of defining who
is the criminal. This requires an examination of the laws and
legal theories used to impose criminal sanctions in the workplace
setting. Also explored is the effect criminal enforcement has on
individual employees and the difficult position it often places
them in.

Finally, the question of who should decide whether a crime
has been committed is explored. This issue relates to what the
proper forum is for enforcement of cases involving workplace
injuries and deaths. One of the assumptions currently being
subjected to judicial scrutiny is that the federal Occupational
Safety and Health Administration (OSHA) has the exclusive en-
forcement authority in responding to workplace hazards created
by exposure to toxic substances.1

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1. As discussed further in Section V, although the purpose and coverage of the
Occupational Safety and Health Act is broad, it was not intended to displace all other
federal or state laws which dealt in some way with the safety and health of workers.
What it does displace is an unsettled question.
II. WHAT IS THE CRIMINAL ACT?

There are several basic premises which have been of importance in shaping the development of the American criminal justice system.\(^2\) One of these basic premises concerns the requirement that the criminal defendant take some action. Generally, in order for conduct to be criminal there must be something more than an evil intent, the intent must be acted upon.\(^3\) This requirement has been somewhat modified in circumstances where there is a duty to act and no action is taken. However, under these circumstances, there must be a legal duty to act in order for there to be criminal liability; a moral duty to take an affirmative action is not enough.\(^4\) Other basic premises are that only harmful conduct should be made criminal, and then only when the act of the defendant is the "legal cause" of the injury suffered. Finally, as discussed in greater detail in Section IV of this paper, some sort of "evil" state of mind is usually required for conduct to be considered criminal.

These basic premises taken together, that for there to be a criminal liability there must be an injury caused by an action on the part of the defendant, are important in the analysis of what activity is being punished when local prosecutors use the criminal common law statutes in the occupational setting. It would seem that, based on these basic premises, criminal liability would not occur any time an employee was killed or injured, but only when there was criminal conduct on the part of the person charged.

In 1985, the attention of corporate America was caught by a case commonly referred to as *Film Recovery Systems.*\(^5\) This case, in which each of the three individuals convicted were sentenced to 25 years in prison, marked the first time corporate officials were convicted of murder for a workplace death. Although *Film Recovery Systems* has been a dramatic, attention-getting case, it is not the first, or only case, where prosecutors have attempted to use statutes defining traditional common law crimes to impose

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2. W. LAFAVE & A. SCOTT, CRIMINAL LAW Chapter 3 [hereinafter Lafave].
3. Id. at 193.
4. Id. at 203-04. However, one of the special relationships where the common law has imposed an affirmative duty to act is in the case where an employer has failed to aid his endangered employee.
criminal sanctions on individuals for workplace injuries. It is interesting to examine these cases for the purpose of identifying what factors make the defendant's conduct criminal. The conditions necessary for criminal sanctions to be imposed seem to fall into two categories: situations where "gross and obviously unsafe conditions" resulted in someone's injury or death and instances where individuals, aware of the dangers of an operation, have not informed others of those dangers. "Gross and obviously unsafe" is a way of describing the fact that something more than just unsafe conditions needed to exist for criminal sanctions to be imposed. It is comparable to the fact that criminal negligence requires something more than "ordinary" negligence; it usually requires gross and wanton or gross and reckless conduct. The obviousness of the unsafe condition seems to relate to how comfortable the court is that the criminal defendant was aware that the hazardous condition existed. If the injury resulting from a workplace hazard was not directly foreseeable, it is difficult for the prosecutor to establish the criminal mental state which is a necessary element to proving common law criminal liability.

A. Gross and Obviously Unsafe Conditions as a Basis for Imposing Criminal Liability

The first type of case, where gross and obvious unsafe conditions existed, is best exemplified by People v. Deitsch. In this

6. See, e.g., Commonwealth v. Godin, 374 Mass. 120, 371 N.E.2d 438 (1977) (president of a fireworks manufacturer convicted of manslaughter as the result of an explosion in a fireworks manufacturing plant that killed three employees); People v. Warner-Lambert Co., 51 N.Y.2d 265, 414 N.E.2d 660, 494 N.Y.S. 2d 159 (1980) (indictment reversed which had been filed following an explosion in a chewing-gum manufacturing plant that killed six employees); Granite Construction Co. v. Superior Ct., 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983) (indictment was filed after seven employees were killed in a construction accident); People v. Chicago Magnet Wire Corp., 126 Ill. 2d 356, 534 N.E.2d 962, cert. denied sub. nom. ASTA v. Illinois, 58 U.S.L.W. 3202 (U.S. Oct. 3, 1989) (indictment of company and five of its executives for aggravated battery, reckless conduct and conspiracy for exposing employees to toxic substances upheld); People v. Pymm Thermometer Corp., 1989 N.Y. App. Div. LEXIS 13537 (Oct. 23, 1989) (reinstating jury verdict that executives of Pymm Thermometer were guilty of assault for exposing workers to unsafe levels of mercury fumes). In the last three years, more than 200 such cases have been brought against companies or company executives. N.Y. Times, Sept. 19, 1988, at 1, col. 4.

7. In the Illinois Supreme Court's decision in Chicago Magnet Wire, the court stated that since the charges were "based on the defendants' alleged wilful failure to remove workplace hazards which create[d] a substantial probability that they will cause injuries to their employees," employers were not left without guidance as to what standard of care they must meet. People v. Chicago Magnet Wire Corp., 126 Ill. 2d 356, 373, 534 N.E.2d 962, 969 (1989).

case, one employee died and another was injured after being trapped in a burning warehouse. The employer, Deitsch Textile Corporation, its president, his brother, and the supervising foreman were charged with second degree manslaughter, criminally negligent homicide and reckless endangerment. Evidence before the grand jury established the following: the fire escapes in the building were so blocked off by bales of material that all but one of the employees were not even aware that a fire escape existed; most of the employees received no instructions about what to do in case of a fire; self-closing fire doors were propped open and the self-closing mechanisms rendered inoperative; it was common practice to leave the elevator doors open on various floors simultaneously; and that there may have been few, if any, fire extinguishers in the building. Although the fire marshal was unable to ascertain how the fire started, the court upheld the indictments, stating that it could "see no bar to the imposition of criminal liability for deaths caused by a fire upon one who maintains what is, in effect, a fire trap, no matter what the cause of the fire." 9

There are, however, problems inherent in this type of case, in defining when conditions are sufficiently bad enough to be considered gross and obviously unsafe. Most people would agree that the situation in Deitsch presented such a situation because of the well-understood dangers of fire. There is, however, substantially less agreement on the hazards presented by exposure to chemical substances. Consider, for example, asbestos. Asbestos has been in use since 2500 B.C. and its hazards were identified by the early Romans. Its modern use dates from 1880 and its health hazard as a cause of asbestosis10 was recognized as early as the 1930s in the asbestos textile industry. 11 Yet, OSHA did not promulgate a standard regulating exposure to asbestos until 1974,12 and there is still substantial disagreement about what

9. Id. at 336. It is interesting to note that the court cited for this proposition the case following the infamous Triangle Fire, People v. Harris, 74 Misc. 353 (N.Y. Ct. of Gen. Sessions 1911). This fire occurred in a tenement sweatshop in New York City at the beginning of this century and was the turning point in a movement to upgrade workplace fire safety. However, when that case went to trial, the jury acquitted the owners of the factory — in part, say historians, because of the judge's narrow charge to the jury.

10. Asbestosis is "[O]brosis of the lung caused by asbestos." INT'L LABOUR OFFICE, 1 ENCYCLOPAEDIA OF OCCUPATIONAL HEALTH AND SAFETY 187 (3d ed. 1983) [hereinafter ENCYCLOPAEDIA].

11. Id.

level of exposure presents a risk and how much of a risk is posed. Therefore, a critical, and extremely difficult, issue in determining whether an individual is a criminal will be in defining when the risk posed to employees by the defendant's actions becomes large enough to be considered gross and obviously unsafe.

One approach suggested for defining when a risk is too large is to use standards or regulations promulgated by OSHA or some other regulatory agency for defining the criteria of what constitutes a sufficiently unsafe condition to impose criminal liability. However, just as the civil cases that have addressed this issue have held that compliance with a standard is not necessarily sufficient to avoid liability, it is not universally accepted that violation of a standard is sufficient evidence to establish negligence. In addition, courts have consistently held that the existence of OSHA standards can not be used to create a cause of action for civil liability. It would seem that if the existence of OSHA standards is not sufficient to establish civil liability; it is inconsistent for their existence to be sufficient to create criminal liability.

More importantly, to use regulatory standards to establish criminal liability is inconsistent with the theory behind the establishment of occupational standards; particularly those related to exposure to toxic substances. Standards such as permissible exposure limits (PELs) are normally established at a protective level, a level to which most workers may be repeatedly exposed without adverse effect. Thus, exposure to levels above the PEL

13. ENCYCLOPAEDIA, supra note 10, at 193. See also, Davis & McDonald, Low-Level Exposure to Asbestos: Is There a Cancer Risk?, 45 Brit. J. Indus. Med. 505-508 (1988). "We cannot say, and it may be impossible to prove or disprove that at very low levels of exposure to asbestos the risk of cancer is zero..." Id. at 507.

14. A violation of an OSHA standard is simply some evidence of negligence. Any liability is not based on the violation of the standard itself but rather upon the theory that the violation is evidence of failure to meet a proper standard of care. See G. Nothstein, Toxic Torts 212-26 (1984).


16. See American Conference of Governmental Industrial Hygienists, International Symposium on Occupational Exposure Limits. The preface to the ACGIH, Threshold Limit Values for Chemical Substances and Physical Agents in the Work Envi-
do not necessarily mean that workers will suffer harm. Therefore, the existence of an OSHA standard relating to exposure to a toxic substance does not necessarily prove or disprove the existence of a gross and obviously unsafe condition.

There is no duty under OSHA to provide a risk-free environment. Nor does OSHA have the authority to attempt to impose the elimination of all risk from exposure to toxic substances in the workplace. Section 6(b)(5) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 655(d)(5), the only provision which deals expressly with exposure to toxic chemicals, directs the Agency to set a standard for toxic materials "which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity ...."

In the Supreme Court's decision in the Benzene Case, Justice Stevens stated in a plurality opinion:

By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." There are many activities that we engage in every day — such as driving a car or even breathing city air — that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe." Similarly, a workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.17

Even though the Justices all seemed to agree in this case that the goal in regulating exposure to toxic substances was not perfect safety,18 the decision provided little guidance on what the test would be for determining that a significant risk exists or how much of a risk was acceptable. However, a latter decision,

18. Chief Justice Burger's concurring opinion stated: "Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible." 448 U.S. at 664.
in the Cotton Dust Case, made clear that once OSHA determines that a significant risk of harm exists, a standard can be set that is protective, not just preventative.

If federal regulatory standards cannot be used as a basis for proving the existence of gross and obviously unsafe conditions, then an independent determination will need to be made by the jury assigned to the particular case that the conditions were sufficiently unsafe. The experience with environmental and toxic tort cases has shown that a jury assigned to a case in which exposure to toxic substances allegedly has or will cause health effects will face a number of very difficult questions at or beyond the extent of the development of scientific knowledge. Compounding the problem will be the fact that in a criminal trial, unlike the situation in toxic tort cases, the prosecutor has the burden of proving each element of the crime "beyond a reasonable doubt" rather than "more likely than not." This means that scientific, statistical evidence sufficient to award damages in a civil case is likely to be insufficient to impose liability in a criminal case. This is particularly true of cases involving exposure to


20. In most regulatory decision-making involving questions of permissible exposure to toxic substances, various protection factors are factored in and conservative assumptions made so that an extra degree of protection is provided beyond what would simply prevent illness. Therefore, even if exposure to a toxic substance were above "permissible exposure levels," it may well be below that which has been shown to cause health effects.

21. See generally, Black, Evolving Legal Standards for the Admissibility of Scientific Evidence, 239 SCIENCE 1508 (1988). See also Nothstein, supra note 14, at 474-75. In Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975), the controversy was whether the company's discharge of tailings of asbestos-like particles substantially endangered public health. In 139 days of trial, the court heard more than 100 witnesses and received more than 1600 exhibits. The parties presented extensive expert testimony and an expert witness was appointed specifically to assist the court. On appeal, the Eighth Circuit held that "the medical scientific conclusions here in dispute clearly lie 'on the frontiers of scientific knowledge.' Indus. Union Dep't, AFL-CIO v. Hodgson, ... 499 F.2d, 467, 474 (1974). ... In assessing probabilities in this case, it cannot be said that the probability of harm is more likely than not.... The best that can be said is that the existence of this asbestos contaminant in air and water gives rise to a reasonable medical concern for the public health." Reserve Mining Co., 514 F.2d at 519-20.

22. See People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (The California Supreme Court overturned the conviction of a couple for assault and robbery because the unlikelihood of coincidence, as presented by the prosecution, did not establish the probability that the accused couple was guilty. The court expressed "strong feelings that [the application of statistical techniques in the proof of facts], particularly in a criminal case, must be critically examined in view of the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is
chemical substances because "proof" of toxic effects is often based on epidemiological studies which are statistically based.

B. Failure To Warn About a Hazard as a Basis for Imposing Criminal Liability

The second type of case, one in which there has been nondisclosure of a hazard, is perhaps best exemplified by the Film Recovery Case.\textsuperscript{23} In this case the individual defendants were convicted of murder following an employee's death due to overexposure to cyanide. The cyanide exposure was the result of an industrial operation in which silver was recovered from film in open vats containing a cyanide solution. The indictment characterized the criminal conduct as a failure to instruct an employee about "the dangerous nature of his work" and failure to provide him "with appropriate and necessary safety and first-aid equipment and sundry health-monitoring systems for his protection."\textsuperscript{24} Of particular importance to the prosecutor was the fact that affirmative steps were taken to keep employees uninformed about the dangers of the substances they were working with — individuals were hired who couldn't read the warning labels and danger symbols were removed from chemical containers.\textsuperscript{25}

Although the facts presented in this case were egregious, there are also problems inherent in this type of case. This is particularly true in those situations where no affirmative steps are taken to keep workers uninformed. First, there are the same problems, as with the previously described type of case, in determining that there is a danger that should be warned against. Second, this is clearly criminalizing not an act, but a failure to act — a failure to inform. As indicated earlier, it is a basic premise of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{24} Grand jury indictment of Film Recovery defendants, April 1984, points 2 and 3.
\item \textsuperscript{25} Comments of Jay Magmuson, prosecutor, at the Annual American Industrial Hygiene Conference in San Francisco, California, May 17, 1988.
\end{enumerate}
\end{footnotesize}
criminal law that to impose liability for failing to act there must be some legal duty to act. The problem in this type of case is not in determining if there is a legal duty imposed by the employer/employee relationship, but in determining the extent of that duty. In other words, defining the perimeters of the legal duty employers may be under to inform employees of hazards in the workplace.

The duty to disclose safety, health, and environmental hazards is currently a rapidly evolving, and often confusing, area of the law. There are federal regulations dealing with worker right-to-know, a federal law and regulations dealing with community right-to-know, right-to-know laws promulgated by state and local governments, and various recently enacted laws dealing with disclosure of environmental hazards upon the transfer of real property. The development of these laws are a further extension of the development of the failure to warn doctrine of products liability and of the liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Again there may be the claim that these laws and regulations, particularly OSHA regulations, should be used to show that there was a legal duty to warn employees about the hazards of chemicals on the part of the employer. As mentioned previously, these

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26. The situations giving rise to a legal duty include (1) duty based upon relationship, (2) duty based upon statute, (3) duty based upon voluntary assumption of care, (4) duty based upon creation of the peril, and (5) duty to control the conduct of others.

27. The Records Access Regulation, promulgated by OSHA in 1980, requires employers to provide employees access to records containing information relating to the medical and exposure histories of employees exposed to toxic substances or harmful physical agents. 29 C.F.R. § 1910.20 (1988). The OSHA Hazard Communications Standard, originally enacted in 1983 to cover chemical manufacturers and then later expanded to cover all workplaces, requires employers to take steps to affirmatively provide information on the hazardous properties of substances used or produced in the workplace to employees. 29 C.F.R. § 1910.1200 (1988).


laws are complex and often confusing. Therefore, defining the perimeters of the employer's legal duty will be difficult. For example, the OSHA Records Access regulation does not compel that information be acquired by employer, only that records already being kept be retained and provided to employees if so requested. Likewise, the OSHA Hazard Communications Standard does not require the employer to develop or search out information of the hazards of substances being used, that is the responsibility of the supplier of the chemical.

If OSHA regulations were used for showing a legal duty leading to common-law criminal liability, state courts would be placed in the position of determining the extent of the legal duty imposed on employers by a federal regulatory scheme. This would also mean that standards developed by OSHA would be used to impose liability and sanctions much more stringent than those the Agency itself could impose. First, as discussed later, OSHA can only impose criminal sanctions in narrowly defined circumstances. Second, although the OSH Act does impose a legal duty on employers and employees, it does not allow sanctions to be imposed on employees. This is an important fact because, in most of the cases where local prosecutors attempt to impose criminal sanctions for workplace hazards, individual employees are indicted as well.

III. IS THE CRIME SUFFICIENTLY DEFINED?

A basic premise of criminal law is that in order for acts to be criminal there must be some advance warning that such conduct is criminal. This is reflected in the ex post facto prohibition, the rule of strict construction of criminal statutes, the void-for-vagueness doctrine, and the trend away from open-ended common law crimes. Yet, in most of the recent indictments by local prosecutors, open-ended common law crimes, such as reckless endangerment and assault, are exactly what are being used as prosecutors seek to impose criminal liability.

32. "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct." OSH Act § 5(b), 29 U.S.C. § 654(b) (1982).
33. Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541, 554 (3d Cir. 1976).
34. Lafave, supra note 2, at 195.
This difference in how explicitly the crimes are defined may be one of the principle differences between the common law crimes and the statutory crimes contained in the OSH Act. The OSH Act authorizes criminal prosecution in the following three situations: (1) against an OSHA official who gives an employer unauthorized advance notice of an inspection; (2) against anyone who falsifies OSHA-required records; (3) where a willful violation results in an employee's death.35

Title 29 U.S.C. § 666(e) provides that:

Any employer who willfully violates any standard, rule, or order promulgated pursuant to Section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

OSHA Instruction CPL 2.39 provides that, in order to qualify for referral to the Department of Justice for prosecution, there must be evidence that: (1) a specific OSHA standard was violated; (2) the violation was willful; and (3) the violation resulted in an employee's death.

Although this statutory language and the interpretation given to it by the OSHA instruction may restrict its usage,36 it can be argued that it certainly provides more notice to individuals about what behavior is considered criminal than common-law statutes such as those defining criminal endangerment.

IV. WHO IS THE CRIMINAL?

Another basic premise of criminal law is that conduct, to be criminal, must consist of something more than mere action, or failure to act. Some sort of evil state of mind is required as well and that mental state must concur with, or relate to, the act or omission giving rise to the criminal liability.37

35. 29 U.S.C. § 666(e)-(g) (1982).
37. Notable exceptions to this premise are the felony murder rule and the development
With this concept in mind, again return to the question of whether injury or death due to occupational exposure is poisoning. The dictionary defines poisoning as injuring or killing "with a substance that through its chemical action kills, injures or impairs an organism."\textsuperscript{38} However for poisoning to be criminal, there must be an intent on the part of the defendant to kill or do serious bodily injury.\textsuperscript{39} One is not guilty of murder if poison is administered innocently or for a lawful purpose and yet produces death.\textsuperscript{40} This is an important distinction. In most occupational settings, the exposure of workers to toxic substances is not an act intended to cause illness or impairment but, instead, it is a by-product or result of the activity of the enterprise. Therefore, the necessary intent may be missing. Also, even if some evil state of mind can be discerned, it may be difficult to determine whose "state of mind" it is.

Until fairly recently, criminal liability was seldom imposed on business entities such as corporations, both because of the difficulty of defining the "mental state" of such an entity and because of the difficulty of applying criminal law statutes literally to corporations. Today, however, the organization itself is often being named as one of the defendants when a criminal action is brought because of one of the theories discussed below which were developed to get past the mental state requirement. What each of these theories have in common is that the illegal actions of individual employees exposes the corporation to criminal liability.

Several theories have been advanced for imposing common-law criminal liability on a corporation: identification, imputation, ratification and enterprise liability.

\textsuperscript{38} WEBSTER'S NEW COLLEGIATE DICTIONARY (1973).
\textsuperscript{39} Lafave, \textit{supra} note 2, at 647. Lafave also states that poisoning is criminal when the defendant's conduct evinces a depraved heart or when the death by poison resulted from the defendant's commission or attempted commission of a felony. Lafave, \textit{supra} note 2, at 647. State v. Gayle, 234 Minn. 186, 48 N.W.2d 681 (1951).
\textsuperscript{40} Lafave, \textit{supra} note 2, at 647. However, if a death results from a negligent handling of poison, there may be criminal liability for second-degree manslaughter. State v. Cantrell, 220 Minn. 13, 18 N.W.2d 681 (1945).
Under the identification theory the acts of high-level corporate officers are directly equated to be acts of the corporation. Although this theory works successfully for closely-held corporations, it does not work as well for large publicly-held corporations where corporate officers are isolated by the corporate structure from corporate activity and therefore know nothing about the criminal activity.

Under imputation theory, the corporation is criminally liable for "the acts of its agents, done within the scope of the agent’s employment for the benefit of the corporation." This concept originally came from the tort theory of respondeat superior and was gradually carried over into the criminal law. Imputation is distinguishable from identification in that under imputation theory it doesn’t matter whether the agent who committed the violation is a “low-level” employee or a higher level supervisory employee.

Ratification refers to a corporation’s after-the-fact approval of an employee’s criminal conduct. It might also include “looking the other way” when a subordinate is engaging in criminal conduct. Its growth seems to be related to concurrent developments in the principles of liability for aiding and abetting someone else’s criminal conduct and for criminal conspiracy.

The latest concept being developed is one referred to as enterprise or organizational liability. This theory is used to impose liability on a corporation in situations where it is unclear which or if any one employee is specifically responsible for violating the law. This is often the situation in large complex organizations where there may not even be a single individual totally responsible for the criminal conduct. In addition to these theories, many crimes are defined by statute, particularly in the environmental area.

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42. First, General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers, in CORPORATE CRIMINAL LIABILITY 26 (O. Obermaier ed. 1986).
43. Id. at 29, (citing United States v. Dye Constr. Co., 510 F.2d 78, 82 (10th Cir. 1975)).
44. Parisi, supra note 41, at 51-53.
45. Lafave, supra note 2, at 256-67.
46. See United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978). Corporate criminal liability was imposed for killing migratory birds where the corporation had failed to prevent birds from drinking from polluted ponds.
47. See, e.g., the Toxic Substances Control Act § 16(b), 15 U.S.C. § 2615(b) (1982); Clean
In practice, however, no matter what theory is used there is little difference in imposing criminal or civil liability on a corporation. Because a corporation cannot be imprisoned and is seldom "killed," the only sanction usually available is monetary fines. Therefore, prosecutors have been increasingly looking to impose criminal liability on individual employees instead. Prosecutors cite several reasons for this, the principal one being deterrence. Prosecutors believe that since the fines to which corporations can be subjected are fairly insignificant, deterrence can be achieved only by prosecuting individuals within the corporation. The other reasons are more pragmatic. Prosecutors hope that the individuals indicted will help them build and successfully prosecute their case against their employer and higher-level employees. Also, prosecutors prefer a case where there is a corporate representative at the defense table. This gives the jury an actual individual to identify with the crime rather than just an impersonal company or corporation.

For ease of discussion, the situations in which an individual employee may face criminal sanctions can be divided into three broad categories: (1) direct participation in the misconduct; (2) obstruction of judicial or agency action; and (3) failure to disclose criminal activity or to prevent the misconduct of others.

A. Direct Participation in the Crime

Criminal liability for direct participation in the misconduct is perhaps the easiest to understand. There are, however, several complicating factors. First, as discussed previously, is the problem of defining what the crime is. This is easier in the case of substantive regulatory crimes, such as those under the OSH Act. It becomes much harder when broad general crimes are alleged such as "criminal endangerment."

The second complicating factor is identifying who the responsible individual is in an organization with overlapping job tasks


and responsibilities. Although illegal acts of an individual employee may subject a corporate employer to liability, the illegal conduct of a corporation may not expose an individual employee to criminal sanctions unless there is criminal conduct on the part of that individual.\textsuperscript{50} In many cases, the hazard may not exist or the injury may not occur unless several employees act or fail to act.

Also, the danger may exist as a result of a complex business decision involving many levels of management or complicated cost-benefit analysis. Another inherent problem in seeking to use criminal sanctions in the corporate setting is the inverse relationship that often exists between knowledge and authority in the corporate structure. On the one hand, corporate officers and high-ranking employees may not have any knowledge that crimes are in fact being committed because of the size and diversity of the corporate structure. Yet, on the other hand, the individual employee may not know that the activity is in fact illegal or have any power to change the situation if the employee wants to keep his or her job.

Finally, there is the problem of whether the employee believes there is any real choice in avoiding the criminal activity. Although there is a right to refuse hazardous work under certain specified and limited circumstances,\textsuperscript{52} the rule in labor relations has traditionally been “Work now, Grieve later.” However, courts have not, in the past, recognized the defense of “I was just following orders” in criminal matters.\textsuperscript{51}

\textbf{B. Obstruction of Judicial or Agency Action}

Two federal statutes, 18 U.S.C. § 1503 and 18 U.S.C. § 1505, prohibit the obstruction of pending judicial or agency proceedings and the destruction or concealment of records that could be evidence in such proceedings. Potential violations include hiding


\textsuperscript{51} Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). A right to refuse hazardous work has also been recognized in certain circumstances under the NLRA (NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)), and the Federal Mine Health and Safety Act (Miller v. Federal Mine Safety Comm'n, 687 F.2d 194 (7th Cir. 1982)).

\textsuperscript{52} Lafave, \textit{supra} note 2, at 441. It is no defense to a crime committed by an individual — be he an employee, a soldier, or presidential aide — that he was only carrying out his superior's unlawful orders. See Calley v. Calloway, 519 F.2d 184 (5th Cir. 1975).
witnesses, suggesting that a witness not testify or speak to investigators, or the destruction or concealment of documents sought by investigative agencies. Under 18 U.S.C. § 1001 it is a crime to knowingly and willfully make a false statement "in any matter within the jurisdiction of any department or agency of the United States."

In 1985, a safety director of the GTE-Valeron Corporation pleaded guilty to one count of providing false information to a federal inspector. He admitted misleading an OSHA inspector during a September 1981 inspection of an industrial operation by telling her a machine at the plant was under repair when he had actually ordered that it be shut down before she arrived. The machine, a rough-cut saw, was shut down because it was known to produce high levels of toxic dust. The executive was sentenced to serve three months in prison and required to pay the maximum fine of $10,000. His lawyer described the incident as "an isolated indiscretion" whereas a former worker, now suffering from heavy-metals disease, described it as "a continuous conspiracy by Valeron to dupe the workers." 53

As prosecutors seek to impose criminal sanctions on individual employees, courts may become more concerned about limiting the scope of authority regulatory agencies currently have to compel corporations to turn over information or open themselves to inspection because of concerns about individual employee's Fourth and Fifth Amendment rights. For example, in one case, a California court held that, in view of the possible penal consequences of the California OSHA, a search warrant could be issued only if the supporting affidavit showed probable cause to believe that safety violations currently existed on the business premises. 54

C. Failure to Disclose or Prevent the Misconduct of Others

There seems to be increasing interest in imposing criminal sanctions on individuals who fail to prevent or disclose the misconduct of others, particularly if a person is in a position of

authority in the organization. Such an individual may face criminal indictment under conspiracy or aiding and abetting statutes.\(^55\)
The use of aiding and abetting provisions can have far-reaching consequences in the corporate context. 18 U.S.C. § 2 provides that anyone who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Criminal liability may be imposed under this section without proof that a defendant personally committed every act or even knew all the details of the crime. All that is necessary is that he or she was in some manner associated with the criminal venture.\(^56\) For example, under federal aiding and abetting statutes, corporate executives have been convicted for their acquiescence in, or silent approval of, crimes committed by subordinates.\(^57\)

Conspiracy statutes have the potential of applying to a host of corporate activities. The federal statute provides that:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.\(^58\)

The broad reach of this statute could engulf a corporate executive in a conspiracy prosecution based on his or her position in a

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\(^{55}\) Although federal statutes are discussed in this section, many state criminal statutes also contain aiding and abetting and conspiracy violations. In several of the recent criminal cases brought in response to workplace injuries, there have been conspiracy counts included in the indictment.


\(^{57}\) See United States v. Laffal, 83 A.2d 871 (D.C. 1951). In Laffal, the court stated: "[T]here is ample authority in support of 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 .... If 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." Laffal, 83 A.2d at 872 (quoting Carolene Prods. Co. v. United States, 140 F.2d 61, 66 (4th Cir. 1944), aff'd, 323 U.S. 18 (1944).

company, awareness of criminal actions of others, and an inference that he or she agreed to enter into an unlawful scheme.99

Criminal liability may also be imposed for not disclosing the criminal activity of another. There is at least one area in which an individual already has an affirmative duty to disclose the misconduct of someone else, when he or she discovers someone has committed a felony. 18 U.S.C. § 4 provides:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

Yet, the employee who is considering disclosing illegal activity, in other words, blowing the whistle, often faces a difficult dilemma. If she doesn't act as informant, she may face criminal sanctions, yet, if the facts are brought to the authorities, the whistle-blower is likely to be fired and blackballed in finding future employment in the profession in which she works. Ones personal life may also be drastically affected. A survey of 90 whistle-blowers conducted by a founder of the Whistle-Blowers Assistance Fund found that after speaking out and being fired, 17 percent of the group lost their homes, 8 percent declared bankruptcy, and 15 percent got divorced. The study also reported that almost 10 percent tried to kill themselves.60

The backlash against whistle-blowers is often harsh. Any litigation involving retaliation for the reporting of illegal activity is often prolonged and acrimonious because of the "collateral consequences" a court ruling in support of a whistleblower can have on an employer.61 The consequences of acting as a whistle-blower prompts many to just "forget it" when considering reporting on illegal activity. A 1983 survey of federal employees by the Merit

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99. See State ex rel. Kropf v. Gilbert, 213 Wis. 196, 233, 251 N.W. 478, 488 (1933) (The court inferred knowledge and authorization of conspiratorial acts from a corporate executive's active role in the operation of the business, his review of certain reports, and the failure of the Board of Directors to prevent criminal activity from occurring.).

60. ABA J., June 1, 1987, at 20.

Systems Protection Board found that 25 percent of the employees surveyed said they knew of waste, fraud and abuse, but 70 percent of those said they were unwilling to discuss it.62

The experience of whistle-blowers in other areas, such as the government employment or the legal field, does not give much comfort to those who might consider reporting illegal activity. The Office of Special Counsel was set up in 1978 to protect federal civil servants from suffering adverse consequences for reporting wrongdoing. Yet, according to Representative Patricia Schroeder, this office seeks disciplinary or corrective action in less than 1 percent of the cases where civil servants expose wrongdoing. There have been several bills proposed in Congress to provide protection for whistle-blowers, however, in the past, they have died in Congress or been vetoed.63

The legal profession has formal rules that actually mandate whistle-blowing. This does not, however, mean that whistle-blowing is either done or accepted.64 In its October 1, 1986, issue, the ABA Journal published an article exploring the stories of two lawyers who had come forward with information of wrongdoing. The article stated that “Their experiences cast a dark cloud on a legal system that exacts a heavy toll from those who uphold its rules and put themselves out to address its shortcomings.”65

There is currently only minimal and fragmented legal protection for employees who consider blowing the whistle. Protection of employee whistle-blowers is a fairly recent legal development. It has developed relatively slowly over the last 40 years.66 Up until the beginning of the twentieth century, employers had the right to fire employees for any reason, or even no reason — the employment-at-will doctrine. The employment-at-will doctrine was slowly eroded as the Supreme Court constitutionally recognized Congress’ power to prohibit certain forms of employment discrimination and as states carved out a public policy exception,

63. On March 16, 1989, the Senate again approved a whistle-blower bill to increase job protection for federal workers who expose waste, fraud, and abuse.
64. According to some, one of the key reasons that corruption in the Chicago Cook County Court system was able to grow until Operation Greylord, the federal investigation and prosecution of those involved in the corruption, was because of the unwillingness of judges and lawyers to report wrongdoing.
66. THE LABOR LAWYER'S GUIDE, supra note 61, at 8-14.
which prevents an employer from firing an employee for a reason which violates a clear mandate of public policy.

At the federal level, the Supreme Court’s decision upholding the constitutionality of the National Labor Relations Act marked the turning point in the legality of employee protection laws.\(^{67}\) Since the passage of the NLRA, Congress has passed a number of laws that contain provisions which protect whistle-blowers.\(^{68}\) However, there is no comprehensive federal law that prohibits employers from retaliating against employees who disclose potential corporate or governmental violations of law. Only employees who engage in certain specific whistle-blower conduct in certain specifically protected industries are covered. In addition, there is a lack of consistency between the statutes as to how an employee goes about obtaining redress.

The OSH Act prohibits discharging or otherwise discriminating against any employee who has filed a complaint, or instituted or testified in any proceeding, or otherwise exercised any right afforded by the Act.\(^{69}\) Employees have been protected for raising OSHA-related complaints to their union\(^{70}\) and management\(^{71}\) as well as the Department of Labor. An employee reporting a violation to OSHA can request that neither his name, nor that of any employees mentioned in such notice be made public.\(^{72}\) However, the OSH Act does not give an employee a federal statutory right to initiate his or her own suit for retaliatory discharge.\(^{73}\) The employee, instead must file a complaint with the local OSHA office within 30 days after the employee learns of the discriminatory act. Then if OSHA determines that there was a violation, the Secretary sues on behalf of the employee.

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\(^{67}\) NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).


\(^{69}\) 29 U.S.C. § 660(c) (1982).


\(^{72}\) This protection was specifically added to the Act because prior experience indicated that employees were reluctant to report safety violations because they were afraid of losing their jobs.

\(^{73}\) Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980).
sequently, if the federal government does not initiate an action on behalf of the employee, the employee does not have another legal remedy under federal OSHA. The employee would then have to pursue a cause of action under state law.74

Often, the employee's only recourse is to bring a suit under state law for wrongful discharge or breach of contract after being fired, at his or her own expense, at a time when no longer employed. Although a majority of states have recognized a public policy exception to the common law termination-at-will doctrine, the parameters of the protection are still being defined. Presently, there is no agreement among the various states as to what is protected activity, what type of disclosures constitute legitimate whistle-blowing, what type of damages are recoverable and how overlapping statutes and laws should be interpreted.75 In addition, if there is a state or federal statutory remedy covering a whistle-blower's claim, some courts have required the employee to invoke the statutory remedy instead of pursuing the common law remedy.76

Although it strengthened the claim that there is a cause of action if discharged for being a whistle-blower, a recent case decided by the California Supreme Court sharply limited the damages an employee could receive after being wrongfully discharged. In this case an employee was fired after telling his employer that a new supervisor was under FBI investigation for allegedly embezzling funds from a previous employer.77 The Court held that because the relationship between the worker and his employer was "fundamentally contractual," he was only entitled to lost pay and related economic losses and would not be entitled to any punitive damages or other tort damages.78

74. Unless, as discussed below, the court finds that the existence of a whistle-blower protection provision in a federal law preempts the state law cause of action.
75. THE LABOR LAWYER'S GUIDE, supra note 61, at 2.
76. Id. at 40, 103-119. In Olguin v. Inspiraton Consol. Copper Co., 740 F.2d 1468, 1476 (9th Cir. 1984), the whistle-blower protection provision in the Mine Health and Safety Act was cited as a reason to deny a whistle-blower protection under a public policy tort. However, in Lepore v. National Tool & Mfg. Co., 540 A.2d 1296 (N.J. 1988), the court held that since the right to a safe and healthful workplace was applicable to all workers, the state tort remedy was not preempted by OSHA.
78. NAT'L LAW J., January 16, 1989 at 3.
V. Who Should Decide?

Currently, one of the most controversial questions relating to the use of criminal sanctions for punishing those responsible for workplace injuries is the question of who should decide that a crime has been committed. The issue is whether local prosecutors can criminally indict individuals for unsafe workplace conditions using general criminal law statutes or whether such indictments are preempted by the Occupational Safety and Health Act.

Shortly after the decision in the Film Recovery Case, the Cook County Prosecutor brought another case, this time indicting corporate officials on multiple counts of aggravated battery, reckless conduct, and conspiracy for exposing employees to federally regulated substances and violating their duty to provide a safe workplace for employees. The Circuit Court of Cook County dismissed the indictment and the Illinois Appellate Court affirmed the dismissal. The appellate court opinion stated, "In our view, the comprehensiveness of the Occupational Safety and Health Act, in conjunction with the fact that the states have been afforded the opportunity to develop their own regulatory schemes, evidences a congressional intent to preempt the state from applying its criminal statutes to conditions in the workplace that are specifically regulated by OSHA." 80

This decision was recently overturned by the Illinois Supreme Court. In an opinion written by Justice Daniel Ward, the Court stated that to interpret the law so that state criminal prosecution would be preempted by OSHA "would, in effect, convert the statute, which was enacted to create a safe work environment for the nation's workers, into a grant of immunity for employers responsible for serious injuries or deaths of employees." 81

This case has attracted widespread attention. Labor unions, other state prosecutors, and manufacturing and chemical industry organizations all filed amicus briefs with the court. The Michigan Supreme Court recently relied heavily on the Chicago Magnet Wire decision in reversing a lower court decision that dismissed

81. Chicago Magnet Wire at 373, 534 N.E.2d at 969.
a similar indictment. The significance of the case increased when the United States Supreme Court recently declined to review the state court's decision. This decision is likely to affect the pending appeals in the *Film Recovery* case as well as encourage prosecutors nationwide to consider criminal charges in other situations where workplace conditions lead to serious injury or death.

The issues involved in this case are broader and more complex than may be apparent on the surface. On one side are two issues that states feel strongly about — the protection of their citizens from exposure to toxic substances and the state's historical power to prosecute crimes. Yet, on the other side, there are the potentially serious ramifications to major federal programs requiring uniform national application and interpretation in order to be administered effectively.

Cases involving federal preemption of state law are not new. One of the earliest cases decided by the Supreme Court, *Gibbons v. Ogden*, involved this issue. The Supreme Court has recently held that "the first and fundamental inquiry in any preemption analysis is whether Congress intended to displace state law . . . ." However, Congress' intent is not always expressly, or clearly, stated; so the Court has over the years outlined factors to consider in determining what Congress intended. Although one of these factors focuses on the extent to which state law conflicts or stands as an obstacle to the execution of the federal law, a state can pursue a policy which frustrates the policy underlying federal laws if the Court is persuaded that Congress intended to tolerate the conflict.

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83. 22 U.S. (9 Wheat.) 1 (1824).
84. Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1, 6 (1986).
85. Preemptive intent may be inferred when: (1) the preemptive design is implicitly contained in the federal Act's structure and purpose; (2) "[t]he scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; (3) the Act touches "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"; (4) the object sought by the federal law reveals a purpose to displace state law. Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Preemptive intent also may be inferred when: (5) the state policy produces a result inconsistent with the objective of the federal statute; or (6) the state law conflicts or stands as an obstacle to the execution of the federal law. *De la Cuesta*, 458 U.S. at 153.
86. See Baker v. General Motors Corp., 478 U.S. 621, 634-35 (1986); New York Telephone
The Occupational Safety and Health Act was enacted by Congress in December of 1970. Its purpose was broadly to assure safe and healthful working conditions for working men and women. Its purpose was broadly to assure safe and healthful working conditions for working men and women. It was enacted into law because of the widespread belief that safety and health dangers facing American workers were too large and becoming worse and because of a widespread conviction that existing state safety legislation was generally weak or not well-enforced and widely variant.

Congress intended the coverage of the OSH Act to be broad. It covers every private sector employee employed by any person engaged in a business affecting commerce. Its primary purpose is the prevention of workplace hazards and the injuries they cause.

However, although broad, the OSH Act was not intended to be all encompassing. For example, specifically excluded from its coverage were the working conditions of federal, state, city, and county public sector employees. Also, OSHA has no jurisdiction to regulate working conditions where any other federal agency has statutory authority to prescribe or enforce safety and health rules. Nor did the OSH Act displace all state laws or programs.
which dealt in some way with occupational safety and health. 93 It also left in place the state workers' compensation programs then in existence for compensating workers who have been injured on the job. 94

The law also stated that one of the ways it believed its goal of assuring safe and healthful working conditions was to be met was "by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws ..." 95 Therefore, the OSH Act specifically recognized that the states had a role to play in occupational safety and health.

However, Congress was concerned about inconsistent and ineffective state programs. An entire section of the Act was dedicated to "State Jurisdiction and Plans." 96 Sections 18(a) and (b) read:

(a) ... Nothing in this Act 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 6 [29 U.S.C. § 655].
(b) ... 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 6 [29 U.S.C. § 655] shall submit a State plan for the development of such standards and their enforcement.

The rest of the section lays out the mechanism and procedures by which a state plan becomes effective.

Important to the debate surrounding the issue of whether the OSH Act preempts criminal prosecution by local prosecutors is this section of the Act and the fact that the OSH Act permits

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93. Examples would be state programs for elevator inspections, state fire codes, and boiler regulations. These programs would, by their very nature, impact worker safety and health. However, OSHA has not regulated them, and there is no claim that they would be preempted solely because the OSH Act "occupied the field" of workplace safety and health.

94. "Nothing in this Act shall be construed to supersede or in any manner affect 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." 29 U.S.C. § 653(b)(4) (1982); see also 29 U.S.C. § 676 (1982).


states to adopt their own safety and health standards and programs so long as the state designates an agency to administer the program, gives the agency sufficient legal authority and funding for enforcement and has standards which are "at least as effective" as the federal standards. Otherwise, it would appear that if OSHA has promulgated a standard under § 6 of the OSH Act with respect to a safety and health issue, state jurisdiction is preempted. Although Congress saw safety as a historical responsibility of the states, it was a responsibility that the federal government would preempt if a state was not willing to adopt an effective program. To date, few states have adopted their own program, and of those that did, many have since given up their state-run programs.

There have been several recent cases interpreting the preemptive effect of § 18 of the OSH Act.97 These cases have dealt with the preemptive effect of the OSHA Hazard Communication Standard on state and local "right-to-know" laws.98 In New Jersey State Chamber of Commerce v. Hughey, the court held that state law was expressly preempted to the extent that the OSHA standard regulating the same issue was in effect and that as to other issues the state law would be impliedly preempted to the extent that it was either impossible to comply with both the state and federal law or the state law provision served as an obstacle to the accomplishment of Congress' object in the OSH Act to promote safe and healthful working conditions.

If § 18 is not viewed as an express preemption of criminal enforcement by local prosecutors of areas regulated by OSHA

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98. Right-to-know laws are a fairly recent phenomenon. They seem to be the result of a growing awareness, resulting from mass disasters such as Bhopal, that toxic chemicals can cause serious health effects. Although a comprehensive Hazard Communication Standard was proposed under the Carter Administration which would have placed an affirmative duty on employers to inform employees of potentially hazardous materials in the workplace, it languished there after Reagan took office in 1981. Organized labor started focusing on the passage of state right-to-know laws and by the end of 1983, roughly 14 states and at least two municipalities had enacted some type of right-to-know law. In most cases, the right-to-know was expanded beyond just worker right-to-know and the laws included some requirements for informing the community about potential chemical hazards.
under § 6 or if express preemption is not clear, other factors would need to be examined to determine if Congress intended to preempt state enforcement. One of the factors would involve an examination of the effect state regulation, or in this case, state criminal enforcement, would have on the ability of the federal government to maintain a cohesive program in an area with a major influence on interstate commerce.\(^\text{99}\) The implementation of safety and health related provisions have a huge financial impact on the industrial enterprises affected. One of the reasons industry supported the passage of the OSHA Hazard Communication Standard was to minimize the number of disparate state right-to-know laws, in some cases with conflicting provisions, with which it would have to comply. A similar result can be anticipated from the use of state criminal statutes in the workplace. Exposure to a chemical may, in one state, be criminal, yet, in another, be acceptable. Also, to allow enforcement using common law criminal statutes would allow states to regulate safety and health without having to submit a state plan, provide funding, or promulgate regulations.

Unlike the right-to-know preemption cases, the *Chicago Magnet Wire* case is not a situation where the state attempted to enforce its own regulations. It is instead a situation where local or state prosecutors are attempting to use common law criminal statutes in a sphere of activities which are federally regulated.\(^\text{100}\) Therefore, it would not be the laws themselves that would be preempted, but the enforcement of these laws under certain circumstances.

One case which may provide guidance for this discussion is *Pennsylvania v. Nelson*.\(^\text{101}\) The issue in this case was whether a federal act which prohibited the knowing advocacy of the over-

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\(^{99}\) City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). "The pervasive nature of the scheme of federal regulation of aircraft noise ... leads us to conclude that there is pre-emption." Id. at 633. The Court also noted that "if we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it ... would severely limit the flexibility of the FAA in controlling air traffic flow" throughout the navigable airspace. Id. at 639.

\(^{100}\) As the court considered significant in *Chicago Magnet Wire*, these cases are not looking at federal preemption of state laws or regulations but at federal preemption of enforcement of general criminal statutes. If there is preemption, the statutes themselves are not generally preempted, only their enforcement in certain situations, e.g., where OSHA has promulgated regulations.

throw of the government of the United States preempted the state of Pennsylvania from criminally convicting Nelson under a state law proscribing the same conduct. In this case the Court found that the federal act did preempt state enforcement. In its analysis the Court looked at three factors — the pervasiveness of the federal scheme, the dominance of the federal interest, and the danger that state enforcement would conflict with the administration of the federal program. The Court was particularly concerned about the likelihood that a multiplicity of tribunals was likely to produce different criteria for substantive offenses. It would seem that each of these concerns or factors are raised by the states applying common-law criminal statutes to occupational exposure to chemical substances.

Interestingly this case also raised the possibility that if concurrent state enforcement power was found, there was a risk of "compounding punishments" or double jeopardy. Although the Supreme Court has held that prosecution by both state and federal governments is not barred by the constitutional protection against double jeopardy, its position has been strongly criticized by commentators.102 If the OSH Act does not preempt state criminal enforcement, a possible consequence is a future case again raising the issue of double jeopardy, if both OSHA and local and state officials are pursuing enforcement actions resulting from the same workplace hazards.

VI. Conclusion

The use of common law criminal statutes for deterring occupational exposure to toxic substances is not as simplistic as its proponents would make it appear. It is not simply a matter of jailing those responsible for "poisoning employees." Instead, inherent in their use are difficult issues of federalism, protection of constitutional rights, and the determination of unacceptable risk. This paper has presented these concerns, not to suggest that the exploitation of worker's health is acceptable, but instead to suggest that as decisions are being made by prosecutors and the courts, the long-term effects on both the development of criminal law and on national regulatory programs instituted to assure worker safety and health should be considered. Perhaps

102. LaFave, supra note 2, at 126.
other options for promoting workplace safety and health should be examined. Although environmental law has been revised several times, the OSH Act law has not been revised in the almost 20 years since it was first passed. Perhaps a critical examination of the OSH Act and a revision to promote workplace safety and health will be a worthwhile outcome of this debate.
WHEN IT IS NOT AN ACCIDENT, BUT A CRIME: PROSECUTORS GET TOUGH WITH OSHA VIOLA TIONS

Ira Reiner* and Jan Chatten-Brown**

I. INTRODUCTION

In 1911, more than 100 workers, all women, were killed in the Triangle Shirt Waist fire. All exit doors to the factory were bolted closed, preventing the employees' escape. Some jumped to their death. Others burned in the fire or died from the smoke. The inhumane conditions in which the women worked caused a public outcry. The New York District Attorney charged the owners of the factory with manslaughter. Despite the fact that the defendants were eventually acquitted, employers were put on notice that their white-collar status was not a shield of immunity from criminal prosecution for failure to eliminate workplace hazards.

Since the Triangle Shirt Waist fire, public interest in seriously attacking the causes of occupational deaths, injuries, and disease has waxed and waned. Measured by legislative activity and media coverage, it currently has reached a new high.

In 1970, unions achieved a long-term objective by persuading Congress to pass the Occupational Safety and Health Act. Optimism regarding OSHA's potential slowly turned to disappointment, however, as the agency's staff was cut, new standards delayed, civil penalties compromised, and criminal prosecutions of the most egregious offenders thwarted.

By the mid-1980s, much of the battle to deter unsafe working conditions moved to another arena — the state courts. Though but one of the tools for improving working conditions, criminal prosecution is an important option, and is the focus of this article.

Before turning to the emerging area of criminal prosecutions, however, it is useful to have some sense of the scope of the problem.

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II. Scope of the Problem

Workplace-related deaths, injuries, and disease are far more pervasive than often perceived. There is no comprehensive national survey of occupational fatalities, nor is there a standardized state reporting system. As a result, estimates of deaths range widely. The Bureau of Labor Statistics, which relies solely on employer surveys, estimated the number of occupational fatalities in 1984 at 3,750. The National Safety Council, on the other hand, calculated the figure for the same year at 11,500. In a report entitled *National Traumatic Occupational Fatalities, 1980-1984,*, the National Institute for Occupational Safety and Health estimates that approximately 7,000 traumatic occupational fatalities occurred each year during 1980-1984. This figure, which represents 8.8 persons per 100,000 workers, excludes deaths from asbestos exposure and other occupationally related diseases which do not result in traumatic or immediate death. The National Safe Workplace Institute, in a 1987 report,1 estimated 120,000 men and women died traumatic deaths in American workplaces since July 1971, when the OSH Act was signed into law. The Bureau of National Affairs concludes that more than 100,000 workers may have died nationally in job-related accidents since 1984.2

Occupational disease estimates are higher, and at least as uncertain. A recent congressional report found that occupational health surveillance is “fragmented, unreliable, and 70 years behind communicable disease surveillance.”3 Despite the statistical uncertainties, there is no question that the magnitude of the problem of occupational disease is great. Many experts believe that 50,000 to 70,000 workers die each year from occupational diseases.4

According to John Moran, former Director of Safety Research at the National Institute of Occupational Safety and Health:

2. Bureau of National Affairs, Occupational Safety and Health: Seven Critical Issues for the 1990s at 9 (July 1989) [hereinafter Seven Critical Issues].
4. Statement of Dr. Phillip Landrigan, Mount Sinai School of Medicine, to the Senate Comm. on Labor and Human Relations (Apr. 1988).
Deaths caused by work-related injuries result in more years of human life lost than those caused by cancer and heart disease combined. In fact, from ages 1 through 44, injury is the leading cause of death in the nation. The cost to our nation exceeds $100 billion annually.

Every day of the year an average of 32 workers die on the job, and 5,500 suffer a disabling injury. In addition, an average of 165 workers die of illness that is work-related while another 1,000 new cases of work-related illness develop. The cost to our nation exceeds $50 billion annually.\(^5\)

Behind each statistic there is a face and a family. There is more than economic loss; there is human suffering. *Faces — The Toll of Workplace Deaths On American Families*\(^6\) tells the story of a few of those deaths, but most go untold. They are deaths Congress had hoped to prevent when enacting the OSH Act in 1970.

III. THE CRIMINAL SANCTIONS IN THE OSH ACT ARE RARELY APPLIED

The purpose of the OSH Act was to "assure so far as possible every man and woman in the nation safe and healthful working conditions."\(^7\) To do so, the Act established a standard setting and regulatory process intended to be prophylactic. Punitive measures for failure to comply were primarily contained in the civil penalty provisions of the Act.\(^8\) However, the Act also included limited provision for criminal prosecution; willful violations of the Act can be prosecuted if the violation results in death.\(^9\)

Unfortunately, even this limited tool has been extremely underutilized. As a congressional committee recently concluded:

The criminal penalty provisions of the OSH Act, as presently written and as enforced by OSHA, provides no deterrent to employers violating the statute. A company official who willfully and

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6. *FACES*, supra note 5, was released contemporaneously with the AFL-CIO-sponsored first national day of mourning for workers killed on their jobs. The National Day of Mourning, held April 28, 1989, marked the anniversary of Congress’ passage of the Occupational Safety and Health Act.
8. 29 U.S.C. § 666(a)-(d).
recklessly violates Federal OSHA laws stands a greater chance of winning a State lottery than being criminally charged by the Federal Government for workplace safety violations.  

For good reason, this congressional committee concluded the likelihood of federal prosecution is slight. Between 1970 and 1988, a mere 42 cases were referred by OSHA to federal prosecutors. Of those, only 14 were prosecuted. The reasons for the scant number of prosecutions are several. First, early efforts to prosecute under the OSH Act were often unsuccessful. In four federally prosecuted cases, either the grand jury did not return an indictment, or there was an acquittal or a hung jury. In at least two cases, the individual defendants were dismissed so that only the corporate defendant remained charged.  

Second, the deterrent value of a successful prosecution under the federal Act is perceived as small. The maximum penalty under the Act is a fine of $10,000 and up to six months imprisonment. A second conviction could result in a fine of up to $20,000 and not more than one year in jail. More important than the amount of the maximum fine available is the limited jail time that can be imposed. To federal prosecutors accustomed to seeking and obtaining long prison terms, six months in jail must seem short indeed. Nevertheless, while jail time is provided as an option at sentencing, the reality is, no one has ever spent a day in jail for a criminal violation of the OSH Act. It is unclear whether a U.S. Justice Department official has ever sought the sanction of jail time.  

Third, federal case law defining “willful” places a heavy burden on prosecutors. Essentially, the employer’s action must exhibit an intentional disregard of a standard, or a “knowing, conscious, and deliberate flaunting of the Act.” According to outgoing OSHA Assistant Secretary, John Pendergrass, before making a
referral the agency reviews their records to determine whether the employer:

a) had a prior history of similar violations; b) was responsible for other injuries and/or deaths in connection with similar conduct; c) was apprised of the hazardous conditions by recent events or some other person; and d) lacked a safety program designed to inform employees of hazards and methods by which those hazards could be eliminated.\(^\text{15}\)

Fourth, a federal OSHA inspector in the field focuses his or her attention on whether an employer violated a standard, rather than garnering evidence of an individual's willful misconduct. While OSHA has a staff of industrial hygienists and safety compliance officers, the federal government has not committed any resources specifically to the investigation of safety crimes. In contrast, the federal government in 1988 had 50 criminal investigators, 20 FBI agents, and eight Department of Justice attorneys assigned to investigate and prosecute environmental crimes.\(^\text{16}\) Unlike federal OSHA, California law provides for a criminal bureau of investigations within California OSHA.\(^\text{17}\)

IV. STATE PROSECUTORS FILL THE VOID

After a decade of federal inaction under the criminal provisions of the Act, state prosecutors nationwide began to pursue workplace deaths.\(^\text{18}\) In 1980, prosecutors in New York charged an employer, Warner-Lambert, and its managers with manslaughter for the death of six employees in an explosion and fire in a chewing-gum manufacturing plant. The grand jury indicted defendants after the state presented evidence that Warner-Lambert's insurance carrier had advised defendants that the use of magnesium stearate and liquid nitrogen could result in a dust explosion hazard. The insurance carrier recommended installation of a dust exhaust system and modification of certain electrical equipment. Although some work was done, defendants declined

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17. CAL. LAB. CODE § 6315 (West 1984).
18. As will be discussed infra in Section VI, California has been unique in its approach to OSHA violations, with prosecutions since the early 1970s.
to shut down the operation pending modifications. The evidence showed that the cause of the explosion was related to a dust hazard, but the exact catalyst was the subject of considerable speculation. As a result, the New York Court of Appeals held that the corporation and individual defendants could not be held criminally liable, because the triggering mechanism was not identified. The court said that despite the defendants' awareness of the risk of explosion from the use of magnesium stearates, the risk was "undifferentiated," and therefore the explosion was "neither foreseen or foreseeable." 19

In our opinion, the court in Warner-Lambert misconstrued principles relating to foreseeability. Nationally, the decision had a chilling effect on prosecutors contemplating use of criminal sanctions to redress deaths caused by employer negligence.

Things changed drastically in June 1985, when three management officials from Film Recovery Systems were found guilty of murder for the cyanide poisoning of one of their employees, a 59-year-old Polish immigrant, Stefan Golab. 20 Film Recovery was a processing firm that used cyanide to recover silver from film put into large vats. The evidence showed that the managers knew of the hazards of cyanide and were aware of the appropriate antidote. A ventilation system had been recommended. Numerous employees suffered nausea, vomiting, and bleeding from the nostrils before Stefan Golab's death. When office workers became ill, they were protected by moving the office to a building next door. More large vats utilized in silver recovery were crammed into the plant area. Ironically, federal OSHA came to inspect the facility several months before the death. Unfortunately, they conducted only a review of the records, which were not properly maintained, and did not inspect the plant. 21

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21. For several years, federal OSHA had a policy favoring "records inspections." Under that policy, where records show that the employer has fewer than average injuries and illnesses, inspections of that operation are waived. As a result, there was an increased incentive for employers to under-report. Fortunately, the policy was reversed in 1987.
On February 20, 1983, Stefan Golab went into convulsions as a result of the exposure to cyanide fumes after repeatedly going into vats to remove residue. No antidote was administered. After being convicted of murder, the three managers were sentenced to 25 years in state prison. With extensive national coverage of the convictions, notice of the potential criminal prosecutions spread from courtrooms to boardrooms.

A number of other newsworthy prosecutions soon followed the Film Recovery case. One of the most egregious set of facts involved Pymm Thermometer. The situation at Pymm Thermometer was well described in the congressional report *Getting Away with Murder*:

In January 1981, a worker at the Pymm Thermometer plant in Brooklyn, New York, wrote to OSHA:

"Mercury is being used, gas and ovens. Please, we don't know how to describe any violations, but we are sure there are more. Please send an inspector down to see for himself. We only make the minimum wage, so at least we will know our health is okay."

In March 1981, OSHA inspected the Pymm plant and found serious violations. No protective gear was being used to reduce workers' exposure to mercury — no respirator masks, no aprons, and no gloves. Work surfaces were covered with mercury, and even the area where workers ate their lunch was contaminated with mercury. OSHA issued a citation, assessed a fine of $1,400, and set a deadline of October 1981 for the company to clean up the factory. However, over the next few years, OSHA regularly extended the compliance deadline.

In 1984, the New York City Department of Health was alerted by a local doctor to elevated levels of mercury in the body of a Pymm worker. The New York City Health Department went to the Pymm factory, inspected it, conducted tests, found violations of the health code and discovered elevated levels of mercury in the workers.

In October 1985, tipped off by a former Pymm worker, an OSHA inspector discovered a hidden cellar operation at the Pymm plant — a cellar virtually without ventilation, filled with broken thermometers, with pools of mercury on the floor, and noxious vapors in the air, which produced permanent brain damage in one employee, Vidal Rodriguez, and exposed many others to serious health risks.\(^\text{22}\)

Based upon these facts, the Brooklyn District Attorney and

\(^{22}\) *Getting Away with Murder*, supra note 10, at 6.
New York Attorney General prosecuted Pymm Thermometer and its owners and managers for criminal assault and reckless endangerment for exposing employees to mercury. After a four-week trial, the jury was quick to convict, but the trial judge set aside the conviction, on grounds of preemption. The Appellate Division of the New York Supreme Court subsequently overturned the judge's and reinstated the jury verdict.

Chicago Magnet Wire, like Film Recovery, was prosecuted by the Cook County, Ill., District Attorney. The charge involved not a death but, rather, exposure of 42 employees to various hazardous substances during the coating of wire. Charges filed included aggravated battery, reckless conduct, and conspiracy.

Aside from the prosecutions in California, which are based on unique criminal provisions for OSHA violations, perhaps a dozen other prosecutions for workplace safety violations have occurred across the country since 1985. However, the momentum for criminal prosecutions has been delayed by the contention that the existence of the federal OSHA law preempts state criminal prosecutions.

V. THE PARADOX OF ARGUING PREEMPTION

When Congress debated the OSHA law in the late 1960s, much of industry argued that occupational safety and health was best left to the states. Once states became actively involved in prosecuting employers for workplace safety hazards, corporate defendants changed their position 180 degrees. They began arguing that the federal law provides a shield from state prosecution by preempts the field.
As stated by union lawyer George Cohen:

"It would be paradoxical in the extreme for any court to hold that a Congress whose primary goal was "to assure so far as possible every working man and woman in the nation safe and healthful working conditions ..." nonetheless enacted a statute that deprived employees of the longstanding protections provided by state criminal law." 27

Yet, so some courts have ruled. 28

The basic argument of the defendants is that § 18 of the OSH Act 29 expressly preempts state prosecution under a general criminal statute for a death arising out of a working condition over which federal OSHA has jurisdiction, unless the state has a federally approved plan that allows such prosecution. Section 18 states, in pertinent part:

(a) Nothing in this Act 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 6.
(b) 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 6 shall submit a State plan for the development of such standards and their enforcement.

Proponents of preemption argue § 18(a) precludes states, including local prosecutors, from exercising authority over any subject for which federal OSHA has adopted a standard, unless the state has submitted, and gained approval for, a state plan. 30

Prosecutors believe that § 18 refers only to the process of

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27. Cohen, Preemption: A Union Lawyer’s View, Seven Critical Issues, supra note 2, at 43. Mr. Cohen’s article is reprinted in its entirety in this volume, 17 N. Ky. L. Rev. 153 (Fall 1989).
30. Approximately half the states have their own plans.
standard-setting. Furthermore, the savings clause found in the Act precludes an interpretation of § 18(a) that would result in express preemption. Section 4(b)(4) of the Act provides:

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

We believe the right to prosecute an employer for murder, manslaughter, battery, or any similar crimes found at common law would be retained under § 4(b)(4), while defendants argue this section should be construed only as saving tort and worker compensation laws. In reconciling and interpreting these sections, an important principle is the presumption against preemption. This presumption is particularly strong when the historic police powers of the states are at issue, where preemption is allowed only if it was the "clear and manifest purpose of Congress." Further, the U.S. Supreme Court rejected a similar preemption argument like that made by defendants in a case regarding state action for injuries in areas regulated under the Federal Atomic Energy Act of 1954. In light of these presumptions against preemption, and the language of §§ 18(a) and 4(b)(4), it is difficult to see how the argument of express preemption can prevail.

However, proponents of preemption are not limited to arguments regarding express preemption pursuant to § 18(a). There are three other theories under which courts may preclude state

31. The Illinois Supreme Court in Chicago Magnet Wire agreed:
[We cannot say that the language of section 18 of OSHA can reasonably be construed as explicitly preempting the enforcement of the criminal law of the States as to conduct governed by OSHA occupational health and safety standards. The language of section 18 refers only to a State's development and enforcement of "occupational health and safety standards." (29 U.S.C. § 667(a) (1982)). Nowhere in section 18 is there a statement or suggestion that the enforcement of State criminal law as to federally regulated workplace matters is preempted unless approval is obtained from OSHA officials.]
126 Ill. 2d at 364, 534 N.E.2d at 965.
32. 29 U.S.C. § 653(b)(4) (emphasis added).
action. Courts imply preemption, even in the absence of express legislative language, when the Congress intended to occupy the field, when state regulation conflicts with federal law by making compliance with both laws impossible, or when preemption can be inferred by the legislative history of the act. None of these theories apply to the OSH Act.

By maintaining state authority under § 18(a), providing for submission and adoption of more stringent state plans under §§ 18(b) and 6, and enacting the savings clause under § 4(b), Congress made it clear that it did not intend to occupy the field.

The purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards. (See United Airlines, Inc. v. Occupational Safety & Health Appeals Board, 82 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982)). It was not fear that the States would apply more stringent standards or penalties than OSHA that concerned Congress but that the States would apply lesser ones which would not provide the necessary level of safety.

Likewise, criminal prosecution of workplace safety violations support and complement, rather than conflict with, the federal Act.

Prosecutions of employers who violate State criminal law by failing to maintain safe working conditions for their employees will surely further OSHA's stated goal of assuring so far as possible every working man and woman in the Nation safe and healthful working conditions. (29 U.S.C. Section 651(b)(1982)).

Finally, there is no legislative history to support the conclusion that Congress intended to preempt the field. Indeed, in light of the dearth of earlier prosecutions, it is unlikely that state pro-

36. The rationale applies with equal force when state legislation preempts local regulation.
41. People v. Chicago Magnet Wire Corp., 126 Ill. 2d at 368, 534 N.E.2d at 967. (The Los Angeles District Attorney joined the Brooklyn and Middlesex District Attorneys as amicus curiae in support of the People.)
42. Id. at 373, 534 N.E.2d at 969.
prosecutors were a matter of concern, and discussion of such prosecutions is absent from the Act's legislative history.

We agree with the Illinois Supreme Court in *Chicago Magnet Wire*:

To adopt the defendants' interpretation of OSHA would, in effect, convert the statute, which was enacted to create a safe work environment for the nation's workers, into a grant or immunity for employers responsible for serious injuries or deaths of employees. We are sure that that would be a consequence unforeseen by Congress.43

We believe the decisions in *Chicago Magnet Wire* and *Wisconsin ex rel. Cornellier v. Black* bode well for a successful resolution of the preemption question.44

Fortunately, because of California's approved state plan, prosecutions under California law have not been dependent on arguments regarding preemption.

VI. THE LOS ANGELES DISTRICT ATTORNEY'S OSHA PROSECUTION PROGRAM

California law contains two criminal provisions far more expansive than that provided under the federal Act. Labor Code § 6425 makes it a misdemeanor to willfully violate an OSHA regulation when such violation results in death or permanent or prolonged impairment.45 Labor Code § 6423(a) makes it a misde-

43. *Id.*

44. We note that the U.S. Department of Justice in a letter to Congressman Tom Lantos dated December 9, 1988, also opined that they "see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability." The letter is reproduced in *SEVEN CRITICAL ISSUES*, *supra* note 2, at B3-B6 (1989). See also the well-reasoned analysis of this preemption question in Note, *Getting Away With Murder: Federal OSHA Preemption of State Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535 (1987).

45. *CAL. LAB. CODE* § 6425 (West 1977);

Any employer, and every employee having direction, management, control, or custody of any employment, place of employment, or other employee, who willfully violates any occupational safety or health standards, order, or special order, or section 25910 of the Health and Safety Code, and that violation caused death of any employee, or caused permanent or prolonged impairment of the body of any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by fine of not more than twenty thousand dollars ($20,000) or by imprisonment for not more than one year, or both.
meanor to knowingly or negligently violate a Cal-OSHA regulation, when that violation is serious. Both of these provisions are incorporated in California's state plan. Additionally, Penal Code § 385 makes it a misdemeanor to work within six feet of a high-voltage line.

Under the Labor Code sections, individuals who exercise responsibility, management, custody, or control of the place of employment can be charged in addition to the corporate employer. Pursuant to these sections, California prosecutors long have charged corporate and individual employers for OSHA violations. However, nowhere have the prosecutions been as fully institutionalized as in the Los Angeles District Attorney's Office.

In December 1984, Los Angeles District Attorney Ira Reiner established the first occupational safety and health section in a local prosecutor's office in the country. Initially, the OSHA Section relied upon referrals from Cal-OSHA, the state agency with responsibility for occupational safety and health. After several months, the District Attorney concluded a more aggressive program was needed to identify and to investigate cases potentially appropriate for criminal prosecution. Letters were sent to all police chiefs, and the County Sheriff, asking that all occupational fatalities be investigated as potential homicides. A one-day occupational fatality investigation seminar was conducted for approximately 80 homicide investigators. Subsequently, training tapes on OSHA fatality investigations were prepared and distributed county-wide to law enforcement.

In September 1985, a program was initiated in which a deputy district attorney and an investigator are on call 24 hours a day, seven days a week, to respond to the scene of traumatic occu-

46. CAL. LAB. CODE. § 6423(a) (1973):
Except where another penalty is specifically provided, every employer, and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee, who does any of the following shall be guilty of a misdemeanor: (a) Knowingly or negligently violates any standard, order, or special order, or any provision of this division, or of any part thereof in, or authorized by, this part of the violation of which is deemed to be a serious violation pursuant to Section 6432.

47. CAL. PENAL CODE § 385(b) (West 1988):
Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects, or moves any tools, machinery, equipment, material, building or structure within six feet of a high-voltage overhead conductor is guilty of a misdemeanor.
pational fatalities in Los Angeles County. District Attorney personnel are notified by law enforcement, the fire department, or the Coroner's Office. We in turn notify Cal-OSHA.\textsuperscript{48} The program is known as the "roll-out" program and is the linchpin of the District Attorney's OSHA prosecution efforts.

Upon arrival at the scene, the responsibility of the deputy district attorney and district attorney investigator is to obtain the necessary physical and testimonial evidence to determine whether the fatality was due to employee negligence, was an accident, or was the result of a criminal act of the employer or an individual. Without prompt investigation, important physical evidence can be lost. Of even greater concern is the fact that in most cases key witnesses continue working for the employer. If statements are not promptly obtained from such witnesses, their concern about the death of a worker may be superseded by their own concern for job security.

Since establishment of the OSHA Section, District Attorney personnel have responded to more than 200 workplaces. At many of the locations, there were multiple deaths. Twenty-seven criminal cases had been filed by the Los Angeles District Attorney as of October 1989. Most of the cases involve multiple defendants. More than 15 other cases investigated by the Los Angeles District Attorney have been filed by local city attorneys with authority for misdemeanor prosecutions in their jurisdiction. All but six of the cases filed by the Los Angeles District Attorney's Office involve fatalities. Of the nonfatal cases, one concerned a chlorine leak that sent more than 80 people to the hospital.\textsuperscript{49} Approximately half of those hospitalized were students and teachers from a nearby school. Another nonfatality prosecution was due to safety violations at a refinery\textsuperscript{50} and a third at a metal forging plant.\textsuperscript{51} Both resulted in third-degree burns to workers. A fourth filing was for amputation of fingers on a punch press.\textsuperscript{52} A recent case involved an 18-foot unshored trench cited by OSHA as a willful violation. We filed even though the trench had not col-

\textsuperscript{48} Between July 1987 and May 1989, while federal OSHA exercised jurisdiction for private-sector enforcement, we notified federal OSHA.
\textsuperscript{49} People v. Dial Corp., No. 87-M00849 (Feb. 21, 1986).
\textsuperscript{50} People v. American Plant Services, No. 31296587 (July 6, 1984).
\textsuperscript{51} People v. Weber Metals, No. 89M04226 (Apr. 10, 1989).
\textsuperscript{52} People v. Inwesco, No. 88M17974 (Dec. 29, 1988).
lapsed and no one was injured.\textsuperscript{53} Deaths from unshored trenches are so frequent that it is very important to prosecute whenever we learn of a violation in order to maximize the deterrent effect. The sixth case was for lead exposure.\textsuperscript{54}

The first involuntary manslaughter case filed by the OSHA Section was against Michael Maggio.\textsuperscript{55} Maggio was president of a small drilling company and was personally present when a shaft for an elevator was being drilled. At approximately 15 feet in depth, an obstruction was hit. Maggio directed the victim to go to the bottom of the shaft and remove the obstruction. After doing so, the victim was lifted out of the shaft. Drilling continued with a 16-inch-diameter drill bit. At about 33 feet, another obstruction was hit. Maggio again sent the victim down to remove the obstruction. The victim was lowered by cable to the bottom of the hole with his foot inserted in a sling. The air was not tested, the walls or sides of the hole were not encased or shored, and the victim was not placed in a safety harness. Almost immediately, the victim went into convulsions. Firefighters were called. When they arrived, they sought to blow fresh air into the hole. Maggio told them they could not do so since the walls of the well were not encased and might collapse, burying the victim. By the time the victim was removed, he was dead.

After the defendant was held to answer at a preliminary hearing, he pleaded nolo contendere to the charge of involuntary manslaughter. He was sentenced to 60 days in county jail and required as a condition of probation to adopt and implement a comprehensive accident prevention plan for his company.

Two other involuntary manslaughter cases involved deaths caused by unshored excavations. In \textit{People v. Gonterman},\textsuperscript{56} Gonterman was the manager of a trenching company and was present when a cave-like excavation was made under a street with no shoring. A series of small cave-ins partially refilled the excavation. Shoring materials were present but were not of adequate size. Gonterman directed the workers to continue to dig. The entire embankment collapsed, burying the victim. After Gonterman was held to answer at a preliminary hearing, he pleaded

\textsuperscript{53} People v. Pangborn Plumbing Corp., No. 89M00594 (June 15, 1989).
\textsuperscript{54} People v. Federated Metals, No. 89M06086 (May 23, 1989).
\textsuperscript{55} People v. Maggio, No. A780779 (Mar. 26, 1986).
\textsuperscript{56} People v. Gonterman, No. A91972 (July 21, 1987).
nolo contendere to involuntary manslaughter. He was sentenced to 90 days in county jail and required as a condition of probation to adopt and implement a comprehensive accident prevention plan.

In a third excavation case, charges were filed against five defendants, including the owner and foreman of the construction firm employing the victim, the construction company, the corporate general contractor, and the projects soils engineer. In this case, the victim was removing dirt from a trench where footings were to be poured. The dirt apparently was in the trench as a result of a slide that had occurred the night before. While working in the trench, a 14-foot embankment immediately above the worker collapsed and buried the victim. The investigation showed that the soils report was grossly inadequate because it failed to recommend shoring for a vertical cut when exposed planes of bedrock angled toward the excavation area at almost a 45-degree angle. Despite substantial evidence of the personal knowledge of the soils engineer regarding the conditions, and warnings from the excavation contractor who did the work, the soils engineer was not held to answer to the criminal charge. As of October 1989, of the remaining defendants, one pleaded nolo contendere to a violation of Labor Code § 6423 and was sentenced. The rest await trial.

The fourth involuntary manslaughter case was filed against the owner of an unreinforced brick building and the contractor who was doing remodeling work on the building. Representatives from the concrete coring company, who made the cuts in the walls of the building, repeatedly warned defendants that bricks should not be removed without the bricks above the cut being shored. After a portion of the bricks were so removed, the brick wall collapsed, burying the victim, who was an undocumented day laborer. Both defendants pleaded nolo contendere to involuntary manslaughter, were fined, required to adopt safety programs, and sentenced to 90 days in jail.

All of the cases filed, except two, named one or more individuals as well as the corporation. One of the cases which was filed solely against a company was for an electrocution of an employee

58. People v. Wilson, No. A954496 (July 1, 1987).
of Southern California Gas Company. The death occurred before we instituted our roll-out program. The referral from Cal-OSHA came so late that it was impossible to adequately investigate the case to determine which individuals were responsible prior to the running of the statute of limitations.

The other case where no individual was charged is against seven corporations for violations of the Labor Code and Fire Code, resulting in the death of a maintenance worker during the First Interstate Bank Building fire in May 1988. At the time, the First Interstate Bank Building was the tallest building in Los Angeles. It was completed in 1972, before the Fire Code required sprinkler systems. Although not legally required to retrofit, the building management decided to do so, and the installation of the sprinkler system was proceeding for approximately a year before the fire. Because the construction work involving the installation of the sprinkler system generated dust, between 30 and 40 false alarms occurred a month. In order to avoid the audible alarms, the electronic alarm system was modified. The modification allowed lights to show alarms at the security panel without an audible signal. The modification also resulted in overriding the fire safety return of all elevators to the mezzanine level.

When the warning alarm was bypassed, communications were by hand-held radio with engineers working in the building. The engineers were asked to check the areas in which the alarms were activated to see if there was actually a fire. It was a routine practice for the engineers to utilize the elevators in responding to an alarm.

The City Fire Code requires each high-rise to have an audible alarm and that the alarm immediately be transmitted from the place at which it occurs to the Fire Department. Several notices of violation were issued by the Fire Department. In December 1987, First Interstate management and the Fire Department agreed on a procedure to avoid false alarms during construction or repair work by removing the smoke detectors in the work area and replacing them when the work was complete. However, the procedure was not followed.

60. People v. Equitable Life Assurance Soc'y, No. 89R22311 (May 1989).
On May 4, 1988, installation of sprinklers was taking place during the night shift on the fourth, fifth, and 58th floors. The smoke detectors were not disconnected. Instead, the alarm system was overridden. When a series of alarms went off, a security officer asked for a maintenance person to check the 12th floor for a possible fire. Alexander Handy responded and was engulfed in flames when the elevator doors opened on the 12th floor. The fire doors to the elevator vestibule had been propped open by the cleaning crews with combustible materials, and the "fire mode" (where the elevator doors would not automatically open) was not operative. Many other workers and tenants were trapped for hours in the worst high-rise fire in Los Angeles history. No individual was charged because the culpability was so diffused amongst the various corporate defendants.

A major concern of critics considering the effectiveness of occupational safety and health prosecutions has been the ability of prosecutors to determine the culpability of higher level corporate officials in large companies. Although a number of the defendants in our cases have been small employers and supervisors from those companies, several have been large employers. These include Golden State Foods Company, which is the nationwide distributor of meat for McDonald's restaurants, and its vice president;61 GTE, a large electrical supplier;62 and one of the largest metal processors in the Southwest.63

Deaths resulting in prosecution include several for violation of California requirements for a lockout device or some means of preventing inadvertent movement of equipment during cleaning and operation. Those deaths include situations where an individual was literally ground up in a meat blender;64 crushed to death in a poultry blender;65 and cut in half in a steel scrapping machine.66

At least five cases have been filed in Los Angeles County based on electrocutions, where an individual was allowed to work too close to a high-voltage line. In one of those cases, the evidence

64. Golden State Foods, No. 31386211 (June 11, 1985).
showed that the tree-trimmers employed by defendants were not trained regarding the dangers of touching anything that fell on high-voltage lines. Moments before the victim was electrocuted, a fellow employee removed a palm frond from the line. The supervisor was present but took no action. When the victim attempted to remove a similar palm frond, he was electrocuted.\textsuperscript{67} The supervising partner of the tree-trimming company was sentenced to 30 days in county jail. The other partner was required to institute a comprehensive safety program and pay a fine of $8,500 as a condition of probation. In a second tree-trimming case investigated by the Los Angeles District Attorney's Office, and filed by the Los Angeles City Attorney's Office, the owner of the tree trimmer, in an interview at the scene hours after the death, admitted knowing of the legal requirements, and the earlier prosecution. Three other prosecutions for working too close to high-voltage power lines during building renovations were investigated by the Los Angeles District Attorney's Office and filed by the City Attorney's Office. These violations are easy to prove, because they require only a showing that the defendant allowed another to work within six feet of a high-voltage line. No showing of recklessness or negligence is required.

In April 1988, a jury found Reliance Steel and Aluminum Company and two corporate managers guilty of failing to train employees on the unique hazards of their job. The case arose when an employee was killed when caught in the recoiler of a steel slitter. A recoiler acts like a large spindle to rewind the steel after being slit on a steel slitting machine. The standard practice of the company had been to have the employees insert pieces of cardboard at the pinch-point where the steel was rewound. The slitter had the capacity to run at over 1,100 feet per minute, although the actual speed at which the steel was normally run was substantially less.

There had been no policy against wearing gloves when inserting cardboard. The victim apparently was pulled into the machine when his gloves became caught. In \textit{Reliance Steel},\textsuperscript{68} evidence obtained during execution of a search warrant showed repeated prior recommendations from Reliance's insurance company re-

\textsuperscript{67} People v. Lymon, No. M48042 (Oct. 24, 1985).
\textsuperscript{68} People v. Reliance Steel, No. S34359 (July 22, 1985).
garding the need for more safety training, as well as prior injuries of a nature that should have put the company on notice of safety hazards on the slitter. What was more shocking was that normally 30 days of training was provided to a new operator on the machine. Before his death, the victim was given only three to fours hours of training, and then left to operate the machine with a non-English-speaking helper. The victim did not speak Spanish. The defendants were placed on probation and required to pay $60,000 to the University of California Labor Occupational Health Program for development and distribution of a program on guarding and safety training and to develop a model safety and health program, which includes:

(a) employment of a full time, qualified safety and health professional;
(b) designation of a plant safety chairperson;
(c) creation of a comprehensive joint employer-employee health and safety committee;
(d) a requirement for a safety consultant to conduct a detailed job safety analysis for each piece of equipment;
(e) daily safety inspections;
(f) a prohibition on the insertion of cardboard in steel slitters; and
(g) detailed training requirements.69

Such detailed safety and health programs have become common elements of our case dispositions.

Thus far, only two prosecutions have been based on health hazards in the workplace. These were against Dial Corporation,70 for a chlorine exposure, and People v. Federated-Weiner Metals, Inc.,71 for lead exposures. However, several State Hazardous Waste Control Act prosecutions for illegal disposal of asbestos have involved the exposure of employees to asbestos. In one such asbestos case,72 the defendant was sentenced to six months in jail. We anticipate that over the next several years there will be a substantial number of prosecutions for illegal exposure of workers to asbestos (in violation of various asbestos business-practice requirements set forth in the California Labor Code and California Business and Professions Code) and other hazardous

69. Id.
70. See supra note 49 and accompanying text.
substances. Further, the provisions of California's Proposition 65, which prohibits discharges of known carcinogens and reproductive hazards into drinking water and also requires all persons to warn individuals exposed to such hazards, went into effect as to the first group of substances listed in February 1988. It goes into effect as to the warning requirement for specific substances 12 months after they are identified by the state as known carcinogens or reproductive toxins. Eighteen months after such listing, the discharge of such substances is prohibited where it may contaminate drinking water. We anticipate utilizing the provisions of Proposition 65 in conjunction with the California Worker's Right to Know Law.

VII. CONCLUSION

None of the cases prosecuted by the OSHA Section involved intentional deaths. They were all the result of either a reckless or negligent act, or a failure to act. Nonetheless, in each case the defendant violated his duty of care to another human being. Under California law, the acts or omissions were criminal. The deaths or injuries were not accidents.

It is our belief, confirmed by the comments of numerous safety engineers and industrial hygienists throughout the County of Los Angeles, that the Los Angeles District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. We believe this is true of similar prosecution programs across the country. The number of prosecutions may be small, but, like a barking dog, their very presence may deter thousands of violations.

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74. Strong commitments to OSHA prosecutions also have been made by prosecutors in Cook County, Ill.; Brooklyn, N.Y.; Milwaukee, Wis.; and Austin, Tex.
A proposal called the High Risk Occupational Disease Notification and Prevention Act (hereinafter called “the High Risk Bill”) was one of the principal pieces of legislation put forward by organized labor in the last (100th) and current Congresses.

The High Risk Bill would establish a new board of scientific experts in the Department of Health and Human Services (“HHS”). The purpose of the board would be to determine what, if any, substance or matter a person is exposed to in the workplace may be “associated with” a health risk. If the board determines that a particular substance fits in that category, the Secretary of HHS will notify each and every worker currently exposed and also workers who may have been exposed to the substance in the past. A notified worker will be told to see a physician about the exposure. If the physician determines that an employee “shows symptoms of conditions increasing the likelihood of incidence” of the disease in the notice, the employer must provide medical benefits and, more importantly, transfer the employee to a job where he will not be exposed to the substance. The employer must continue to pay the employee the same wages he received at the job that entailed the higher risk. If the employer has no job available, he must pay the employee his current salary for one year.

There are many criticisms and plaudits that have been made about this bill; however one views the measure, it is a serious proposal.


Mr. Schwartz gratefully acknowledges the counsel and assistance in preparation of this article of Ms. Liberty Magarian, an associate at the law firm of Crowell & Moring.
In the 100th Congress, the controversial measure was passed by the House of Representatives, but died on the Senate floor after its supporters were unable to cut off filibusters by the Bill's opponents. This year, at the outset of the 101st Congress, Senator Howard Metzenbaum, D-Ohio, has reintroduced the Bill with several minor modifications.1

The Bill's ostensible and laudable purpose is to inform workers that they were exposed to materials in the workplace that may cause an illness or an injury so that the worker can obtain proper medical care. An unfortunate, but very real side-effect will be a flood of new and unfounded liability claims. As will be explained below, the High Risk Bill will trigger new workers' compensation and tort liability claims against employers, and products liability lawsuits against businesses and manufacturers of products used in the workplace.

The Bill's proponents have argued that the Bill does not in "black letter" establish any new "theories" for suing employers and manufacturers, and therefore, it is "tort neutral." It is true — the Bill does not expand the "black letter" tort law. In the context of our present tort and workers' compensation systems, however, the High Risk Bill will create new and unprecedented factual circumstances that will provide grounds for thousands of unfounded claims. In that sense, the High Risk Bill is not "litigation neutral." This article will focus on the principal types of tort and workers' compensation claims that would arise if the High Risk Bill were to be enacted. First, an understanding of the current liability climate will set the stage.

**LIABILITY WORLD: NEW FRONTIERS**

The recent "liability crisis" or "litigation explosion" focused the public's attention on our courts, juries, and the legal rules themselves. There was a great deal of finger-pointing in a search for the real culprit. It is indisputable, however, that over the past several years, courts have made significant departures from the boundaries of traditional tort law to allow new types of claims. Some courts have allowed persons to bring claims where they have suffered purely stress or emotional harm, have allowed employees to bring tort lawsuits against their employers, and

have allowed the use of probability theories to prove that a product or conduct caused a harm. As will be demonstrated, each of these new causes of action will come into full bloom if the High Risk Bill becomes federal law.

Emotional Harm Claims

Traditional tort law requires some physical injury as an element in a tort action for damages based on negligent infliction of emotional distress. A majority of states still impose this requirement. The physical injury may be required to be the stimulus causing the emotional distress or be the disabling consequence as evidenced by physical manifestations or symptomatology of the mental injury.

Courts allowed recovery for purely mental disturbance as long as it stemmed from a physical injury caused by the defendant's negligence under the rationale that the physical component provides sufficient assurance that the mental disturbance was not feigned. Some courts began to erode this principle by allowing recovery for mental disturbance where it was certified by some physical injury, illness, or other objective physical manifestation.

A growing number of states have gone one step further and allowed recovery of damages based on negligent infliction of mental distress without requiring any showing of a physical component. Moreover, even where physical injury is required,

2. See, e.g., DeStories v. City of Phoenix, 154 Ariz. 604, 744 P.2d 705 (Ariz. Ct. App. 1987) (damages may not be recovered for mental anguish from exposure to a toxic substance absent proof of some present physical harm or medically identifiable effect; mere ingestion of toxic substance did not constitute sufficient physical harm); Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978) (emotional distress must result in physical manifestations or mental illness); Hoard v. Shawnee Mission Medical Center, 233 Kan. 267, 662 P.2d 1214 (1983) (no recovery for emotional distress suffered by plaintiff which is caused by the negligence of defendant unless it is accompanied by, or results in, physical injury to the plaintiff); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979) (action for negligent infliction of emotional harm requires serious injury to mental and emotional distress that is accompanied by objective physical symptoms).


4. Id. at 364.

some state courts have held that the mere inhalation or ingestion of a toxic substance is sufficient physical injury to allow recovery for emotional distress even though no physical illness or consequence has developed.6

A similar breakthrough has occurred to the boundaries of the workers' compensation system. Under state workers' compensation laws, 23 jurisdictions have accepted the position that an employer can be liable to an employee for a mental stimulus producing a mental or nervous result, with no physical component either the cause or the disabling consequence.7 The term for this type of claim under workers' compensation laws is "mental-mental" liability.

_Erosion of the Workers' Compensation Immunity Doctrine_

Traditionally workers' compensation rules make an employer immune from tort lawsuits by employees. In the early part of this century "immunity shields" were placed in workers' compensation laws in exchange for employers agreeing to absorb a no-fault liability for workers' compensation. Thus, under workers' compensation, if an intoxicated or careless employee injures himself in the workplace, the employer pays. This is because it is a no-fault system. An employee injured in the course of his employment has been limited to recovery provided by his state's workers' compensation scheme.

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6. See, e.g., Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985) (inhalation of asbestos fibers satisfies the impact rule; plaintiff need not physically manifest his emotional distress); Laxton v. Orkin Exterminating Co., Inc., 639 S.W.2d 431 (Tenn. 1982) (where plaintiff has ingested indefinite amount of harmful substance, finder of fact may conclude that plaintiff has suffered sufficient "physical injury" to support an award for mental anguish even if subsequent medical diagnosis fails to reveal any physical injury).

7. See LARSON, WORKMEN'S COMPENSATION § 42.25(c) (1988).
In recent years, however, a number of courts have reinterpreted state workers' compensation laws and have permitted workers to make an end-run around workers' compensation immunity shields. They have done so by creating new exceptions to the normal workers' compensation immunity shield to allow tort claims by employees against employers.

First, some judges looked to an old exception in the immunity shield for intentional wrongdoing by an employer. Historically, this exception was inserted so that an employer could not stand behind the immunity shield when he had struck a worker, wrongfully locked him up, or committed some other physical tort upon him. The most frequent justification for allowing such an exception is that intentional torts committed by the employer do not fall within the coverage of the workers' compensation scheme because they are not accidental.

Certain jurisdictions reason that the workers' compensation system was designed to supplant the common law of torts only with respect to negligently caused employment accidents, so that harm resulting from some deliberate action by an employer could still be remedied through common law. These "intentional tort" claims are predicated on the theory that an employer failed to disclose important health information to his or her employee.

Some courts made new interpretations to this exception to more easily allow employees to circumvent the exclusive remedy doctrine of workers' compensation statutes and maintain an action in tort against their employer. Some courts have allowed claims for intentional torts to be heard without any allegation of a deliberate intent or purpose to injure a specific employee. Rather, "any general knowledge or information that ... persons would be placed in a position of peril by [the employer's] reckless and heedless conduct would amount to a legal willful tort.... It is not necessary to show actual malice or ill will ... [towards a specific employee]." Under this reasoning, even an employer's failure to act — specifically, his failure to provide warnings — may be considered intentionally tortious. Some courts have held

10. See Foster v. Xerox Corp., 40 Cal. 3d 306, 707 P.2d 858, 219 Cal. Rptr. 485 (1985) (tort law action could be brought where employee's injury was aggravated by the
that an employer's conduct constitutes "intentional" if he knows that the consequences are "substantially certain" to result. Words like "substantial certainty" create a very fuzzy line and leave much room for litigation and dispute over whether an innovative plaintiff's attorney can circumvent the workers' compensation immunity shield.

Relaxation of Causation Standards

A growing number of courts are using very attenuated causation requirements in products liability cases. In general, to prove causation in a torts case, the plaintiff must prove by the preponderance of the evidence (i.e., more likely than not) that the defendant's conduct caused plaintiff's injury.

In cases involving toxic harm, some courts allow use of epidemiological or statistical evidence to prove causation. Under the traditional rule, statistical correlations alone indicated that the probability of causation exceeds 50 percent are insufficient. Some particularistic or anecdotal evidence, i.e., "proof that can provide direct and actual knowledge of the causal relationship between the defendant's tortious conduct and the plaintiff's injury" is required. Some courts have weakened this rule, requiring only statistical evidence without additional proof of causation.

Epidemiologic proof has been allowed in many different types of tort cases. For example, several cases involving toxic shock syndrome have relied heavily on epidemiological studies from the Federal Center for Disease Control. In addition, many swine flu cases have used epidemiological studies to prove causation.

Courts have found different levels of persuasion for particular types of scientific data. Generally, courts have been quite critical of data or studies based on animals. These courts reason that

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15. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1241 (E.D.N.Y. 1985) (animal studies presented by the plaintiff were "of so little probative force and are so potentially misleading as to be inadmissible").
animal studies are not helpful because they involve different biological species and far higher concentrations than those exposed to by humans and, accordingly, do not establish any cause and effect relationship for human exposure to the particular substance.

Courts may admit statistical data into evidence although they generally have not found it very persuasive on the issue of causation. They may admit expert testimony, published studies, reports and articles into evidence to help establish causation.

**IN THIS LIABILITY CONTEXT, THE HIGH RISK BILL WILL BRING ABOUT NEW TORT CLAIMS**

The High Risk Bill would establish a new federal bureaucracy, a Risk Assessment Board, within the Department of Health and Human Services, that will review medical and scientific studies concerning the incidence of disease associated with exposure to occupational health hazards. The Board will identify and designate those populations at risk of disease, will develop an appropriate form and method of notification that will be used by the Secretary of Health and Human Services to notify those designated populations at risk of disease, and will determine the appropriate type, if any, of medical monitoring and/or beneficial health counseling for the disease associated with the risk. The Secretary will make every reasonable effort to insure that each individual within a population at risk is notified, including employees who were exposed to the occupational health hazard within 30 years prior to the date of notification. Notifications will be sent from the government to each individual in a population at risk and, where that is not possible, notification will be made through public service announcements or other means.

Employers will be required to provide the medical monitoring recommended by the Board to their current employees. In addition, if an employee's physician determines that the employee should be removed to a less hazardous job, the employer must provide an alternative less hazardous job for the employee at

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16. See, e.g., Johnston v. United States, 597 F. Supp. 374, 394-95 (D. Kan. 1984) ("a court must consider statistical risk calculations with a healthy degree of skepticism and must not rely upon this method to provide an easy answer to a complex problem").

17. Upon request, the Secretary may certify a private employer or state or local government to conduct notification of its current or former employees.
comparable earnings, seniority and benefits. If no alternative job is available, the employer must pay the employee for up to 12 months.

Obviously, employers are concerned with these new federal requirements of mandated pay and benefits and mandatory medical monitoring. Aside from those costs, however, the Bill is certain to increase significantly the number of liability and stress claims filed against employers and product manufacturers by present and former workers who are notified that they are in a population at risk. Given the current liability climate, described above, it is easy to see why.

**Stress and Fear of Illness Claims**

Visualize what will occur under this Act. A new official board of the federal government will send written notices with federal government imprimatur that the recipient, personally, may be suffering or likely to suffer from a very serious illness: cancer, heart disease, liver damage. The mechanics of the Act will permit aggressive plaintiffs' lawyers to obtain the names and addresses of those notified. The Act does not grant plaintiffs' attorneys that right, but they can work their way through its provisions and obtain the names from the Department of Health and Human Services. If the plaintiffs' lawyers run into a stumbling block at HHS, they are likely to be able to obtain the names and addresses of employees from worker-affiliated organizations precisely at the time when employees have been notified. Failing this, the plaintiffs' attorneys can do what they have done in other instances and specifically advertise and ask: "Have you been notified by the federal government that you may have cancer?" They soon will be on their way to the courthouse.

Once plaintiffs' attorneys have obtained these names and addresses, they can contact the individuals who have been notified. As discussed above, in a growing number of states, they can inform those individuals that they may have a right to bring a lawsuit against the manufacturer of the substance if they have serious worry, anxiety or fear that they may become ill in the future. Plaintiffs' attorneys will be able to tell those individuals that some state courts allow persons to bring tort claims for fear that they may have an illness and fear of future injury even though they currently have no objective symptomatology. An individual who received such notice and is told that he may have
a tort claim if the notice caused him stress or fear, could be tempted to agree to a retainer.

Plaintiffs' attorneys will also tell individuals that claims could be brought for stress under workers' compensation laws in approximately 23 states. The total medical, employment and productivity costs of psychological disorders in the workplace may run in the tens of billions of dollars. A recent report by the National Council on Compensation Insurance indicates that in the 23 states that allow such claims, approximately 15 percent of the pay-outs now go for stress claims.\(^\text{18}\)

Proponents of the High Risk Bill, in a curious turn of phrase, tell small business that they do not have to worry about this result because protections have been placed in the Bill. These protections say, in effect, that no person may bring a tort or workers' compensation claim for mental or emotional harm, fear of disease, or stress "resulting directly or indirectly from any report, finding, notice, medical evaluation decision, or monitoring decision made under this Act, from any other action taken under this Act, or from any failure to take an action required by this Act."\(^\text{19}\) However, the precise language of the High Risk Bill does not preclude a notified person from testifying that he has fear of a future illness or disease based on other sources of information. The Bill will foster litigation over whether a particular stress or fear stemmed from receipt of a government notification. For example, a federally notified employee could testify that the basis of his fear is information received from other workers, from a newspaper, or sources that the Board used to create its notice. In fact, the High Risk Bill specifically authorizes as admissible into evidence the results of any medical evaluation or monitoring, any medical and other scientific studies and reports concerning the incidence of disease associated with exposure to occupational health hazards, and any data related to exposure to occupational health hazards for individual employees.\(^\text{20}\)

Practicing lawyers can appreciate that effective plaintiffs' lawyers will be able to bring stress or fear claims in the practical world. Energized plaintiffs' lawyers will not necessarily be stopped

\[^{20}\] Id. at § 10(g)(3).
from bringing stress and fear of future illness claims because the notice is inadmissible or because such claims are barred if they can be proven to have resulted directly or indirectly from the government notice. The only way to abate this problem is to preclude any notified employee from bringing a tort or workers' compensation claim based on fear of future illness or stress where the fear or stress relates to the illness identified in the federal notification he received. While this would modify existing state tort law, the public policy purposes of the legislation serve to justify such a very limited change. Moreover, in the practical world of litigation, these claims would be unlikely to ever have arisen were it not for the impact of the High Risk Bill itself.

Employee Tort Suits Against Employers

As discussed above, traditional workers' compensation rules make an employer immune from tort lawsuits by employees. In recent years, a number of courts have permitted workers to make an end-run around workers' compensation tort immunity shields by creating an exception for intentional wrongdoings by an employer when the employer "knew with substantial certainty" that an event would occur.

In this context, the High Risk Bill is a plaintiff's lawyer's dream. The High Risk Bill is telling workers that they may have a serious disease because they were exposed to a substance in the workplace. In order to bring one of these new-style tort suits, all a plaintiff's attorney has to do is show that the employer "knew with substantial certainty" that this risk existed and did not tell his employee about it. In order to do this, the plaintiff's attorney can utilize all the information that the Risk Assessment Board has collected and then try to show that the employer either knew or should have known about these facts. Similar to the way the National Transportation Safety Board's gathering of evidence helps plaintiffs' lawyers in air crash cases, the collection of information by the HHS under the High Risk Bill will provide plaintiffs with a Teflon slide toward, at least, potential recoveries. The operations of the practical world of litigation compels the conclusion that thousands of lawsuits of this type will be brought once the High Risk Bill is operative. These suits will create further irreparable damage to the employer immunity shield, a basic tenet of the workers' compensation system.
In order for the High Risk Bill to be "litigation neutral," it must not accelerate the erosion of the traditional workers' compensation immunity shield. The only solution is to amend the Bill to preclude a notified worker from bringing a tort suit against his employer on the grounds that the employer knew with substantial certainty about that risk prior to the time of government notification. This should only occur if the worker is eligible for and can receive his workers' compensation benefits. This approach will not strand an injured worker, but will also help assure that the notification process does not create new tort exposure for employers. Further, it will encourage employers to cooperate under the Act and not create a situation where their very active cooperation leads to lawsuits against them.21

A New Rain of Products Liability Suits

When one searches for precise words as to what specific factual context will prompt a notification under the High Risk Bill, one gets lost in a swirl of words in three different sections. First, the definitions section defines the term "occupational health hazard" as "a chemical, physical, or biological agent, generated by or integral to the work process and found in the workplace, or an industrial or commercial process found in the workplace, for which there is statistically significant evidence (based on clinically or epidemiologic study conducted in accordance with established scientific principles) that chronic health effects have occurred in persons exposed to such agent or process." 22 On the other hand, the section setting out the functions of the Risk Assessment Board, indicates that the Board should review "pertinent medical and other scientific studies and reports concerning the incidence of a disease associated with exposure to occupational health hazards." 23 Finally, a different part of that section instructs the Board in identifying the populations at risk of a disease to consider "the extent of clinical and epidemiologic evidence that

21. This approach would modify the ability of courts to further erode the workers' compensation immunity shield, but it can be justified by the legitimate purposes of the High Risk Bill. The authors of the Bill have already taken a more dramatic step in another context within the legislation. They have provided an immunity shield to doctors who advise workers under the Act about whether they have a suspect illness from exposure. Id. at § 10(h).

22. Id. at § 3(b) (emphasis added).

23. Id. at § 4(c)(1)(A)(i) (emphasis added).
specific substances, agents, or processes may be a causal factor in the etiology of chronic illness or long-latency diseases among employees exposed to such substances, agents, or processes in specific working conditions. . . .” 24

As can readily be determined, plaintiffs' lawyers can have a field day with all of this. What is clear is that none of these provisions equals the general causation standard that is required to prove a tort lawsuit. The traditional causation standard requires that a substance or product on a more probable than not basis caused an individual's harm. The lower causation standards for risk notification under the High Risk Bill will alert plaintiffs' attorneys to potential lawsuits, and they may bring those lawsuits against product manufacturers. In today's legal climate, with some courts beginning to relax causation standards, these cases can press forward. Moreover, it could prompt more suits based on the theory that the defendant should be responsible for a harm because the claimant's exposure to a chemical increased the probability that he would suffer that harm. The threat of these cases can generate settlements even though the manufacturer is clearly not liable. The recent Agent Orange cases illustrate this very type of event. In those cases, the learned trial Judge Jack Weinstein observed, after a settlement was made, that there was no causal relationship between the alleged harm and the product manufactured by defendants.25

Unfortunately, there is no easy solution for this problem. The only approach one might consider is to raise the standard of proof necessary for making a notification under the High Risk Bill. The Bill itself could also emphasize in black letter that the standards for generating a notice under the Act are significantly less than the standard for proving causation for purposes of imposing civil liability.

CONCLUSION

The High Risk Bill, as constituted, will create an avalanche of new and unnecessary liability exposures. While proponents may argue that the Bill is "tort neutral" in that it does not spell out new tort causes of action, it is not litigation neutral — it is a

24. Id. at § 4(c)(2)(A) (emphasis added).
litigation gusher. Armed with, or advertising to seek, names and addresses of notified employees, the organized plaintiffs' bar will find this Act provides a tour of Ft. Knox, with samples. On the other hand, small business will find it a liability nightmare that has come alive — it can lead to their extinction. If the Bill is to become law, its proponents should seal off these new and unnecessary liability exposures and allow the debate to focus on its merits: Is the Bill necessary and is it fair?
THE HIGH RISK OCCUPATIONAL DISEASE
NOTIFICATION AND PREVENTION ACT: A GOOD
PROPOSAL THAT SHOULD BE ENACTED INTO LAW

David L. Mallino*

The High Risk Occupational Disease Notification and Prevention Act would establish a $25 million federal program to identify, notify, and provide medical monitoring of workers who are at high risk of occupational disease because of previous exposures to toxic substances found in the workplace.¹ The purpose of the bill is to prevent occupational disease or to diagnose it early enough for successful treatment.² The public health community, which has endorsed the legislation, believes the bill to be medically and scientifically sound and would go far in substantially reducing both the human and economic costs of occupationally related diseases.³ Moreover, a substantial portion of the business community also believes that the legislation would provide positive beneficial health results and actively supported it in the 100th Congress.⁴

While the bill is designed to address a critical public health problem, it does not create any new regulatory or liability burdens on American business, in spite of the contentions of its critics. Moreover, again contrary to its opponents’ allegations, the bill neither duplicates existing federal programs nor does it create a large new federal bureaucracy. Finally, the costs of the legislation, both to the federal government and employers is modest indeed compared to its ultimate benefits.

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4. Id.
What the bill does do is fill a critical gap in the nation's effort to protect the health of its workforce and reduce the suffering caused by occupational disease which accounts for some 87,000 deaths each year.\(^5\) Furthermore, it would greatly reduce the economic costs of disease which, at a minimum, has been estimated at from $7 billion to nearly $10 billion a year.\(^6\)

By providing high-risk workers with the medical information they need to protect themselves from death and disease and by encouraging them to enter into medical monitoring programs, the "High Risk" bill creates a workable, cost-effective approach to disease prevention. In addition to the scientific, medical, legal, and economic questions associated with disease prevention, the "High Risk" bill also raises an important moral question: "the right to know." Do workers have a fundamental and moral right to know that they were exposed to highly toxic substances in the course of their employment and are at high risk of disease? We believe that they have such a right which should be expressed in a public policy mandate. To do anything less is simply unconscionable.

**Magnitude of the Occupational Disease Problem**

The relationship between workplace exposure and disease has been studied since the early 1700s, when Bernardino Ramazzini wrote his *Treatise on the Diseases of Tradesmen*. Scientists and medical researchers have found that many contemporary workers are exposed to a wide range of toxic substances, agents, and processes at sufficiently high levels so as to substantially increase the risk of death and disability. Science has determined, for example, that there is an increased incidence of lung disease and cancer due to exposure to asbestos; an increased incidence of leukemia for workers exposed to benzene; an increased incidence of neurological disorders among workers exposed to various solvents; increased incidence of cancers of the bladder and urinary tract among workers exposed to certain dye chemicals; and an increased incidence of liver and brain cancer among workers exposed to inorganic arsenic.

The rates of certain occupational diseases have been well studied and are generally accepted. In 1980, Barth and Hunt

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6. *Id.*
reported annual deaths from occupational diseases at between 10,000 and 210,000. In 1982, the Department of Labor's Bureau of Labor Statistics reported 106,000 cases of occupational disease.

According to the U.S. Office of Technology Assessment (OTA), from four to 38 percent of all cancers are associated with occupational exposures, with the most acceptable range of between five and fifteen percent. Using the National Cancer Institute's estimate of new cancer cases for both sexes in 1987, and applying OTA's conclusions, new cancers in 1987 associated with occupational exposures are between 38,600 and 366,700, with the range fitting most estimates of between 48,250 and 144,750. Moreover, applying 1983 data on the number of cancer deaths for both sexes and applying OTA's figures, cancer deaths associated with occupational exposures in 1983 account for 17,720 to 168,340, with the range of most estimates being from 22,159 to 66,450.

More recently, Dr. Philip Landrigan, Director of the Division of Environmental and Occupational Medicine, Mt. Sinai School of Medicine in New York, analyzed 1986 data for the State of New York. His study found that some 5,000 to 7,000 deaths occur each year in New York State as a result of occupational exposures, and an estimated 35,000 new cases of occupational disease arise each year in the state.

The Senate Labor and Human Resources Committee, by extrapolating Landrigan's data, concluded that between 62,000 and 87,000 deaths occur each year in the United States due to hazardous occupational exposures.

In addition to the individual human suffering, occupational disease has a profound impact on both the private and public sectors of our economy. According to the Congressional Research

7. Id. at 5 (citing P. BARTH & H. HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES (1980)).
8. Id. (citing BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES BY INDUSTRY, 1982 (Apr. 1984)).
9. Id. (citing OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSMENT OF TECHNOLOGIES FOR DETERMINING CANCER RISKS FROM THE ENVIRONMENT (June 1981)).
10. Id. (citing 37 CA-CANCER JOURNAL FOR CLINICIANS at 12 (Jan.-Feb. 1987)).
11. Id. at 5-6 (citing U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1987 at 75 (1987) and the U.S. National Center for Health Statistics).
12. Id. at 6 (citing P. LANDRIGAN & S. MARKOWITZ, OCCUPATIONAL DISEASE IN NEW YORK STATE: PROPOSAL FOR A STATEWIDE NETWORK OF OCCUPATIONAL DISEASE, DIAGNOSIS AND PREVENTION CENTERS (report to the N.Y. Legislature, Feb. 1987)).
13. Id. at 6-7.
Service, in 1985 occupational diseases cost the U.S. economy at least $7.1 to 9.7 billion.\textsuperscript{14} This includes between $500 million and $1.4 billion in medical costs, from $1.1 billion to $2.9 billion in forgone earnings, and $5.4 billion in costs to the federal government for various social services.\textsuperscript{15} The federal costs include $2.2 billion for Social Security Disability, $800 million for Supplemental Security Income, $1.3 billion for Medicaid, and $1.1 billion for Medicare.\textsuperscript{16}

Even these cost estimates are only partial, because the figures do not include federal tax losses from earnings forgone; state workers' compensation and unemployment insurance costs; and employer costs for sick leave, insurance, and recruitment and training costs for replacement workers.\textsuperscript{17}

**Notification and Medical Intervention**

The public hearing record on the "High Risk" bill is replete with expert testimony to the effect that notification and early medical intervention can have a highly positive effect on either disease prevention or successful treatment. For example, Dr. James A. Merchant, testifying before the Senate Labor and Human Resources Committee on behalf of the American Lung Association and the American Thoracic Society, stated "[t]he ability to alter adverse health outcomes of workers exposed to occupational health hazards depends in large part on early recognition and intervention."\textsuperscript{18}

In addition, Dr. John R. Seffrin of the American Cancer Society, testified that more than 165,000 Americans will die from cancer in 1987 simply because their disease was not detected early enough. If one applied OTA's estimates of occupational cancer cases to the Cancer Society's data, it would suggest that 8,000 to 25,000 occupational cancer deaths could be prevented annually through early detection and medical intervention. Dr. Seffrin stated that since cancer is ordinarily treatable only in its early stages, early detection is highly cost-effective.\textsuperscript{19} Medical science

\textsuperscript{14.} Id. at 7.
\textsuperscript{15.} Id.
\textsuperscript{16.} Id.
\textsuperscript{17.} Id.
\textsuperscript{18.} Id.
\textsuperscript{19.} Id.
has known for some time that a number of common occupational diseases can be affected by early medical intervention, including lead, mercury and pesticide poisoning; various forms of pneumoconiosis; and cancer of the skin, bladder and colon.

Based upon previous experience with a number of pilot notification programs, we know that such notification can, in fact, work and have a positive impact on disease. In 1981, a NIOSH-funded notification project in Augusta, Ga., identified 1,385 individuals who were at high risk of bladder cancer because of workplace exposure to the chemical betanaphthylamine. The project located and notified 849 of 1,100 surviving workers. Of those notified, 88 percent participated in the bladder cancer screening and education program. There were 15 confirmed cases of bladder cancer (five detected through the screening program) plus 22 instances where screening results placed workers in a special risk category for future monitoring.20

In 1980, the National Cancer Institute funded a notification project sponsored by the Pattern Makers League of North America and the Worker's Institute for Safety and Health after three independent studies indicated that pattern makers in the automobile and agricultural implement industries had twice the risk of death from colon and rectal cancers. The project involved 12,000 active and retired workers employed in 700 different workplaces in 27 states and three Canadian provinces. Of 1,513 participants who completed the examination, there were 12 confirmed cases of colon or rectal cancer and 219 instances where colon-rectal polyps were detected, warranting future medical screening.21

In 1978, another notification project, funded by a joint labor-management effort in Port Allegany, Pa., identified individuals who were at high risk of lung cancer from exposures to asbestos while working at a glass and insulation plant. The project notified 854 of 1,086 surviving workers. Of those notified, 70 percent participated in the medical screening program. With a latency period of at least 20 years, the earliest cases of lung cancer are

20. Summaries of the pilot notification programs can be found id. at 10 and in H.R. Rep. No. 194, 100th Cong., 1st Sess. at 4-5 (1987).

just beginning to be detected by the screening program.22

ECONOMIC COSTS OF A FEDERAL NOTIFICATION PROGRAM

During consideration of the "High Risk" bill, two basic kinds of economic costs were identified as being associated with the program: costs to the federal government and potential costs to employers.

1. Federal Costs

Senator Howard Metzenbaum, D-Ohio, the primary Senate sponsor of the legislation, requested that NIOSH prepare a detailed federal cost estimate for the program. The NIOSH analysis concluded that the total federal cost of administering the legislation, including notification of workers at risk plus funding for 10 occupational health centers, was between $19.9 million and $26.5 million annually, depending upon how many employees were notified each year.23

Although the bill's critics alleged that it would create a large and costly new federal bureaucracy, the fact of the matter is that the only new federal entity created by the bill was a seven-member Risk Assessment Board to determine whether a given worker population was at risk. The Board was to be staffed by the Department of Health and Human Services (HHS) and made part of the existing administrative unit structure. Finally, NIOSH's cost estimate stated that apart from the Risk Assessment Board members, only 50 full-time federal employees were needed to implement the legislation.24

2. Employer Costs

In spite of the claims of the bill's opponents, the legislation imposed no new regulatory burdens on employers. Indeed, the only responsibility of employers under the bill is to provide for

24. Id.
the medical monitoring of their current employees only if the employer is the employer that exposed the worker to the hazard. This is not a new requirement since under most current OSHA health standards, employers are responsible for medical monitoring. Under the "High Risk" bill, employers would not be responsible for the medical monitoring costs of their former employees (including retirees).

According to Dr. Landrigan of Mt. Sinai Hospital, the costs of various occupationally related medical monitoring procedures, should such testing be required, would amount to a total of $224 per employee.25

Thus, if all of the available medical tests were administered to 100,000 to 300,000 workers each year at a cost of $224 per employee, the total costs range would be from $22 million to $67 million.26

For several reasons, however, the medical monitoring cost to employers under the bill would be considerably less than the estimated amount. In the first place, not every worker notified would choose to participate in a medical monitoring program. The NIOSH experience in pilot notification projects indicated about a 70 percent participation rate. Secondly, the individual testing costs ignore economies of scale if large numbers of workers were to be screened at one time. Finally, given the Act's emphasis on notifying former as well as current employees, all notified former workers would have to assume their own monitoring costs. According to the Senate Labor Committee, a reasonable estimate of medical monitoring costs to be borne by employers is between $7.4 million and $22.3 million, because only some one-third of the notified employees actually will receive monitoring at employers' expense.27

In addition to the costs of medical monitoring, the bill's critics alleged that it would create a "tidal wave" of litigation and enormous liability costs. Indeed, this liability question was central to the whole debate over the bill in the 100th Congress. The critics felt that once employees were informed that they were at risk of cancer or other serious disease, they would generate a mass of workers' compensation and tort claims. The critics pointed

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26. Id.
27. Id. at 15.
to the experience of the Augusta, Ga., notification project, where 171 current and former employees filed tort claims against the company seeking $335 million in damages. We believe that these allegations are without foundation for a number of reasons.

First, neither the Port Allegany nor the Pattern Makers notification projects resulted in much, if any, litigation. "Even in the Augusta project, the company settled 120 of the 171 cases out of court for amounts totaling about $500,000, and the Georgia Supreme Court dismissed all the other suits on the grounds that workers' compensation was the exclusive remedy for occupational disease claims. In any event, the volume and magnitude of the claims in Augusta can be attributable to certain unusual aspects of the situation."\(^{28}\) It should be noted that betanaphthylamine (BNA), the subject of the Augusta notification project, had been a suspected carcinogen as early as 1895 and a known carcinogen since the 1930s. The chemical had been banned in Switzerland and Great Britian by the 1950s. All American companies except the one in Augusta had previously discontinued production and use of BNA.

The second, and perhaps the most important, basis for the conclusion that liability costs would not be substantial is the language of the legislation itself. Section 10(g) provided that an action taken pursuant to the Act may not serve as the basis for any claim for compensation, and that evidence of an action taken pursuant to the Act may not be admissible in any compensation proceeding. This language was carefully negotiated with those sectors of the business community that supported the bill and, in fact, was fundamental to their support. The chemical, electronics, paint and coatings, and a portion of the insurance and building supplies industries were satisfied that the bill, as written, created no new liability burden.\(^{29}\)

Third, a report on the bill prepared by the General Accounting Office (GAO) did not conclude that the legislation would contribute to increased liability or litigation costs. Although recognizing the expressed concern that notified workers may bring more claims, the GAO concluded that "even if the bill is not enacted,

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28. Id.
29. The liability question was so central to the legislation that we have appended to this article the complete legal analysis of § 10(g) of S. 79 contained in S. REP. No. 166, 100th Cong., 1st Sess. at 32-33 (1987).
an increase in lawsuits and claims might occur because workers are generally becoming more aware of their rights to compensation for health problems caused by workplace exposure to hazardous substances.”

INADEQUACY OF CURRENT FEDERAL EFFORTS

The individual risk notification program mandated by the “High Risk” bill is not being performed under current law. During consideration of the legislation, its critics asserted that the Hazard Communication Standard promulgated by OSHA in 1983 provided ample information and protection for workers who were exposed to hazardous substances.

The Hazard Communication Standard (HCS) became effective in 1985-1986. Under the standard, manufacturers and importers of hazardous chemicals are required to provide labels and material safety data sheets informing users and their employers of certain hazards with regard to the specific chemical. The standard does not call for individual notification of employees. Rather, the material safety data sheets are merely available to employees for review at their place of employment, and are supposed to provide information on the make-up of the substance, its properties, the permissible exposure levels, the acute and chronic health effects, appropriate control measures, and other data. The material safety data sheets are nothing more than fancy warning labels that accompany a given chemical.

There are several important differences between the Hazard Communication Standard and the “High Risk” bill. First and most important is a fundamental difference in purpose. The HCS is a general hazard information system, designed to educate employees and workers to recognize future exposures. Risk notification, on the other hand, seeks to warn particular categories of workers who are known to be at high risk that past exposures threaten them with disease, and to provide for appropriate medical surveillance. It thus tells individuals in a selected group that they


themselves are at risk because of previous toxic exposures and that they should seek appropriate medical monitoring to reduce the risk of disease. It is therefore a retrospective program dealing with harm that has already occurred and, given the latency periods involved, will likely result in disease unless something is done. The HCS is prospective in nature and warns of a potential future threat of exposure. The HCS provides no information on appropriate medical monitoring and makes no provision for medical monitoring.

Moreover, the HCS applies to all employees who have any potential exposure to a workplace hazard and covers some 32 million workers. The “High Risk” bill, on the other hand, involves an effort to deal with narrowly defined categories of workers numbering in the thousands who are known to be at increased risk of disease. Further, the HCS fails to protect former employees. Hundreds of thousands of Americans are known to be at risk from having been exposed to occupational health hazards before they retired, were laid off, became disabled, or simply took a new job. Given the long latency periods for most occupational diseases, these men and women would undoubtedly benefit the most from the notification and medical monitoring provided by this bill.

Finally, under the proposed legislation, the federal government is primarily responsible for conducting risk notification. The HCS, however, is administered by employers. Indeed, one difficulty with the standard is that its primary source of information, the material safety data sheet, is prepared individually by each manufacturer or importer of the chemical, and it is clear from preliminary studies that there are substantial discrepancies in the hazard information available to workers.32

In sum, the “High Risk” bill complements rather than duplicates the OSHA Hazard Communication Standard. Educating all workers to recognize and understand workplace hazards does not take the place of a notification program aimed at encouraging medical surveillance that will save the lives of those workers who are known to be at increased risk of disease because of past exposures.

32. For a complete analysis of the HCS section, see S. REP. No. 166, 100th Cong., 1st Sess. at 18 (1987) and H.R. REP. No. 194, 100th Cong., 1st Sess. at 6-7 (1987).
LEGISLATIVE HISTORY AND CURRENT STATUS

The "High Risk" bill was initially introduced in the 99th Congress by Rep. Joseph Gaydos, D-Pa., and by Sen. Metzenbaum. The Gaydos Subcommittee on Health and Safety and Metzenbaum's Labor Subcommittee conducted a series of in-depth hearings on the bill but took no further legislative action. Reintroduced in the 100th Congress as H.R. 162 and S. 79, the legislation underwent a series of changes as a result of negotiations among organized labor, the public health sector, parts of the business community and the bill's sponsors. Most of the adjustments were made to accommodate the business groups who were seeking a compromise. The changes fell into three areas: tighter scientific and medical criteria for determining worker populations at risk; additional procedural and administrative protections; and clearer language on employer liability.

As a result of these successful negotiations, the legislation was actively supported by the Chemical Manufacturers Association, the American Electronics Association, the National Paint and Coatings Association, and some 25 individual companies including ARCO, IBM, General Electric, Crum and Forester Insurance and the Manville Corporation.33 It should be emphasized that this was the first time in recent memory where a successful effort was undertaken on an occupational or environmental health bill to develop a compromise proposal with those sectors of the business community most affected by the legislation.

Even though the bill enjoyed substantial business support, as well as support from the entire labor and public health communities (including the American Cancer Society, American Lung Association, and the American Medical Association), it was bitterly opposed by other business groups, including the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Federation of Independent Businesses, and the American Insurance Association. Moreover, the Reagan administration — led by the Departments of Labor, Health and Human Services and Justice — vigorously opposed the bill and threatened a veto should it be passed by Congress.

33. For a complete list of individual companies supporting S. 79 and H.R. 162, see S. REP. No. 166, 100th Cong., 1st Sess. at 16 (1987).
After another series of public hearings and successful mark-ups by the House and Senate Labor Committees, the bills — which had 152 House and 36 Senate co-sponsors — were sent to the House and Senate floors respectively.

The first floor vote occurred in the House on October 14-15, where, after defeating a Republican substitute offered by Rep. James Jeffords, R-Vt., by a vote of 191-234, the bill was passed by a vote of 235-186.

The vote in the Senate did not occur for another five months and was more complicated. By this time, it was clear that most Senate Republicans, led by Senators Orin Hatch, R-Utah, and Dan Quayle, R-Ind., were committed to a filibuster, which would require 60 votes to close off.

On March 18, 1988, the legislation was brought to the Senate floor where the expected filibuster began. After more than a week of debate and four cloture votes, the bill was pulled from the Senate floor. The final vote occurred on March 29, with 42 votes for cloture and 52 against, including 14 mostly Southern Democrats. Of the six Senators who did not vote, five were committed co-sponsors of the bill. However, even with the additional five votes, the vote would still have been 47 to 52 — 13 short of the required 60.

The “High Risk” bill, which was introduced in the 101st Congress, continues to be a well thought-out and reasonable proposal that in the end would save countless lives as well as money for everyone involved. If nothing else, the debate over the bill raised the issue to a higher level of public awareness. It is only a matter of time until some type of worker notification and counseling is enacted into law, perhaps at the state level. The “genie” is out of the bottle, and the opponents cannot put it back. As workers become more aware of the toxic workplace hazards confronting them, they will increasingly demand their right to know. Even though the “High Risk” bill was defeated because of political considerations, the notions that inspired it will continue to seek a public policy resolution.34

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APPENDIX

Analysis of the liability provision of S. 79, Section 10(g), prepared by the Senate Labor and Human Resources Committee and included in its report on S. 79.

Effect on Other Laws

The legislation provides that a finding or determination by the Risk Assessment Board, a notification issued pursuant to Board action, and the initiation of medical monitoring following notification may not be the basis for a claim for compensation either in a state or federal court or in an administrative process such as workers' compensation. It provides moreover that no evidence of any such finding, determination, notification or initiation is to be admissible in any compensation proceeding. At the same time, the medical and scientific studies on which Board determinations are based, any data which was available to the Board concerning exposure of individual employees, and the results of employee medical monitoring would continue to be admissible.

The Committee recognizes that, at a time of great public concern for what some have called a "liability crisis," many who are otherwise sympathetic with the legislation are anxious that it not aggravate that problem by expanding employers' liabilities. It is the Committee's intention to do nothing that would either increase the frequency of compensation claims or make it easier to establish such claims. The aim of the legislation — to help prevent occupational disease — is entirely distinct from the compensatory objectives of workers' compensation and tort litigation. On the other hand, this is not a "tort reform" bill. It is not the Committee's intention to restrict in any way the rights of employee-claimants under current state or federal tort or workers' compensation laws. The legislation is liability-neutral. It does not limit employer liabilities; it does not expand the rights of employee-claimants. It leaves the parties where they are today.

Section 10(g) of the Act implements the Committee's intention in this regard both substantively and by rule of evidence. As a matter of substance, no state or federal claim for compensation may be based on an action taken by the Risk Assessment Board, by NIOSH, or by the employee's employer pursuant to this Act (except, of course, for federal claims authorized by other provi-
sions of the Act itself). An employee may not, for instance, allege in a tort or workers' compensation claim that he or she has suffered damages due to emotional stress, fear of disease, or mental anguish resulting from inclusion in a Board-determined population-at-risk, or from notification of such inclusion, or from the initiation of medical monitoring. The employee may bring such a claim, if applicable law permits, so long as the alleged emotional harm was generated independent of any finding or determination by the Board or any notification received from NIOSH. But actions taken by the Board, NIOSH, or the employer pursuant to the Act may not be a ground of the claim.

Section 10(g) reinforces this substantive rule with a rule of evidence. It requires that state and federal courts and administrative agencies draw a distinction between actions taken under the Act and materials used in making determinations under the Act. Studies and data that existed independent of the Act and were available to or used by the Board are to be admissible in evidence to the same extent as they are under current law. So too are the results of medical monitoring undertaken by employees. No reference to the Board itself, however, or to actions taken by the Board, by employers or by others acting pursuant to the Act is to be admissible. Thus, as an evidentiary matter as well, claims seeking compensation for stress, fear of disease, or other emotional harm arising from the notification process are barred.

The final sentence of Section 10(g) is intended to insure that in compensation proceedings arising out of a hazardous occupational exposure, the mere receipt of notification may not trigger the running of any applicable statute of limitations, including a state statute. As discussed above, notification may not be used against employers as evidence of liability. The Committee also intends that the employer knew or should have known of the existence of the disease identified in the notice, or that the employee knew or should have known that specific occupational exposures were the cause of the identified disease. The Committee's approach in this regard is consistent with the so-called "discovery rule" adopted by many states, which provides that a statute of limitations does not begin to run until such time as the prospective plaintiff either knew or had reason to know the nature of the illness or injury and its operative cause. See, e.g., Van Buskirk v. Carey Canadian Mines Ltd., 760 F.2d 481, 498

Although the provisions of Section 10(g) are intended to supersede rules of evidence and procedure under state law, the Committee does not believe that these intrude impermissibly on the sovereign functions of the states. Under Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the boundaries of Congress' power under the Commerce Clause to affect state law are set primarily by Congress itself, not by any independent constitutional check on federal authority. By minimizing new litigation burdens on state courts while fully protecting employees' rights under existing state law, the Committee believes it is discharging its responsibility to protect the states' special position and to further the principles of cooperative federalism.
CRIMINAL ENFORCEMENT OF OSHA:
EMPLOYERS’ RIGHTS AT RISK

Stephen A. Bokat*

On February 2, 1989, the Illinois Supreme Court held in People v. Chicago Magnet Wire Corp.¹ that states could bring criminal prosecutions against employers and their executives for alleged unsafe working conditions. This decision is remarkable for the manner in which it ignores the express intention of Congress to preempt the field of workplace safety and health with the Occupational Safety and Health Act of 1970 (OSH Act).² If allowed to stand, the decision will throw the enforcement of safety and health regulation into disarray as local prosecutors and grand juries apply ad hoc notions of what is a safe and healthy workplace. Neither employees nor employers will have advance knowledge of their rights and responsibilities regarding workplace safety and health. It was precisely to avoid this situation that Congress originally passed the OSH Act.

A petition for certiorari, supported by numerous amici,³ was filed in Chicago Magnet Wire. Inasmuch as the debate on whether, under the Supremacy Clause,⁴ the OSH Act preempts such state criminal prosecutions is likely to revolve around Chicago Magnet

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3. Amici filing in support of the Petition for Certiorari included the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Electrical Manufacturers Association, the Synthetic Organic Chemical Manufacturers Association, the Chicago Association of Commerce and Industry, the Illinois Construction Industry Committee, the Illinois Retail Merchants Association, the Illinois Manufacturers’ Association, the Illinois Self-Insurers Association, and the Management Association of Illinois.

Wire this article will concentrate on that holding and the arguments for its reversal.\textsuperscript{5}

**The Occupational Safety and Health Act of 1970**

The OSH Act was passed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions ..."\textsuperscript{6} In doing so, Congress was concerned that occupational safety and health standards be uniformly applied on a national basis.\textsuperscript{7} The Secretary of Labor is authorized to set appropriate safety and health standards and regulations that virtually all employers must comply with.\textsuperscript{8} The statute provided for the adoption of existing federal and national consensus standards so that a body of standards was in place soon after the statute's passage.\textsuperscript{9} Moreover, a detailed procedure was established for the adoption of emergency temporary standards and permanent standards.\textsuperscript{10} The Secretary is also authorized to conduct investigations, conduct on-site inspections, and institute enforcement proceedings.\textsuperscript{11}

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\textsuperscript{5} A number of other courts have addressed this question with differing results. In Colorado v. Kelran Constr., Inc., 13 OSHC 1898 (Colo. 1988), the court held that prosecutions under general state criminal laws were preempted. "[T]he Court cannot find that Congress intended [that] employers were required to meet the federal OSHA and OSHA approved state standards PLUS other standards imposed by local prosecutors, courts, and juries." Id. at 1899.

The Texas Court of Appeals reached a similar conclusion in Sabine Consol., Inc. v. Texas, 756 S.W.2d 865 (Tex. Ct. App. 1988).

And in People v. Hegedus, 169 Mich. App. 62, 425 N.W.2d 729 (1988), the Michigan Court of Appeals held that the prosecution of a supervisor for involuntary manslaughter in connection with the death of an employee was preempted by the OSH Act. Michigan had adopted a state plan pursuant to the OSH Act but the prosecution was not brought pursuant to that statute. The Michigan Supreme Court reversed citing, inter alia, Chicago Magnet Wire, at 432 Mich. 598, 443 N.W.2d 127 (1989).

\textsuperscript{6} 29 U.S.C. § 651(b).


\textsuperscript{8} The OSH Act is applicable to all employers engaged in an industry "affecting commerce." 29 U.S.C. § 652(5). This phrase indicates that Congress intended the statute to reach as far as its powers under the Commerce Clause. Usery v. Franklin R. Lacy, 628 F.2d 1226 (9th Cir. 1980).

\textsuperscript{9} 29 U.S.C. § 655(a).

\textsuperscript{10} 29 U.S.C. § 655.

The Act also contains a general duty clause that, in the absence of specific standards, requires employers to provide a workplace free of hazards likely to cause death or serious injury.\(^\text{12}\) The Act creates a separate agency, the Occupational Safety and Health Review Commission, to adjudicate enforcement actions brought by the Secretary.\(^\text{13}\) The Commission consists of a corps of administrative law judges, who conduct trials pursuant to the Administrative Procedure Act,\(^\text{14}\) and a three-member commission acting as an appellate court.\(^\text{15}\) Appeals from the Commission's decisions are taken directly to a U.S. court of appeals.\(^\text{16}\)

Penalties for violations of the statute, standards, and regulations are primarily civil. Section 17(b)\(^\text{17}\) of the Act mandates a civil penalty of up to $1,000 for each "serious violation" of the statute.\(^\text{18}\) Penalties of $1,000 may be assessed for non-serious violations.\(^\text{19}\) The statute also provides for penalties of up to $10,000 for willful or repeated violations, and penalties of up to $1,000 per day for failure to abate cited violations.\(^\text{20}\)

In addition to civil penalties, § 17(e) provides for criminal penalties of up to six months imprisonment and a $10,000 fine for willful violations that result in the death of an employee.\(^\text{21}\) Pursuant to the Sentencing Reform Act of 1984,\(^\text{22}\) an amendment to the Comprehensive Crime Control Act of 1984,\(^\text{23}\) a commission was established to study and make recommendations regarding penalties for criminal enforcement of all federal laws. According to former U.S. Assistant Attorney General William Weld, §§ 3571

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12. 29 U.S.C. § 654(a)(1). The general duty clause provides:
   Each employer — shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
17. 29 U.S.C. § 666(b).
18. "Serious violations" are described in § 17(k) of the Act, 29 U.S.C. § 666(k), as conditions which give rise to a serious probability of death or serious injury resulting from them, unless the employer did not or could not know of the presence of the violation with reasonable diligence.
20. 29 U.S.C. § 666(a) and (d).
and 3623 of the Crime Control Act now permit penalties of $250,000 for individuals and $500,000 for organizations where a misdemeanor committed after December 31, 1984, results in a death. 24

Conspicuous by its absence from § 17(e) of the OSH Act is a criminal penalty for violation of the general duty clause, § 5(a)(1). Otherwise, criminal penalties can be sought for violation of any standard, rule, order, or regulation arising under the Act, so long as the requirements of § 17(e) are met — that is, that the violation is (1) willful and (2) the willful violation caused the death of an employee.

These criminal penalties, however, have been used sparingly. According to Daniel J. Mick, the U.S. Labor Department's Counsel for Regional OSHA Litigation, only 50 cases had been referred to the Justice Department for criminal prosecution by 1987 — 16 years after the Act's passage. 25 And of these 50 cases, only 16 had resulted in indictments.

It cannot be overemphasized that Congress's intent in passing the OSH Act was not to create a punitive statute, but one that would result in rapid abatement of unsafe working conditions. Thus, § 9(a) of the OSH Act requires that each citation "fix a reasonable time for the abatement of the violation." 26 The OSHA Field Operations Manual directs the compliance officer to require abatement within "the shortest interval within which the employer can reasonably be expected to correct the violation." 27 It should be noted that a criminal conviction of the OSH Act does not result in an abatement order. In order to obtain an abatement order, it is necessary for the Secretary of Labor to issue a civil citation specifically seeking abatement. Thus, it is not unusual to have civil and criminal cases arising out of the same fact pattern.

In adopting the OSH Act, Congress was particularly concerned with providing a role for the states. In the statute's statement of purpose, Congress stated that it was its policy to encourage safety and health:

25. BNA OSHR, SPECIAL REPORT 1052 (Mar. 4, 1987).
(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws...28

Accordingly, Congress provided a method in § 18(b) of the statute for states to assume jurisdiction of safety and health enforcement:

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.29

Congress also provided under what circumstances states could assert jurisdiction under state law without adopting a "state plan":

(a) 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.30

Thus, by its terms, § 18(a) grants states the authority or jurisdiction only over workplace conditions that are not specifically regulated by an OSHA standard.

The Occupational Safety and Health Administration has issued its own interpretation of § 18:

Section 18(a) of [OSHA] is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue to which a Federal standard has been issued...31

STATE ENFORCEMENT OF GENERAL CRIMINAL LAWS FOR SAFETY AND HEALTH VIOLATION

Under the OSH Act, states can impose criminal sanctions for exposing workers to unsafe working conditions in one of two

31. 29 C.F.R. § 1901.2 (1986).
ways. First, violations of "state plans" adopted pursuant to § 18 of the Act. The second vehicle for imposing state criminal sanctions is through enforcement of general state criminal laws. Twenty-three states currently have state plans providing for criminal enforcement. Because the standard for approval of state plans provides only that the state plan be "at least as effective as" the requirements of the OSH Act and the standards adopted pursuant to it, states are free to adopt criminal penalties that are significantly stricter than those contained in § 17(e) of the OSH Act. For example, California and Washington provide for criminal penalties for "serious" violations, whereas the OSH Act provides for criminal penalties only for willful violations that result in a death. Minnesota's state plan provides for fines of up to $10,000 and imprisonment of up to six months for any willful or repeated violation without the requirement that a death occur as a result of the violation. Some states have been allowed, as part of the adoption of a state plan, to prosecute certain workplace safety and health allegations under their general state criminal laws.

In part due to the less-than-aggressive utilization of the criminal provisions of the OSH Act by the Labor and Justice Departments, a dramatic change has taken place at the local and state level. In what appears to be a very recent phenomenon, state and local prosecutors have begun using general criminal laws (e.g., murder, manslaughter, assault and battery) — not designed to deal with workplace safety and health — to indict corporate officials for what are allegedly unsafe working conditions. This trend appears to have started as the result of an Illinois case, People v. Film Recovery Systems, commonly referred to as the Film Recovery Laboratories case.

The president of the company, its plant manager, and foreman were convicted of murder and 14 counts of reckless conduct.

32. See S. BOKAT & H. THOMPSON, OCCUPATIONAL SAFETY AND HEALTH LAW at 326, n.37 (BNA 1988).
34. CAL. LAB. CODE § 6425 (West 1977); WASH. REV. CODE § 49.17.190 (West 1986).
35. MINN. STAT. § 182.667 (West 1986).
36. E.g., North Carolina has been allowed to prosecute allegations of willful homicide. N.C. GEN. STAT. § 95.139 (Michie 1985).
resulting from the death of an employee due to exposure to cyanide gas. Charges were dismissed against another official, and a fifth has been avoiding extradition in Utah. The company itself was found guilty of involuntary manslaughter. This case achieved great notoriety as a result of its extreme facts.

The prosecution and conviction of the executives in the *Film Recovery* case had a dramatic effect. Shortly thereafter, state and local prosecutors across the country began a flurry of criminal prosecutions against corporations and their officials, primarily for deaths arising out of workplace accidents.

For example, the Los Angeles County District Attorney’s Office set up a special safety and health unit to investigate any workplace incident that resulted in a death. Referred to as a “roll-out” unit, the group responds to the scene of every occupational death. As of late 1988, there had been 18 occupational safety prosecutions in Los Angeles alone, despite the fact that at the time this unit was set up, California had one of the more aggressive state plans in the country. In Texas, a local prosecutor brought charges of negligent homicide against three construction companies and five of their supervisors, after three employees were killed in trenching accidents.

**Employer Response to Criminal Prosecutions of Conduct or Conditions Regulated by the OSH Act**

With the exception of the *Film Recovery* case, employers have almost universally responded to criminal prosecutions for conduct regulated by OSHA by arguing that the state prosecutions were preempted by the OSH Act. The OSHA statute itself and its legislative history provide a powerful rationale for holding that such state prosecutions are invalid.

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42. Id.
43. Obviously, that argument has not been made, and could not be made, with regard to criminal prosecutions pursuant to properly adopted state plans. In *Film Recovery*, the preemption argument was not raised at trial, but was raised on appeal. See supra note 37.
Chicago Magnet Wire

The business community’s opposition to these criminal prosecutions galvanized in response to the prosecutions in Chicago Magnet Wire. Accordingly, this article will explore the legal impediments to state prosecutions under general criminal laws in the context of that case.

Chicago Magnet Wire Company is engaged in the business of coating wire. On June 26, 1985, the grand jury of Cook County voted indictments against Chicago Magnet Wire and five of its corporate officials, charging each with multiple counts of aggravated battery and reckless conduct. The allegations read much like a complaint issued by the Occupational Safety and Health Administration. It alleged in the words of the Illinois appellate court:

[The defendants had] exposed [workers] to numerous federally regulated substances in the workplace; failed to provide necessary safety instructions in the workplace; provided inadequate ventilation in the workplace and maintained dangerously overheated working conditions while the employees were exposed to the federally regulated substances. It was alleged that as a consequence of these acts, 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.

A second set of aggravated battery indictments alleged that the defendants caused employees “to take by deception and for other than medical purposes federally regulated substances.” The indictment also alleged that the defendants deviated from the standard of care of a reasonable employer and therefore violated the duty to provide a safe workplace.

What is truly remarkable about the indictments, considering their repeated references to “federally regulated substances,” is that they do not allege that the defendants violated any OSHA

44. Specifically, the defendants were charged with violations of Ill. Rev. Stat. 1985, ch. 38, paras. 12-4(a) and (c) and 12-5 and with violating the conspiracy statute, Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a). 510 N.E.2d 1173 (Ill. Ct. App. 1987).
46. Id.
47. Id.
standard. In fact, according to the petition for certiorari, the state has never contested the defendants' claim that the working conditions were in compliance with OSHA standards.48

Pursuant to the defendants' motion, the Circuit Court for Cook County dismissed the indictments, finding that all the conduct in question was regulated by OSHA, and therefore under the Supremacy Clause, the OSH Act preempted the state prosecution.

The Appellate Court of Illinois affirmed. It noted that state laws are preempted when Congress has declared its intent, either explicitly or implicitly to occupy an area of the law.49 It found that Congress intended to occupy the field unless conduct was unregulated by OSHA or a state exercised the opportunity to assume enforcement of the OSH Act by adopting a state plan.50 It noted that Illinois had submitted a state plan but that it had been withdrawn on June 30, 1975.51

The appellate court specifically rejected the state's argument that the preemptive effect of the OSH Act extended only to state administrative schemes and not to state criminal laws that might apply to the workplace. The state had argued that § 4(b)(3) of the OSH Act52 supported its contention that Congress did not intend to preempt preexisting state criminal laws. That section 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 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.53

The appellate court found that the congressional intent underlying this section had been consistently construed to be limited to preserve the private rights of action of injured employees with regard to workmen's compensation.54


50. Id.

51. Id.


53. Id.

54. 157 Ill. App. 3d at ___, 510 N.E.2d at 1175.
The determinative factor, the court stated, was not the type of law (i.e. criminal versus safety and health laws) the state was attempting to enforce, but instead, the conduct the state was attempting to regulate. According to the appellate court, the state would not be foreclosed from enforcing criminal laws in the workplace unrelated to worker safety and health. But here, because the conduct the state was attempting to regulate was working conditions regulated under OSHA, the state was barred from doing so by Congress's intent in passing the OSH Act. Thus, the court concluded that:

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. 55

On appeal, the Illinois Supreme Court reversed. 56 The supreme court agreed with the appellate court that the issue of whether a state law is preempted by federal legislation under the Supremacy Clause is a matter of congressional intent. Moreover, the court noted, even absent an express command by Congress to preempt state regulation, preemptive intent can be inferred either if "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation," 57 or "where the regulated field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " 58

However, the Illinois Supreme Court, although not disagreeing that the allegedly criminal conduct was subject to OSHA standards, concluded that § 18 of the OSH Act did not explicitly preempt the enforcement of the criminal law of the states. Reading § 18 literally, the court stated that it referred only to a state's development of occupational safety and health standards, and not to the enforcement of state criminal law. 59 The court also

55. Id. at _____, 510 N.E.2d at 1176.
57. Id. at 362, 534 N.E.2d at 964 (quoting Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985)).
58. Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
59. Id. at 364, 534 N.E.2d at 965.
"observed" that whereas OSHA imposes strict liability for violation of its standards, criminal law requires that the defendants have a mens rea. Therefore, the court concluded, the "[c]riminal charges here do not set any new or other standards for workplace safety but rather seek to impose an additional sanction for an employer's conduct that, if proved, would certainly violate the ... [OSHA requirement that employers comply with its standards]." The court went on to find that "[t]here is nothing in the structure of OSHA or its legislative history which indicates that Congress intended to preempt the enforcement of State criminal law prohibiting conduct of employers that is also governed by OSHA safety standards."

The court also found that Congress's invitation in § 18 of the OSH Act to the states to set up state plans indicates that Congress did not intend to preclude "supplementary state regulation." The court stated that the relatively light criminal penalties contained in the OSH Act indicate that Congress did not intend to preclude more severe state regulation.

The court concluded that "the purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards," and not to prevent the states from imposing stricter standards.

The court specifically rejected the defendants' contention that the state's use of general criminal laws will result in employers having no notice of what is required of them. In this regard, the court strangely states (in view of the fact that there was no contention here that the defendants had violated any OSHA standard), "if a defendant were in compliance with OSHA standards it is unlikely that the State would bring prosecutive action."

60. Id. at 366, 534 N.E.2d at 966.
61. Id.
62. Id.
63. Id. at 367, 534 N.E.2d at 966-67.
64. Id. at 368, 534 N.E.2d at 967. The court ignored the additional penalties provided under the Sentencing Reform Act. See supra notes 22-24 and accompanying text.
65. Id.
66. Id. at 373, 534 N.E.2d at 969.
CHICAGO MAGNET WIRE: A DECISION OUT OF TOUCH WITH OSHA AND ITS LEGISLATIVE HISTORY

The decision of the Illinois Supreme Court in *Chicago Magnet Wire* is simply inconsistent with the OSHA statute and its legislative history.

The framework for analyzing whether the OSH Act preempts Illinois' application of its general criminal laws to workplace safety and health issues must begin with the U.S. Supreme Court's well-defined rules for preemption. Preemption is, in the first instance, a matter of congressional intent. 67 "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" 68 Even if Congress has not evidenced an intent to occupy an entire field, state law is still preempted if it is impossible to comply with both the federal and state laws, or where the state law is "an obstacle to the accomplishment of the full purposes and objectives of Congress" in passing the federal law. 69

As stated *supra* in Part II, Congress expressly provided in § 18(a) of the Act that states are free to assert jurisdiction over any workplace safety or health issue that is not regulated by an OSHA standard. Were there no standards regulating Chicago Magnet's conduct in question here, there would be no question that Illinois would be free to bring criminal charges against the defendants. But, the substances to which the employees in *Chicago Magnet Wire* were exposed were clearly regulated by the OSH Act, and the state has never contended otherwise. Moreover, the state has never contended that the company was not in full compliance with all OSHA standards and regulations. 70

This is a case where the state wishes to take over enforcement of OSHA standards on an *ad hoc* basis. But that is simply not a result envisioned by Congress when it passed the OSH Act, or allowed by the statute.

Congress was explicit about how states could enforce workplace safety and health: by adopting a state plan as provided in § 18(b).

68. *Id.* at 152-53 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
70. See *supra* note 48 and accompanying text.
But Illinois has expressly declined to do so.\textsuperscript{71} There can be no question that in enacting § 18 of the OSH Act, Congress intended to entirely preempt the field (except where OSHA has not issued a standard), and provide an exclusive method for states to assume enforcement of workplace safety and health.

Congress was well aware of the lack of state activity in regulating workplace safety and health at the time it considered passage of the OSH Act. As the Senate Report preceding the passage of the OSH Act stated:

Nor has state regulation proven sufficient to the need. No one has seriously disputed that only a relatively few states have modern laws relating to occupational health and safety and have devoted adequate resources to their administration and enforcement. Moreover, in a state-by-state approach, the efforts of the more vigorous states are inevitably undermined by the shortsightedness of others.\textsuperscript{72}

The Senate Report concludes that anything less than a comprehensive nationwide approach would be inadequate.\textsuperscript{73} Interestingly, in minority views attached to the Senate Report, Senators Dominick and Smith of Illinois complained bitterly about the limited role of the states under the proposed OSH Act:

[T]he role of state governments in the regulatory scheme is also limited. A state may assume responsibility for regulation only on the submission of a stringent state plan. The Secretary must monitor the plan and has authority to revoke it if he finds it does not meet the strict requirements of the plan.\textsuperscript{74}

It is significant that in drafting the OSH Act, Congress rejected the approach it had taken a year earlier in the Federal Coal Mine Health and Safety Act of 1969.\textsuperscript{75} There, Congress provided that the states could continue to enforce state laws that were more stringent than the federal regulations.\textsuperscript{76} Section 18(b) of OSH Act and its legislative history make it clear that Congress rejected the Mine Safety Act approach when it passed the OSH Act. In this regard, the Conference Report states that the Senate

\textsuperscript{72} LEG. HIST., supra note 7, at 144.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 201.
receded on a provision that more stringent state standards would not be in conflict with federal standards.\textsuperscript{77}

Congress's intent with regard to state enforcement of general workplace safety and health is unambiguous. The state's authority to regulate safety and health in the workplace exists only to the extent that no federal standard had been established.\textsuperscript{78} And, "whenever a State wishes to assume responsibility for developing or enforcing standards in an area where standards have been promulgated under this act, the State may do so under a state plan approved by the Secretary of Labor."\textsuperscript{79}

It is precisely individual enforcement of state general criminal laws that would destroy the cohesive, national approach to safety and health regulation that Congress envisioned. \textit{Ad hoc} standards like Illinois' approach would only result in \textit{post hoc} notice to both employers and employees of what are reasonable safety and health practices in the workplace.

The Illinois Supreme Court responded to this argument by stating that the defendants were on notice of the hazards because the state's criminal charges were based on their "alleged wilful failure to remove workplace hazards which create a substantial probability that they will cause injuries to their employees."\textsuperscript{80} In view of the state's failure to allege that any of these hazards (which involved substances regulated by OSHA) violated OSHA standards, it is difficult to understand how the defendants received any notice whatsoever. Even more bizarre, in view of the defendants' apparent compliance with OSHA standards, is the Illinois Supreme Court's statement that "if a defendant were in compliance with OSHA standards it is unlikely that the State would bring prosecutive action."\textsuperscript{81}

The state's position, and that of the Illinois Supreme Court in \textit{Chicago Magnet Wire}, is that the conduct regulated is irrelevant to a determination of whether the state enforcement is preempted by the OSH Act. In this regard, the Illinois Supreme Court stated: "Simply because the conduct sought to be regulated in a

\textsuperscript{79} Id.
\textsuperscript{80} People v. Chicago Magnet Wire Corp., 126 Ill. 2d at 373, 534 N.E.2d at 969.
\textsuperscript{81} Id.
sense under State criminal law is identical to that conduct made subject to Federal regulation does not result in State law being preempted."82 The court appears to say that the general preemption language contained in the OSH Act is insufficient to preempt a state's general criminal law. It holds that in order to preempt a state's general criminal laws, Congress would have to expressly indicate that it intended to preempt those laws.

The U.S. Supreme Court, however, has expressly rejected the argument that Congress must indicate the "type" of law it is preempting, rather than the conduct regulated. In Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, the Court stated that the "critical inquiry" was whether the controversy presented to the state court was the same as that which could have been presented to the federal agency.83 There can be no question in this case that the controversy is identical: Are the employees exposed to unsafe or unhealthy working conditions?

It is significant that Congress considered more punitive measures to enforce the OSH Act but decided against adopting them. Senator Dominick stated his preference for civil sanctions over criminal penalties for willful violations as follows:84

We did it this way because ... most of us know how difficult it is to get an enforceable criminal penalty in these type of cases. Over and over again, the burden of proof under a criminal type allegation is so strong that you simply cannot get there, so you might as well have a civil penalty instead of the criminal penalty and get the employer by the pocketbook if you cannot get him anywhere else.85

The Illinois Supreme Court also relies on § 4(b)(4) of the OSH Act86 in support of its conclusion that Congress did not intend

82. Id. at ___, 534 N.E.2d at 968.
83. 436 U.S. 180, 197 (1978). See also Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971), where the Court stated, "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."
84. Of course, as noted above, the final legislation provided for criminal penalties where a willful violation resulted in an employee’s death. See supra note 21 and accompanying text.
85. LEG. HIST., supra note 7, at 425.
86. 29 U.S.C. § 653(b)(4). That section 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 affect in any other manner the common law or statutory rights, duties, 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.
to preempt the application of general criminal law. The court
reasons that there is little difference in the regulatory effect of
state tort law and criminal penalties assessed under the general
criminal law.\textsuperscript{87} The court finds it implausible that Congress would
be willing to “accept the incidental regulation imposed by com-
rensatory damage awards,” and not be willing to accept the
“incidental regulatory effect” of state criminal law.\textsuperscript{88}

But in so finding, the court ignores the fact that Congress's
express allowance of state worker's compensation and tort actions
by \emph{employers and employees} in § 4(b)(4) was coupled with the
express preemption of § 18. Taken together, it can only be
reasonably concluded that Congress intended to preempt all but
\textit{private} actions.

The State and AFL-CIO argued before the Illinois Supreme
Court that § 4(b)(4) actually permits states to enforce general
criminal laws for safety and health violations. It is of note that
not even the Illinois Supreme Court adopted this reading. The
well-established rule of \textit{ejusdem generis} (“of the same kind”)
teaches that general words that follow specific words must be
construed to include only the same type of things that are
indicated by the specific words.\textsuperscript{89} In § 4(b)(4), the specific words
“workmen’s compensation law” are followed by the general words
“the common law or statutory . . . liabilities of employers . . .
under any law with respect to injuries, diseases or death of
employees arising out of . . . employment.” The words “any law”
must be construed to include only laws of the same type: those
dealing with compensation of employees for employment-related
injuries, diseases, or death. Thus, § 4(b)(4) cannot reasonably be
read to permit a state’s enforcement of its general criminal law.

\textbf{CONCLUSION}

The Occupational Safety and Health Act of 1970 was passed
to create a coherent national safety and health policy. Allowing
states to engage in \textit{ad hoc} creation of safety and health standards
by prosecuting employers under a state’s general criminal laws
will destroy that congressional policy. Congress provided an

\textsuperscript{87} People v. Chicago Magnet Wire Corp., 126 Ill. 2d at 370-71, 534 N.E.2d at 967-68.
\textsuperscript{88} Id.
\textsuperscript{89} \textit{E.g.}, Harrison v. PPG Indus., 446 U.S. 578, 588 (1980).
express method for states to assume jurisdiction over workplace safety and health, with financial support from the federal government. Moreover, when adopting a state plan, states which believe the federal criminal penalties to be inadequate, can expand those remedies. There is, therefore, no rationale for states to regulate safety and health through enforcement of their general criminal laws.
PREEMPTION: A UNION LAWYER'S VIEW*

George H. Cohen**

In 1970 Congress enacted the Occupational Safety and Health Act1 and "declare[d] it to be its purpose and policy ... to assure so far as possible every working man and woman in the Nation safe and healthful working conditions ...."2 After almost 20 years of observing the manner in which the Act has been implemented from the perspective of the interests of labor unions and the workers they represent, this much seems clear beyond any doubt: the lofty goal reflected by that congressional declaration has not been achieved. A critical ingredient is still missing. Top-level officials within a multitude of business enterprises throughout the country have yet to demonstrate a commitment to that goal by directing their managers to take all necessary steps to make their workplaces safe and healthful.

Today we now know that state-of-the-art technology can eliminate or substantially reduce workplace hazards. Some employers have shown an exemplary capacity to utilize that technology.3 However, the technology — whether it be engineering controls, such as modernized ventilation systems, protective clothing and equipment, or comprehensive work practices, such as increased maintenance — can be implemented only when employers are prepared to spend enough money and employ the manpower necessary to get the job done.

Therefore, in assessing the success of the Act, the fundamental question is whether the administration of that law has provided

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2. 29 U.S.C. § 651(b).
3. Experience has shown that employers can derive substantial economic benefits by virtue of increased efficiency and productivity resulting from implementing state-of-the-art technology. This was precisely what happened when cotton textile manufacturers implemented the necessary engineering controls to comply with the cotton dust standard.
employers with a sufficiently powerful inducement to "pay the price," that is, to earmark and devote their resources so that safe and healthful workplaces become a reality.⁴

Regrettably, the lesson of the past two decades is that the programs and actions undertaken by the Occupational Safety and Health Administration (OSHA) have been far too little and much too late to provide any such meaningful inducement. As envisioned by Congress, the Secretary of Labor was to promulgate expeditiously a series of stringent worker-protective safety and health standards that would then effectively be enforced by a cadre of federal inspectors armed with authority to issue citations and abatement orders,⁵ post workplace notices, and propose civil penalties against employers that did not comply with those standards.

The plain fact is that the all-important standard-setting function, by any objective yardstick, has moved at a snail's pace. OSHA has issued only 24 substance-specific health regulations since its creation,⁶ leaving many hundreds of known toxic chemicals unregulated. Furthermore, the Secretary of Labor's enforcement program has been woefully inadequate whether measured in terms of the number of inspectors, the number of workplaces inspected, the number of hazards eliminated and/or the civil penalties typically imposed when violations were found.⁷

All of these factors, coupled with the Reagan administration's abiding commitment to a policy of "deregulation" with respect to federal environmental and occupational health and safety programs, inevitably conveyed the wrong message to corporate

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⁴. Experience also has shown that employers have a penchant for exaggerating the costs of achieving compliance with health standards. Achieving compliance with the vinyl chloride standard, for example, cost only a small percent of the estimates tendered during rulemaking.

⁵. One serious deficiency in the Act itself is that any employer can obtain a stay of any obligation to abate a hazard merely by filing a notice of contest. 29 U.S.C. § 659(c).

⁶. The refusal of the Reagan administration to promulgate more health standards is especially disquieting given that many previously identified toxic chemicals had yet to be regulated and that the U.S. Supreme Court at the beginning of that administration made clear that the secretary of labor has the authority — indeed, the responsibility — to promulgate the most worker-protective health standards, subject to only one relevant limitation: technological feasibility. See American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981).

⁷. Recently and for the first time, OSHA has, in several cases, imposed substantial civil penalties on companies that have engaged in a pattern of illegal conduct.
America. Many employers were lulled into believing that continuing to do precious little to eliminate workplace hazards was an acceptable course of conduct. At bottom, the Act to date has provided only a minimal inducement for employers to clean up their own acts.

I. SPECTER IN THE BOARDROOM

Precisely because the administrative scheme of the Act has not served its intended purpose, labor unions and public interest groups increasingly have turned their attention to other initiatives that might cause employers to sit up and take notice of the risks they confront if they maintain the status quo. One of those initiatives is the subject of this article: the increased use by state law enforcement agencies of criminal prosecutions against individual corporate officers and/or their corporations in appropriate workplace-related situations.

It bears emphasizing at the outset that the purpose of such prosecutions is essentially to punish the charged party and thereby to deter others from engaging in conduct that constitutes a “crime” either under common law or by virtue of a state law. This purpose stands in marked contrast with the purpose of the administrative regulatory scheme established by the Act.\(^8\)

The salutary deterrent effect that the threat of possible criminal prosecution could have on corporate officials is illustrated by this scenario: The chief executive officer of Company A is presiding over a board of directors meeting in which that company is considering the advantages and disadvantages of spending several million dollars to purchase and implement a new ventilation system to reduce worker exposure to asbestos in several of its older plants. The company’s key finance officers have made a presentation emphasizing that the company’s projected small profit margin for that year would be jeopardized by this proposed major capital expenditure and that, therefore, less expensive “patchwork” steps should be taken to deal with the problem.

Even assuming that OSHA would inspect those facilities, if a modest civil penalty and an abatement order were the maximum legal liabilities that the company would face were it to decide not to purchase a new ventilation system, there would be little

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8. See discussion beginning infra in Part III, States Not Preempted.
incentive to appropriate the funds for that system. Let us assume, however, that another consideration entered into the decision-making calculus.

Suppose that the CEO knew that he and his fellow board members could be subjecting themselves, individually, to possible criminal prosecution because the vice president for occupational and environmental affairs already had advised the board that workers were being exposed to excessive levels of asbestos. Assume, further, the board was on notice that, unless a new control system was put in place, there was a substantial certainty that a significant number of workers would contract asbestosis and/or various types of cancer as a direct result of continued exposure to asbestos. In these circumstances, the CEO would understand that a decision not to appropriate the funds for the ventilation system could hardly be explained away as a "legitimate business judgment"; instead, it might well be tantamount to committing a crime.

Perhaps this scenario may help to explain why it appears that the specter of state criminal prosecutions may be serving as a more powerful incentive for corporate decision-makers to take actions that comport with the underlying purposes and policies of the Act than have the Act's core administrative enforcement procedures. The validity of that thesis is bolstered by the degree of anguish that has been generated within the corporate community by these state criminal prosecutions and the extensive counteroffensive it has launched, through counsel, in an attempt to preclude such prosecutions on federal preemption grounds.

Statutory Shortcomings

What has caused this unlikely trend whereby state criminal prosecutions have increasingly served as a deterrent to employer misconduct? In part, this trend is explained by the fact that the Act itself contains only one criminal provision of any significance; it does not suffice to inhibit employer misconduct. Section 17(e) states that:

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation
committed after a first conviction of such person, punishment shall
be by a fine of not more than $20,000 or by imprisonment for not
more than one year, or by both.9

That provision has been administered in a particular manner:
In carrying out its inspection function where workplace fatalities
have taken place, OSHA determines whether the employer's
conduct in a given case warrants criminal prosecution. If OSHA
makes an affirmative determination, it can refer the case to the
Department of Justice. However, a federal criminal prosecution
will be initiated only if the Justice Department recommends that
action and the local U.S. attorney's office responsible for prose-
cuting the case concurs with that recommendation.

Over the first 18 years of the Act, in excess of 125,000 workers
have died at their workplaces. Only 42 cases have been referred
by OSHA for criminal prosecution and, of that number, only 14
cases were actually prosecuted, resulting in 10 convictions.10 But
no defendant has ever spent one day in jail for a criminal violation
of the Act.11

High Visibility Cases

In the face of the federal government's paralysis, a growing
number of state and local prosecutors vigorously began to inves-
tigate the facts surrounding workplace fatalities and serious
injuries and illnesses with a view toward determining whether
the conduct of individual corporate officials or the corporation

10. Ironically, one explanation offered for the reluctance of local U.S. attorneys to
initiate criminal prosecutions is that because of the question "whether a sentence sufficient
to the seriousness of the offense and to the necessary investment of prosecutorial
resources could be obtained in the event of a conviction. In this regard, we think it likely
that the increased fines available will increase the prosecutive appeal of OSHA cases."
Letter from Thomas M. Boyd, Assistant Attorney General, to U.S. Rep. Tom Lantos,
(Dec. 9, 1988) (reprinted in BUREAU OF NATIONAL AFFAIRS, OCCUPATIONAL SAFETY &
HEALTH, SEVEN CRITICAL ISSUES FOR THE 1990s at B3-B6 (July 1989).
11. HOUSE COMM. ON GOV'T OPERATIONS, GETTING AWAY WITH MURDER IN THE WORK-
100-1051, 100th Cong., 2d Sess. (1988).

Apart from its dismal record in enforcing § 17(e), OSHA also has shown a similar
reluctance to file civil suits to obtain court-ordered injunctions to enjoin employers from
maintaining workplace conditions and practices that pose "imminent danger" to workers.
See § 13(a)-(c) of the Act, codified at 29 U.S.C. 662(a)-(c).
itself constituted criminal behavior under the laws they enforce.\textsuperscript{12} Without question, the national attention that has been focused on certain particularly egregious, high visibility cases has spurred this development. The earliest such case involved Film Recovery Systems, a company that operated a silver reclamation facility located in the Chicago suburbs. In the wake of an investigation into the death of a 45-year-old Polish immigrant from exposure to lethal levels of cyanide fumes in May 1983, the Illinois state's attorney indicted several company officials and charged them with murder and lesser offenses. Among other things, the indictment alleged that the defendants intentionally painted over manufacturer's warning labels on 55-gallon drums of toxic chemicals so that the workers would not be able to understand the serious risks they confronted.

After trial, in July 1985, three officers were convicted of murder and sentenced to 25 years in prison. Originally, the defendants appealed the conviction but not on the grounds of federal preemption. But in short order that changed — in the past few years, as the number of state criminal prosecutions increased significantly, the uniform battle cry of indicted corporate officials is that their state prosecutions are preempted by the federal act.\textsuperscript{13}

\section{II. Stage Set for Legal Showdown}

Two recent cases provide an appropriate point of departure for this part of our discussion. In one, the state of New York brought criminal charges of assault in the first degree, assault in the second degree, reckless endangerment in the second degree, conspiracy to falsify business records in the fifth degree and falsifying business records in the first degree against two corporate officers — William Pymm and Edward Pymm Jr. — and against Pymm Thermometer Corp. and the Pak Glass Machinery Corp.\textsuperscript{14}

\textsuperscript{12} For example, the state of California alone has successfully prosecuted 112 cases in the past eight years. \textit{House Comm. on Gov't Operations, supra} note 11, at 4.

\textsuperscript{13} \textit{See Prosecutions for Workplace Hazards}, 121 L.L.R.M. 280 (Apr. 21, 1986), an article that summarizes a variety of other prosecutions initiated by state and local law enforcement authorities.

\textsuperscript{14} \textit{People v. Pymm Thermometer Corp.}, 1989 N.Y. App. Div. LEXIS 13537 (Oct. 23, 1989). \textit{See also N.Y. Penal Law} §§ 105.51(1), 175.10, 120.10(4), 120.05(4), 120.20.
Specifically, the state charged that these individual and corporate defendants knowingly and intentionally subjected their employees to continuous exposure to a toxic substance — mercury — and thereby recklessly endangered the health of those employees. The defendants also were charged with conspiring to hide the existence and conditions giving rise to this toxic exposure from OSHA inspectors. One employee was crippled and suffered brain damage as a result of the defendant's conduct.

After trial in New York Supreme Court in Brooklyn, the jury found the defendants guilty on all counts for causing serious physical injury to that employee, by knowingly and continually exposing him to mercury, and for creating a substantial risk of serious injury to other employees by the same conduct.\(^{15}\)

The defendants filed a motion to set aside the jury verdict, asserting that, as a matter of law, even if they were guilty of the foregoing crimes as charged, their prosecution and conviction is preempted by the federal Act because the toxic substance to which the employees were exposed is regulated by OSHA. On November 18, 1987, the trial judge set aside the verdict on this ground.\(^ {16}\) The state of New York filed a timely appeal, and the jury verdict was reinstated as this article went to press.\(^ {17}\)

In the second case, the state of Illinois brought criminal charges of aggravated battery against Chicago Magnet Wire Corp. and five of its corporate officials.\(^ {18}\) The state alleged that the defendants, acting in their official capacities, committed that common law crime by knowingly and recklessly exposing 41 employees to "poisonous and stupefying substances," causing them serious injury.

Unlike the defendants in *Pymm Thermometer*, these defendants raised federal preemption in a pretrial motion to dismiss. The trial judge in the Circuit Court of Cook County dismissed the charges against the defendants on this ground, and the appellate

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15. *Id.* The jury also found defendants guilty of falsifying business records in an attempt to conceal their acts.

16. *Id.* Although it is of no consequence to our discussion, the trial court also set aside the defendants' conviction on two specific counts of the indictment, charging conspiracy in the fifth degree and reckless endangerment in the second degree, on the ground that the evidence produced was not legally sufficient to support a finding of guilt on these two counts.

17. *Id.*

18. *See ILL. REV. STAT. 1985, ch. 38, paras. 12-4(a), 12-4(c), and 8-12(a).*
court affirmed this decision. On February 1, 1989, the Supreme Court of Illinois issued its decision unanimously reversing the lower court’s dismissal and remanding to the circuit court for trial.

Shortly before that decision was issued, the U.S. Department of Justice publicly declared that its position is that the criminal penalty provisions of the Act were not intended to preempt state prosecutions of employers for workplace-related crime:

As a general matter, we see nothing in the act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by the state criminal laws of general applicability.

The Department of Labor, on the other hand, has consciously chosen to remain silent on this important issue. The department’s Solicitor did not submit an amicus brief in either the Illinois or New York state court proceedings.

Illinois and Michigan are presently the only states whose highest courts have decided the preemption issue. Given the importance of the issue, it is possible that the U.S. Supreme Court will choose to have the last word on this subject. The Supreme Court denied certiorari in Chicago Magnet Wire, perhaps because it preferred to wait to see if the highest court in another state reaches a contrary decision to Chicago Magnet Wire.

III. STATES NOT PREEMPTED

The inquiry whether the federal Act preempts state criminal prosecutions resulting from workplace fatalities, injuries, or ill-

22. As the Solicitor has explained, the Department of Labor has been watching developments “percolate” and intends to stay its hand until a case is presented to the U.S. Supreme Court. Id.
23. This portion of the article is a synopsis of several amicus briefs filed on behalf of the AFL-CIO with respect to the preemption issue. The author participated in the preparation of those briefs in conjunction with Laurence Gold, AFL-CIO General Counsel, and two of Mr. Cohen’s colleagues, Robert M. Weinberg and Virginia Seitz.
resses must begin with a review of the relevant provisions of
that legislation.\[24\]

An Overview and Summary

The discussion that follows first shows that the state's author-
ity to establish and enforce its criminal laws is at the core of its
historic police power, and that such authority is not preempted
by federal statutory law unless Congress unmistakably manifests
an intention to preempt. There is no evidence of a congressional
intent to preempt state criminal law on the face of the Act or

\[24\] Section 4(b)(4), codified at 29 U.S.C. § 653, 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 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.
Sections 17(e), (f), & (g), codified at 29 U.S.C. § 666 provide:
(e) Willful violation causing death to employee
Any employer who willfully violates any standard, rule, or order promulgated
pursuant to section 6 of this title, or of any regulations prescribed pursuant to
this chapter, and that violation caused death to any employee, shall, upon conviction,
be punished by a fine of not more than $10,000 or by imprisonment for not more
than six months, or by both; except that if the conviction is for a violation committed
after a first conviction of such person, punishment shall be by a fine of not more
than $20,000 or by imprisonment for not more than one year, or by both.
(f) Giving advance notice of inspection
Any person who gives advance notice of any inspection to be conducted under this
chapter, without authority from the Secretary or his designees, shall, upon convic-
tion, be punished by a fine of not more than $1,000 or by imprisonment for not
more than six months, or by both.
(g) False statements, representation, or certification
Whoever knowingly makes any false statement representation, or certification in
any application, record, report, plan, or other document filed or required to be
maintained pursuant to this chapter shall, upon conviction, be punished by a fine
of not more than $10,000, or by imprisonment for not more than six months, or by
both.
Sections 18(a) & (b), codified at 29 U.S.C. § 667, provide:
(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 6 of this title.
(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 6 of this title shall submit a State plan for
the development of such standards and their enforcement.
in its legislative history; to the contrary, § 4(b)(4) of the Act clearly reveals congress' intent that the state's authority in this respect be preserved.

The discussion then shows that any reliance on § 18 of the Act for the contention that the Act preempts state criminal prosecutions is entirely misplaced. There is a fundamental conceptual distinction between two different types of laws concerning worker safety and health: viz., those laws that compensate victims of industrial injury and punish employers who wrongfully inflict such injury, and those laws that set preventive, regulatory standards. The difference between these types of laws cuts the line of demarcation between § 4(b)(4)’s broad preservation of state authority and the limited preemption of state authority worked by § 18 of the Act. The latter provision reflects Congress' determination that a unitary federal system of mandatory, minimum, preventive occupational safety and health regulations is necessary to supplement the historic tort and criminal law requirements by which the states have redressed employer actions injurious to their employees. This determination was not intended to, and does not in any way, limit state authority to compensate employees injured by employer torts or to punish employers for criminal wrongs.

State's Rights Expressly Preserved

To begin with, as noted, there is a strong presumption against preempting a state's exercise of its historic police power to establish and enforce criminal prohibitions to protect its citizens against physical harm. The state plainly has a special interest in controlling conduct that is motivated by a malicious or reckless mental state and that endangers the lives of its citizens, whether the conduct occurs in the context of operating a car or operating a workplace.

25. See discussion infra in Heavy Burden for Proponents.
26. See discussion infra in Section 18 Not Relevant to Preemption Issue.
27. See, e.g., Hoag v. New Jersey, 356 U.S. 464, 468 (1958) ("It has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice.") See also Patterson v. New York, 432 U.S. 197, 201 (1977) ("Preventing and dealing with crime is much more the business of the States than it is of the Federal Government."); Abbate v. United States, 359 U.S. 187, 195 (1959) ("[T]he States under our federal system have the principal
Consistent with that principle, the U.S. Supreme Court has repeatedly emphasized that preemption analysis must “start with the assumption that the historic police powers of the states were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.”

Indeed, in San Diego Unions v. Garmon, the U.S. Supreme Court made it plain that, even when Congress generally preempts state law tort remedies in favor of a uniform federal scheme, as, for example, under the National Labor Relations Act, the federal law does not preempt state laws “deeply rooted in local feeling and responsibility,” most particularly those that prohibit the intentional, knowing, or reckless infliction of physical harm upon individuals. What this means is that, unless Congress expressly declares otherwise, “the state still may exercise its historic powers over such traditionally local matters as public safety and order.”

In recognition of this principle, courts have not applied the preemption doctrine to foreclose states from enforcing their “general criminal statutes governing reckless and intentional conduct that threatens public safety.” As one recent decision aptly observed: “The fact that [criminal] conduct may in some respects violate OSHA safety regulations does not abridge the state’s historic power to prosecute crimes.”

Furthermore, in enacting the Occupational Safety and Health Act, Congress was not silent on this issue — it expressly provided

responsibility for defining and prosecuting crimes.”); Kelly v. Washington ex rel. Foss Co., 302 U.S. 1, 13 (1937) (The principle that states may exercise their police power unless it directly conflicts with federal action “is strongly fortified where the State exercises its power to protect the lives and health of its people.”).


that a state shall not be preempted from enforcing its criminal laws. All states make it a crime for “A” to willingly and wrong-fully poison “B,” thereby inflicting grievous bodily injury. So far as we are aware, the fact that “A” is an employer and “B” is his or her employee has never constituted a defense to an otherwise valid indictment for that crime. The federal Act, moreover, provides no criminal penalties for such an act by an employer or by anyone else.

Heavy Burden for Proponents

The proponents of the preemption argument must shoulder a very heavy burden. They must establish that in passing the Act — whose overall purpose is to promote worker safety and health — Congress was animated in part by an intent to deprive the states of their longstanding authority to enforce their criminal laws against employers who knowingly and willfully poison their employees thereby insulating such employers against any criminal penalty for that kind of intentional wrongdoing. Nothing in the Act or its legislative history provides any support for attributing such an unlikely intention to Congress; in fact, § 4(b)(4) of the Act is an express anti-preemption provision:

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 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.

Thus, by its terms, the act does not “diminish or affect in any other manner the common law or statutory ... duties, or liabilities of employers ... under any law with respect to injuries, diseases, or death of employees arising out of or in the course of, employment.”

A fair reading of the quoted words leads directly to the conclusion that the state criminal charges alleging such employer conduct are not preempted. Section 4(b)(4) speaks in broad terms; “any law” is a clear and sweeping phrase, obviously including criminal laws.

33. 29 U.S.C. § 651(b).
34. 29 U.S.C. § 653(b)(4).
The stricture against preemption is not limited to state civil laws generally or even to state tort laws; by its terms § 4(b)(4) applies, as well, to state criminal laws, both “common law” and “statutory.” Employers, moreover, obviously have a “duty” under the criminal “law” of their respective states not to commit assault or to engage in reckless conduct that “injur[es]” individuals “in the course of employment.” Far from disclosing a clear and explicit congressional intent to preempt state law criminal actions, § 4(b)(4), instead, makes it manifest that such actions are not preempted.

**Strained Interpretations**

In *Chicago Magnet Wire* and *Pymm Thermometer*, as in numerous other cases, the defendants offered two strained interpretations of § 4(b)(4) to support their claim that this provision does not demonstrate a congressional decision against preempting state criminal laws.

First, the defendants noted that the provision refers only to the “rights, duties or liabilities” of employers and employees, and not to those of the states. The defendants maintain that this omission is significant because only the states have a “right” to enforce the criminal laws. The simple answer is that § 4(b)(4) would save from preemption only those state laws that touch most closely on the area of federal regulation, while it would preempt all others. Moreover, this argument would nullify the language of § 4(b)(4) that preserves the duties and liabilities of employers under the “common law,” because so far as can be determined, there is no common law specifically pertaining to occupational safety and health.

Consistent with § 4(b)(4)’s plain meaning, it is well settled that the Act does not preempt state law actions seeking money damages for injuries caused by occupational safety and health hazards.35

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It is noteworthy that the courts have consistently found that in § 4(b)(4) Congress
These principles have been established even though it is axiomatic that the power to impose compensatory damages for such injuries carries with it the ability to regulate primary conduct:

[Regulation can be effectively exerted through an award of damages as though some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct by controlling policy.]

Integral Part of Tort Remedies

This point is even more compelling when we pause to consider that punitive damages are an integral part of traditional tort remedies. Where, as in the Act, Congress expressly precludes preemption of state law tort actions, it is presumed that all traditional tort law remedies, including punitive damages are available, unless Congress directs otherwise.

There is little, if any, difference in kind between punitive damages available in tort and criminal penalties. In *Silkwood v.*

sought to ensure that the enactment of the Act neither expanded nor contracted the pre-existing state law rights and responsibilities of employers and employees for injuries arising out of employment. *See, e.g., Practico v. Portland Terminal Co., 783 F.2d 255, 266 (1st Cir. 1985)* (The reading "that observes both [§ 4(b)(4)']s language and ... spirit is that no new duty is to be exacted [by reason of the Act] where none existed before and, equally, no existing duty is to be excused by reason of [Act] regulation." (quoting Provenza v. American Export Lines, Inc., 324 F.2d 660, 665 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964)).

Although not directly relevant here, *Practico* makes clear that one of Congress' purposes in § 4(b)(4) was to ensure that the Act did not create a new private cause of action for employees injured on the job. *See, e.g., United Steelworkers v. Marshall, 647 F.2d 1189, 1235-36 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).* In other words, the case law recognizes that while the Act does establish an administrative scheme to enforce promulgated occupational safety and health standards, the Act does not create a federal private cause of action in tort for damages in addition to those already existing in state law.


38. *See Smith v. Wade, 461 U.S. 30, 49 (1983) (punitive damages are designed to punish and deter outrageous behavior, that is, behavior linked with criminally culpable mental states); Restatement (Second) of Torts § 908 comment b (1977) ("[Punitive] damages can be awarded only for conduct for which this remedy is appropriate — which is to say, conduct involving some element of outrage similar to that usually found in crime."); W. Prosser & W.P. Keeton, Prosser and Keeton on Torts § 2 at 9 (5th ed. 1984) (punitive damages are the civil analogue of criminal penalties).*
Kerr-McGee Corp., for example, the U.S. Supreme Court rejected the argument that because a "state-authorized award of punitive damages ... punishes and deters conduct relating to radiation hazards," it is preempted by the Atomic Energy Act.\textsuperscript{39}

In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.\textsuperscript{40}

In short, since § 4(b)(4) of the Act preserves state law tort actions for compensatory and punitive damages from preemption, and since punitive damages and criminal penalties serve virtually identical law enforcement purposes, there is no statutory or logical reason to preserve the one and preempt the other. Given that § 4(b)(4) preserves state law tort actions — which assuredly regulate conduct by imposing a generally applicable state law standard of care — and given that the Act's anti-preemption provision simply does not expressly distinguish between criminal actions and tort actions, there is no basis for Act preemption of criminal actions.\textsuperscript{41}

One final point in this regard. The fact that the criminal indictments in Pymm Thermometer and Chicago Magnet Wire

\textsuperscript{40} Id. at 256.
\textsuperscript{41} See Chicago Magnet Wire Corp., 126 Ill. 2d 356, 371, 534 N.E.2d 962, 968, cert. denied sub nom. ASTA v. Illinois, 58 U.S.L.W. 3202 (U.S. Oct. 3, 1989). "[I]f Congress, in OSHA, explicitly declared it was willing to accept the incidental regulation imposed by compensatory damages awards under State tort law, it cannot plausibly be argued that it also intended to preempt State criminal law because of its incidental regulatory effect on workplace safety." Id.
specifically referred to OSHA standards governing employee exposure to toxic chemicals is of no moment. Even if it became necessary for the state to implicate a federal safety or health standard in order to prove that a crime has been committed, that consideration would not counsel a result in favor of preemption. The weight of authority is that state law tort actions in which private plaintiffs rely on OSHA standards to establish a per se negligence claim or as evidence that an employer did not act reasonably are not preempted. As the U.S. Court of Appeals for the First Circuit explained:

[W]hile the Fifth Circuit has found, along with every other court that has considered this issue, that § 653(b)(4) was designed to ensure that OSHA did not permit injured employees to bypass applicable state worker’s compensation schemes through a private action in federal court, it has distinguished this limitation on the uses of OSHA from a limitation that would prevent violations of OSHA regulations from having the same consequences under existing common law and statutory schemes as violations of any other regulatory statute.42

That reasoning applies as well in a criminal case.

Narrow Criminal Provisions

The proponents of preemption are reduced to pointing to the narrowly circumscribed criminal provisions in the Act and then claiming that it is proper to imply a congressional intent to preempt all state criminal laws touching on employee health and safety from these sections. That claim, as the Department of Justice has concluded,43 is incorrect. The enactment of federal criminal provisions whose coverage overlaps in one minimal respect with that of state criminal law does not, by itself, manifest a congressional intent to occupy the field and preempt the states. In California v. Zook,44 the U.S. Supreme Court, in holding that the Federal Motor Carrier Act does not preempt a California statute prohibiting the sale of transportation over the state’s

43. See supra note 21 and accompanying text.
44. 336 U.S. 725 (1949).
public highways without a permit from the Interstate Commerce Commission, stated:

[The] automatic "coincidence means invalidity" theory, applied in an area as imbued with the State's interest as is this one, ... would lead us to the conclusion that a state may not make a dealer in perishable agricultural commodities respect its laws on the fraudulent nonpayment of an obligation, if that fraud occurred after an interstate shipment, 7 U.S.C. 499(b)(4), for Congress has not explicitly saved such prosecutions. We would hold, too, that extortion or robbery from interstate commerce ... is immune from state action; that the wrecking of a bridge over an interstate railroad is an "exclusively federal" offense, 18 U.S.C. 1992; that the transmittal of a ransom note in interstate commerce cannot be punished by local authorities, 18 U.S.C. 875.... In short, we would be setting aside great numbers of state statutes to satisfy a congressional purpose which would be only the product of this Court's imagination.45

In this connection, it should be kept in mind that general criminal laws protect different community concerns than do regulatory standards, even when they have overlapping governance of the same conduct. Most significantly, criminal law deters, punishes, and stigmatizes blameworthy behavior.

The fact that a state administrative scheme regulating occupational safety and health might be preempted by the Act does not mean that state criminal laws, which serve different concerns, should be similarly treated.46

IV. NO INTENT TO NULLIFY PROTECTION

In sum, as the Illinois Supreme Court concluded in Chicago Magnet Wire: "It cannot be said that it was the clear and manifest purpose of Congress to preempt the application of State criminal laws for culpable conduct of employers simply because the same
conduct is also governed by OSHA occupational safety and health standards."\(^47\)

Certainly the Act's criminal provisions are not the kind that can be said to raise a rational inference that Congress intended to occupy the field of criminal law relating to employee health and safety. The Act makes it criminal (a) to give unauthorized advance notification of an OSHA inspection (§17(f)); (b) to knowingly make false statements on any filing with OSHA (§17(g)); and (c) to willfully violate an OSHA standard, rule, or order if "that violation caused death to any employee" (§ 17(e)). The penalty for the intentional violation of an OSHA standard that causes the death of an employee is "a fine of not more than $10,000 or ... imprisonment for not more than six months, or ... both."\(^48\)

The first two criminal penalties were intended only to ensure the integrity of the Act's administrative scheme. The third - the penalty for murder - is a narrowly circumscribed criminal penalty. It is simply implausible to contend that Congress, in enacting a statute to ensure worker health and safety, would nullify all criminal law protection of employees by penalizing employers only if their willful conduct kills an employee, ignoring every other circumstance in which an employee is intentionally injured.

Moreover, had Congress intended the Act's criminal provisions to serve as a complete substitute for state criminal law in this regard, common sense dictates that the penalty provision it enacted surely would have exceeded the mere "slap on the wrist" provided by § 17(e).\(^49\)

In these circumstances, the *Chicago Magnet Wire* court correctly concluded:

OSHA provides principally civil sanctions and only a few minor criminal sanctions for violations of its standards. Even for willful violations of OSHA standards which result in an employee's death

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47. *Chicago Magnet Wire*, 126 Ill. 2d at 366, 534 N.E.2d at 966.
48. *Id.* at 363, 534 N.E.2d at 964-65.
49. In point of fact, the penalty provision was incorporated into the Act at the last minute in a context which further demonstrates that Congress did not make a considered judgment to nullify application of state criminal laws by enactment of this lone provision. See Conference Report on S. 2193 at 41, reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, at 1194, 1210 (statement of Rep. Daniels).
an employer can be sentenced only to a maximum of six months' imprisonment. There is no penalty provided for conduct which causes serious injury to workers. It seems clear that providing for appropriate criminal sanctions in cases of egregious conduct causing serious or fatal injuries to employees was not considered. Under these circumstances, it is totally unreasonable to conclude that Congress intended that OSHA's penalties would be the only sanctions available for wrongful conduct which threatens or results in serious physical injury or death to workers.\(^5^0\)

Section 18 Not Relevant to Preemption Issue

The proponents of preemption seek to evade the dispositive force of \(\S\ 4(b)(4)\) by claiming that \(\S\S\ 18(a)\) and \(b\) of the Act expressly forbid the application of any state law that in any manner regulates conduct already regulated by OSHA. This contention is, we submit, wrong. Section 18 is of no relevance to the issue under consideration because it has no application to state law criminal actions. Rather, the singular focus of \(\S\ 18\) is directed to an entirely different federal concern and preempts only one, narrow area of state action — that is, state health and safety standard-setting.

There is a fundamental conceptual distinction between two different types of laws that concern worker health and safety. On the one hand, battery, negligence, and worker compensation laws—such as those referenced in \(\S\ 4(b)(4)\) — make conduct by an employer that in fact injures a particular employee actionable after the injury. The theory of these laws is that conduct which in fact causes harm should result in compensation to the victim or punishment of the person who causes the harm, or both.

So far as we are aware, as of 1970 when the Act became law, every state made employer conduct that in fact injured an employee actionable — in worker's compensation in almost all circumstances, in tort in some circumstances, and, if the action was the product of a criminal intent, in the criminal law as well. And, as far as we have been able to ascertain, the employer-employee relationship has never been held to privilege employer action against an employee that constitutes criminal assault or battery under the state's common law or statutory definitions of those crimes.

\(^{50}\) Chicago Magnet Wire, 126 Ill. 2d at 368, 534 N.E.2d at 967.
In contrast, employee health and safety may also be protected by prophylactic regulation of employer conduct enforceable by injunction and/or fines for breach of the protective rules that are promulgated without regard to whether a particular employee of the employer against whom enforcement action is taken had yet been harmed. The federal administrative scheme implemented by the Act is an example of such a prophylactic approach. While such preventive regulation has the same general aim as laws that make harmful conduct actionable after the harm occurs — *viz.*, to ensure a higher level of safe employer conduct — the means employed to reach that end are, as we have noted, qualitatively different. The preventive regulatory regime requires the promulgation of quite specific standards covering workplace conduct, a system of inspection, citations for failure to meet the standards, and fines and/or abatement orders to correct any failure to comply with the regulations.

This regulatory approach to protecting employees was not widespread in 1970. Only a small number of states had an extensive system for preventing injuries, and the Act was enacted to fill this need.\(^\text{51}\) Congress in enacting the OSH Act had concluded that there would be no further progress in this regard unless a federal system was put in place that empowered the Secretary of Labor to set standards establishing meaningful workplace protections:

> No one has seriously disputed that only a relatively few states have modern laws relating to occupational safety and health and have devoted adequate resources to their administration and enforcement. Moreover, in a state-by-state approach, the efforts of the more vigorous states are inevitably undermined by the shortsightedness of others ....

In sum, the chemical and physical hazards which characterize modern industry are not the problem of a single employer, a single industry nor a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.\(^\text{52}\)

As the *Chicago Magnet Wire* court explained:

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51. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 12 (1980) ("The [OSH] Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring.").

We judge that the purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards. (See United Airlines, Inc. v. Occupational Safety & Health Appeals Board, 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982).) It was not fear that the States would apply more stringent standards or penalties than OSHA that concerned Congress but that the States would apply lesser ones which would not provide the necessary level of safety.53

V. COMPREHENSIVE REGULATORY SCHEME

Thus, the 1970 Congress recognized the need for a comprehensive preventive regulatory scheme, but that Congress also ensured that the widespread system of after-the-fact compensation of victims of industrial injury and of punishment of employers who wrongfully inflict such injury would continue as it existed at the time. Congress, as we have seen, provided that assurance in § 4(b)(4)'s anti-preemption language. Sections 18(a) and (b) of the Act, upon which the proponents of preemption rely, provide:

(a) 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 6 of this title.

(b) 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 6 of this title shall submit a State plan for the development of such standards and their enforcement. 54

This section preempts only the states’ jurisdiction over an “occupational health and safety issue” covered by a “federal standard” absent the state’s affirmative “assumption of responsibility for development and enforcement of an occupational safety and health standard” on the same issue. Sections 18(a) and (b), in other words, forbid states to assert jurisdiction over, develop, or enforce occupational safety and health standards if a federal safety or health standard is already in effect, unless the state

53. Chicago Magnet Wire, 126 Ill. 2d at 368-69, 534 N.E.2d at 967.
operates under a plan approved by the Secretary of Labor.\textsuperscript{55}

Section 18's language shows a congressional intent, then, to preempt state authority only with respect to prophylactic regulation of employer conduct through a regulatory regime. Section 18 simply does not reach state law actions designed to compensate an injured employee or to punish an employer who injures an employee while acting with criminal intent.\textsuperscript{56}

Consistent with the words of §18(a) and (b), the structure of §18 taken as a whole reveals that Congress' focus in this provision was on state standard setting.

In §18(c) — the subsection immediately following the preemption provision — Congress sets out the prerequisites for state "development and enforcement of safety and health standards": the creation of an administrative agency, the formulation of standards that will be "at least as effective" as those promulgated by the federal agency, and the creation of an administrative inspection and enforcement mechanism that will be "at least as effective" as that of the federal agency. The remainder of §18 sets out further administrative requirements governing the submission, rejection, supervision, and termination of state plans.\textsuperscript{57}

None of those requirements has anything to do with the passing and enforcing of a general state law provision prohibiting, for example, criminal assault.\textsuperscript{58}

\begin{enumerate}
\item \textsuperscript{55} See United Steelworkers of America v. Auchter, 763 F.2d 728, 738 (3d Cir. 1985).
\item \textsuperscript{56} See also Chicago Magnet Wire, 126 Ill. 2d at 364, 534 N.E.2d at 965. "The language of section 18 refers only to a State's development and enforcement of 'occupational health and safety standards.' (29 U.S.C. 667(a) (1982).) Nowhere in section 18 is there a statement or suggestion that the enforcement of state criminal law as to federally regulated workplace matters is preempted unless approval is obtained from OSHA officials." Id.
\item \textsuperscript{57} See §18(d), (e), (f), and (h).
\item \textsuperscript{58} This construction of §18 is further supported by the narrow definition of the term "occupational safety and health standard," which appears in another section of the Act: The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, reasonably necessary or appropriate to provide safe or healthful employment and places of employment. 29 U.S.C. § 652(8).
\end{enumerate}
In sum, it was only the administrative regulation of occupational safety and health standards by states lacking an approved plan that Congress decided to forbid.

VI. CONCLUSION

We believe that it would be paradoxical in the extreme for any court to hold that a Congress whose primary goal was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" Nonetheless enacted a statute that deprived employees of the longstanding protection provided by state criminal laws.

the meaning of the Act. As noted, occupational safety and health standards by their very nature are forward-looking and preventive; their point is to establish norms that are enforced through inspections, injunctive orders, and civil fines without regard to whether an injury has yet occurred. "There is no indication that Congress intended the term, 'standards' to include general criminal laws." Note, Getting Away with Murder, supra note 31, at 542. OSHA's administrative scheme bears no relationship to statutes compensating injured workers after the fact or punishing criminal wrongdoing that leads to occupational injuries. Id. "[Criminal laws] do not prescribe specific practices, means, methods, operations, or processes', as such, but rather focus after the fact on whether conduct causing an injury in particular circumstances was blameworthy, as measured by general societal norms." Id. at 543. Cf. West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308 (4th Cir. 1983) (OSHA's toxic substance standards do not preempt state regulations of notice and posting requirements for toxics); P&Z Co. v. District of Columbia, 408 A.2d 1249, 1250 (D.C. App. 1979) (Act does not preempt D.C. accident reporting requirements).

59. 29 U.S.C. § 651(b).

60. Were the U.S. Supreme Court to decide otherwise, this would necessarily trigger the need for a major overhaul of § 17 of the Act to incorporate much more comprehensive criminal provisions and much more severe criminal penalties. Even if those statutory changes were in place, there would remain the nagging question whether federal prosecutors thereafter would devote the manpower and resources to effectively enforce the amended statutory scheme.
THE OCCUPATIONAL SAFETY & HEALTH ACT: 
IS IT TIME FOR CHANGE?

*Sy Holzman*

I. INTRODUCTION

Virtually on the eve of the 20th anniversary of the signing into law of the Occupational Safety and Health Act of 1970, Public Law 91-596, the cries for making changes in the Act seem to be getting louder and louder.

For most of its early history, the OSH Act has been considered sacrosanct — untouchable and unamendable. Proponents of worker health and safety feared the strength of the opponents and believed that any opportunity offered them would result in severe weakening of this milestone in worker protection legislation, at best, and outright repeal, at worst.

That concern pervades the thinking of many who remember with great clarity the bitter debates at the committee and subcommittee levels of the House and Senate in 1970, on the floor of each house, and in the conference room. Some congressmen still remember those early years after the bill's passage, when numerous bills would be introduced in each Congress to repeal or seriously weaken the provisions of the Act.

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1. 116 CONG. REC. 38366-38403; 38702-38733; 37317-37349; 37601-37640; 41753-41765; 42072; 42199-42210.

2. In the 92nd Congress, 96 bills were introduced in the 2nd session alone to amend or repeal the Occupational Safety and Health Act. 118 CONG. REC. INDEX 755.

In the 93rd Congress, 87 bills were introduced affecting the Occupational Health and Safety Act, including 11 proposing total repeal. 119 CONG. REC. INDEX 1169 and 129 CONG. REC. INDEX 1088.

In the 94th Congress 89 bills were introduced affecting the Occupational Safety and Health Act, including nine proposing repeal. 121 CONG. REC. INDEX 1106 and 122 CONG. REC. INDEX 825.
Now, the tide seems to have turned in favor of examining the OSH Act itself for possible amendment. There is a cadre of proponents of worker health and safety who believe that the bitter and outspoken opposition to the Occupational Safety and Health Administration (OSHA), the agency created within the Act to implement and enforce the provisions of the Act, is passed and that the Act can be reopened for amendment without the threat of losing the best parts of what has already been achieved.³

That view certainly is not universal. There is a significant portion of the community affected by the OSH Act and OSHA that believes it is not necessary to amend the Act. These employers and employees believe that today, after nearly 20 years of experience with the Act and the agency, the Act is just as effective as ever and just as timely as regards the problems in the workplace.⁴

And, while the members of this group do not oppose changes in the Act per se, they seem to feel more comfortable with the idea of changing the agency, OSHA, through administrative effort rather than a legislative approach to achieve changes in the agency through amending the Act.

The debate over administrative-versus-legislative change is at the core of what kinds of changes will be made; whether we can expect a wholesale revision of the worker health and safety umbrella (the Act), or modest amendment to fine tune the Act, or modifications within OSHA to achieve change through regulation.

Before discussing what will be in the future, both the immediate as well as the distant, insofar as OSHA reform is concerned, we have to review what the current state of the law is and the forces that brought forth the Occupational Safety and Health Act of 1970.

Passage of the Act itself was no easy task. In the 90th Congress, when the Democrats held the White House, hopes for

³ At the present time, no formal proposals have been presented. The health and safety committee of the AFL-CIO has developed a list of issues it would like to have addressed, and a five-member study group advising Congressman Paul Henry (R-Mich.) has not yet been able to formulate its recommendations.

⁴ Because there are no formal proposals for amending the Occupational Safety and Health Act in public view, most comments by the opponents of such change have not been made publicly or for attribution.
action were bright, but circumstances forced rethinking and the result was no action in the waning days of 1968.

The sharply conflicting political and economic interests expressed in that debate carried over into the 91st Congress and became even sharper with the election of a Republican to the White House. And, while the differences in the 1970 debate centered less on what needed to be done, there was considerable disagreement on how the program would work and who would be in charge.\(^5\)

A great many of the issues were contentious, not the least of which was how the program embodied in the Act would be administered. There was some support for a troika of sorts, separating the three major functions of the program into separate agencies — one for rule-making, one for enforcement, and one for adjudication. On the other hand, there were proponents who believed all the functions should be in one agency. The result was typical — create two agencies, OSHA and the Occupational Safety and Health Review Commission, and put enforcement and rule-making in OSHA and put adjudication in something else.

There was debate over who would do the research for OSHA's rule-making activities. There were those who believed the research arm should be attached to OSHA within the Department of Labor. Others felt that the research activities in occupational safety and health needed to be separate from the actual rule-making and enforcement efforts. The latter group won and the National Institute for Occupational Safety and Health (NIOSH) was created and assigned to the Centers for Disease Control in the Department of Health, Education and Welfare (now the Department of Health and Human Services).

The General Duty Clause,\(^6\) § 5(a)(1), was another point of debate. The framers of the Act recognized that it would be nearly impossible for OSHA to create standards for every possible hazardous condition that might exist in every place of employment and, therefore, sought to produce some general requirement under which employers could be charged.

One school of thought suggested that such a provision was acceptable, but not if the employer could be penalized upon the

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initial discovery of a violation to be charged under the General Duty Clause. Another group felt that first discovery was important. In the end, a compromise was reached that permitted civil penalties upon first discovery of a violation, but a more rigorous standard for determining the violation was established.

Numerous examples of compromise exist. OSHA inspectors were not given the power to close facilities even if, in the inspector’s estimation, there was the prospect of imminent danger. Instead, a court-ordered injunction would be necessary to close all or part of a hazardous operation. 7

There was debate over whether an employer should be given advance notice of an inspection. The ultimate legislative decision was that there should be no advance warning, but there was a caveat—the employer could refuse entry to the OSHA inspector. 8

Organized labor wanted a greater voice for employees in the scheme of health and safety activities. In the final version of the measure, employees could not be cited for violations of OSH Act provisions, but were limited in the citation/settlement process by being able to challenge only the period of time agreed upon for the abatement of a hazard in the workplace. 9

The business community wanted a more voluntary system of enforcement and greater sharing of responsibility for citations of hazards with employees. The Congress said no to the latter, but, as noted before, gave employers the right to refuse entry to OSHA inspectors without a court order.10

There was considerable debate over the issue of covering public employees, including federal, state, and local workers. In the end, a federal advisory board was created to oversee the efforts by various federal agencies in protecting their employees, but OSHA was given no teeth to enforce its standards and regulations in the federal workplace.

The coverage of state and local employees was even more confusing. Federal OSHA was precluded from extending its rules and regulations to the public sector in state and local governments, but if a state opted to develop its own health and safety

8. Id.
program under § 18 of the Act,11 as 25 states and territories have, a required element was a public employee program.

Two of the 25 states and territories have developed state plans that apply only to public employees in those states — New York and Connecticut.

Other examples of compromise abound and, as is typical in much legislation, considerable freedom was left to OSHA to determine its own operational structure through rule-making and administrative policy decisions.

II. Climate for Change

Throughout its life, the Occupational Safety and Health Administration (OSHA) has been under the microscope, the subject of close and constant scrutiny by the Congress and the various constituencies affected by it, most notably, of course business and labor.

In the early days of OSHA, there seemed to be a wait-and-see attitude toward the agency. It was just getting started and policies were being formulated.

As the Ford presidency was coming to an end and the Carter presidency was gearing up, there was a sense that OSHA was not exactly what was expected, insofar as the business community was concerned. There was a period of time when OSHA was castigated vigorously by the business community as an agency dedicated to nit-picking and more concerned with micromanaging safety and health by excessive regulation and overzealous enforcement rather than providing the guidance necessary so that employers could more easily comply with standards and regulations.12

As the Reagan administration took its place in 1981, attitudes reversed. The business community now sensed that it had a champion who was pledged to take OSHA regulatory burdens off the backs of employers.13 At the same time, organized labor and

12. Diseased Regulation, 123 FORBES 34 (1979); Now OSHA Must Justify Its Inspection Targets, BUSINESS WEEK 64 (April 9, 1979); Taylor, If Government Had To Dance To OSHA’s Tune, 88 U.S. NEWS AND WORLD REPORT 64, (1980).
other groups dedicated to the concept of protecting workers on the job shuddered as the new administration’s policy of voluntary compliance was put in place.

From the micromanagement perception of the Carter OSHA to the virtual non-enforcement period of the Reagan OSHA was a significant step. As the policy of voluntary compliance took hold, there was dismay even among some business leaders. Those who believed that solid enforcement was a necessary tool for ensuring compliance with regulations, saw an OSHA that seemed not to care.

The voluntary compliance policy, which relied on the accuracy of employer-maintained injury-illness logs and lost work day records, permitted firms that fell below the national average in both categories to bypass anything more than paper inspections.

In no time, it was clear that the policy was singular. By the end of 1982, inspection numbers were soaring because there was no need to go beyond the examination of corporate records, citations had fallen because there was only observation of facilities when responding to an employee complaint, and civil penalties plummeted to embarrassing levels.

As the Reagan administration matured and new faces appeared in Department of Labor and OSHA leadership, events occurred that forced rethinking.

While the Congress continued to question various occupational safety and health policies and procedures of the administration, most notably the voluntary compliance policy, enforcement of standards and regulations, including the fine structure, and the development of standards themselves, OSHA found itself examining some of those same policies internally.


15. In 1981, the Bureau of Labor Statistics reported the following for OSHA: 57,000 inspections, 1,221 inspectors, 8,100 injuries per 100,000 workers, and 7.6 fatalities per 100,000 workers. The 1982 BLS figures in the same categories were: 61,225 inspections, 1,055 inspectors, 7,600 injuries per 100,000 workers, and 7.4 fatalities per 100,000 workers. In 1983, BLS reported the following: 68,918 inspections, 1,210 inspectors, 7,500 injuries per 100,000 workers, and 5.6 fatalities per 100,000 workers.

OSHA penalties, as reported by the agency (Wall Street Journal, April 22, 1987), for record-keeping violations were as follows: 1980, $22,826; 1981, $14,166; 1982, $9,561; 1984, $21,950; 1985, $23,061; 1986, $1.4 million; and 1987 (for the first quarter), $1.6 million.
A key investigation of a chemical plant in West Virginia uncovered a pattern of improper recording and reporting of injuries and illnesses during those early Reagan years of voluntary compliance.\textsuperscript{16}

With that investigation in hand, OSHA assessed what at that time was its largest penalty ever, more than $500,000, for record-keeping violations in April, 1986.

That was the first in what then became a two-year program to review record-keeping activities. In the course of that program, OSHA set new records for fines proposed with each company cited.

These violent swings of the enforcement pendulum have given considerable support for the notion that perhaps it is time to review the OSH Act as well as to consider changes to the agency charged with enforcing the Act.

Another force in pushing the reform movement was the sense by persons outside the Congress that there was growing support within the Congress for changing OSHA and the Act. Proponents for change pointed to hearings of the Subcommittee on Health and Safety which addressed problems in the construction industry in the wake of a building collapse that killed 28 construction workers. In those hearings in 1987 and 1988, Republican and Democratic members of the Subcommittee as well as representatives of management and labor within the construction industry criticized OSHA’s inability to protect worker lives and cited numerous examples of the agency’s failures to successfully reduce on-the-job injuries, illnesses, and fatalities.\textsuperscript{17}

Hearings by the Subcommittee on Health and Safety on legislation dealing with occupational disease which culminated in passage in the House of Representatives on October 15, 1987, of H.R. 162,\textsuperscript{18} the High Risk Occupational Disease Notification and

\textsuperscript{16} In the wake of the 2,000 fatalities in Bhopal, India, following a dispersal of methylisocyanate, and a later spill of a less lethal substance at Institute, W.Va., OSHA initiated a wall-to-wall inspection of Union Carbide Corporation’s facilities at Institute. The inspection, which took several months, culminated in citations for failing to report and record injuries for the three-year period from 1983 to 1985.


Prevention Act, also engendered the idea that OSHA was in dire need of repair and that, perhaps, revision of the OSH Act itself was the only way to significantly change the agency's direction.

Those hearings and others by the Subcommittee on Health and Safety led to a joint request by the Subcommittee chairman and ranking Republican for a comprehensive examination of the Occupational Safety and Health Administration by the General Accounting Office.

Although GAO and other groups, most notably the Department of Labor's Inspector General's office and the Administrative Conference of the United States, had reviewed smaller parts of the OSHA operation, this was to be the first truly comprehensive overview of the agency to be undertaken. As stated by Congressmen Joseph M. Gaydos, Subcommittee chairman, and Paul Henry, ranking Republican, the purpose for the examination was to determine what "might have to be done to refurbish or reconstruct the agency so that it will be able to fulfill its mission." 19

The GAO study was requested in March 1988 and was originally to be completed by April 1989. For a variety of reasons, not the least of which is that the comprehensive study will take longer, the GAO report is expected to be completed by April 1990.

Another event which gave impetus to the growing sense that the time might be right to review the OSH Act occurred in June 1988, when the Senate Committee on Labor and Human Resources held three hearings on OSHA, the Senate's first oversight hearings on the agency in more than eight years. 20

And again, there seemed to be a consensus among the senators of both parties as well as non-OSHA witnesses that the agency was out of step and was failing to meet its goals and purposes as noted in the OSH Act.

Throughout the Senate hearings and previous hearings by the House Subcommittee on Health and Safety, witnesses pointed to the reduction in OSHA's inspector force, from a high of more

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than 2,000 in 1979 and 1980, to just over 1,100 in 1987. Time after time, OSHA was criticized for the time it took to produce a substance-specific health standard, often six or seven years from the time of inception until the date of final rule promulgation.

OSHA came under harsh attack for its failure to reduce workplace injuries and fatalities. The only significant downturn in injury, and illness statistics occurred during the period of voluntary compliance, and inaccurate or misstated record-keeping is cited as the most obvious reason for the downturn in that period.

But the numbers cited at the hearings spoke for themselves.

While the Bureau of Labor Statistics (BLS) in the Department of Labor reported the lowest number of fatalities annually — roughly 3,500 in 1988, its numbers were considered less than accurate because the data was based on a survey of employers, not developed from independent sources. At the same time BLS noted roughly 3,500 on-the-job fatalities, the National Institute for Occupational Safety and Health estimated about 7,000, and the National Safety Council suggested that the true number was closer to 11,000.21

And so the drive to re-examine the elements of worker health and safety was not only born, but propelled forward.

III. WHAT KINDS OF CHANGES

One of the consistencies with regard to considering changes either to OSHA or to the OSH Act is the commonality of focus. Whether the proposals for change are designed as part of a major overhaul of the OSH Act, a fine-tuning of the Act, or as part of an administrative revision, they fall into three general categories: (1) enforcement/compliance, (2) standards development, and (3) employer/employee rights and responsibilities.

Within the first category, enforcement/compliance, are such concerns as: targeting procedures for high risk industries; the number and quality of OSHA inspectors; dollar values of fines and penalties; review of formal and informal settlements and settlement procedures; review of systems for determining if hazards are abated as scheduled; procedures for referring cases

for criminal prosecution; review of OSHA's role with respect to working conditions under the jurisdiction of other federal agencies; coverage of federal employees; and coverage of state and local employees in states that do not have state plans under § 18 of the OSH Act.

There is a secondary set of issues within this category that focuses on the § 18 state plans and whether they meet the "at least as effective as" requirement with regard to OSHA standards and enforcement and whether OSHA has a system for effectively auditing those individual state programs.

Category two focuses on the ways in which standards are developed, the systems in place for monitoring standards at various stages in the process, and whether the current system is too cumbersome. There is also some interest in encouraging negotiated rule-making and searching for other means aimed at reducing legal challenges to promulgated standards.

Another part of this category centers on the question of whether OSHA should discontinue the effort to develop more substance-specific health standards or whether the effort should be redirected toward development of significant generic health standards.

The last category addresses itself to the roles of employers and employees in the workplace health and safety program. Many employers, especially those in the construction industry, believe that employees should be held accountable and should bear some responsibility for their efforts rather than have the entire effort focused on the employer.

The second half of this category addresses the question of the role of the employee in the health and safety process. Organized labor seems intent on requiring joint employer-employee health and safety committees in workplaces as well as a more defined role for employees in OSHA's system for settling cases in which an employer has been cited for violations.

Of all the issues on which attention has centered, two seem to have garnered the most — dollar values of fines and the process of developing and promulgating health standards. At the same time that there seems to be a strong drive for revising the law with regard to both, OSHA, administratively, has taken action that tends to ameliorate the degree to which change may be needed.
Earlier, I mentioned the efforts made by OSHA in the wake of the voluntary compliance policy and the discovery of significant record-keeping violations by employers. The dollar fines levied in those cases, as noted, reached record-level proportions for one principal reason: the method for determining the fines was modified.

During the heyday of the voluntary compliance policy, the dollar value of fines fell significantly for two reasons. First, since most inspections were a review of records, there were fewer full-walk-around inspections that would generate the discovery of the kinds of violations of standards that would generate fines.

Secondly, and perhaps more significantly, coupled with the voluntary compliance policy was a new formula for assessing and proposing fines under § 17 of the OSH Act. Section 17 sets the dollar amounts for civil penalties. A serious or other than serious violation of a standard or regulation is punishable by a fine of not more than $1,000 per instance and a willful or repeat violation is punishable by a fine for not more than $10,000 per instance. During the voluntary compliance period, it was decided by OSHA to lump all like violations together and assess a single fine. Thus, even if there were 10 willful violations of the record-keeping regulations, a single fine of not more than $10,000 would be the maximum proposed.

After the discoveries at the chemical plant in West Virginia, OSHA decided that a new formula was important. In order to gain attention, both from the media and the business community, OSHA determined that each individual violation of a standard or regulation should be cited and a proposed fine assessed for each. The results were headline getting. Proposed fine amounts soared into millions of dollars and OSHA proved that it could do what was necessary through administrative modification rather than through a legislative process.

The principal discussion with regard to fines for violations is not concerned with the means by which fines are assessed. The discussion, at least up to this point in time, has focused only on the dollar amounts, which have ranged from $3,000 for each violation of a serious or other than serious nature, and $30,000 for a willful or repeat violation, to $5,000 for the lesser violations and $50,000 for the willful and repeat violations.

The only new element that has been suggested deals with whether there should be some kind of daily fine from the time
the employer agrees to abate the hazard until the abatement actually occurs and is reviewed by OSHA.

But the relevant question is not the dollar value of the fine or whether there is a daily penalty until such time as the abatement is completed. Certainly, dollar amounts have to be sufficient enough so as to capture the attention of the violator, but the real purpose of inspections and citations is not to collect dollars for the U.S. Treasury. Rather, the intent is to effect changes in the workplace that will reduce and eliminate the kinds of hazards that will maim or kill an employee.

In this context, the true issue is how settlements are reached and whether those settlements provide the kinds of protections the workers need for the immediate as well as the more distant future. Perhaps it would be more effective to require that at least half of the proposed fine could be diverted for the improvements required to correct or abate the hazardous condition that led to the citation. Perhaps, part of the fine amount could go into some sort of corporate health and safety fund to direct research for plant improvements.

The settlement process is not the clearest. Except for very immediate and informal settlements — those completed before a citation is formally issued, OSHA inspectors play only a small role. The real force in the settlement process is the Department of Labor's Solicitor and his staff. These are the negotiators, and the record is replete with inconsistencies.

And, while those inconsistencies in the settlements may suggest that the process be formalized through the legislative process, it is unlikely that a legislative approach would ensure a better system. What it might do is cast in concrete a settlement format that could work satisfactorily in some circumstance, but that also could preclude the flexibility necessary to achieve special goals in another.

The same argument works with regard to the second issue that has received common attention — developments of standards. While this applies to both health and safety standards, the primary focus has been on health standards, especially those that are substance-specific, such as asbestos, lead, mercury, and so on.

The single argument is that it takes too long from the time it is decided that a standard for a particular substance should be developed until the time a final standard is promulgated and
OSH ACT

1989] OSH ACT 189

goes into effect. In its 20-year history, OSHA has promulgated only 23 health standards, including the generic Hazard Communication Standard.\(^\text{22}\) And, in most cases, the time frame from beginning to end has been between six and eight years. Considering that about 5,000 new substances are being introduced into American workplaces each and every year, it is highly unlikely that OSHA could ever begin to address them all, even if the standards development time frame were reduced to two or three years.

There has been criticism of OSHA for the way it has operated its standards development program, with the most significant charge being that there is no system for ensuring that a standard, once initiated, continues to move through the structure to completion.

OSHA's record shows that at various times in the structure, a proposed standard will be moving along only to be sidetracked because interest in it has waned or because a more powerful force is promoting another standard. OSHA's standard-setting process has been more driven by political forces than by health forces.

That is never more clear than when a promulgated standard is sent to the courts for review because one or more parties to be affected by it consider it either too strong and too difficult to meet or too weak.

Early this year, OSHA updated the air contaminants tables, a collection of some 450 substances for which permissible exposure levels had been developed. The table had been last updated in 1967 and 1968. When the OSH Act was passed in 1970, the table was included as a consensus standard and OSHA was given two years to update the exposure levels, but it never occurred.

\(^{22}\) Excluding the air contaminants standards within Subpart Z, OSHA health standards fall in 29 C.F.R. §§ 1910.1001-.1010 (1988). The Hazard Communication Standard is 29 C.F.R. § 1910.1200 (1988). The Hazard Communication Standard was first proposed during the Carter administration and, in fact, was submitted for the Federal Register printing at the virtual end of that presidency. One of the first actions of the Reagan administration was to recall the standard and to significantly revise it, changing the emphasis from dependence on labels affixed to containers of chemicals to one dependent on the Material Safety Data Sheet, which provided both acute and chronic effects of exposures, insofar as available in current literature. The Standard went into effect fully in May 1986, but applied only to the manufacturing sector. The Standard has since been expanded to apply to all economic sectors.
The updating of these exposure levels was completed in 21 months, far less than the expected six to eight years for a standard. In some cases, new exposure levels were adopted from one or another of the various organizations that review and consider these issues.

Upon promulgation, some 20 legal challenges to the exposure levels were filed by either an industry group saying it could not meet the new levels because the technology to reduce levels did not exist or would cost too much money, or by a labor group claiming that the exposure levels on certain substances among the 450 or so weren't low enough. Those legal challenges have since been consolidated and are pending before the U.S. Court of Appeals in Atlanta.23

There are two important points to consider with regard to this case. First, because there was an internal interest in completing the project, it went forward regardless of the political threats being made by several parties well in advance of its completion. Second, the time frame was reduced significantly, again because of the commitment of OSHA's leadership to the project.

Quite frankly, there is no way to ensure that OSHA leadership will be as committed to other issues, regardless of the legislative language.

If there is any common thread in focusing on the issues of standards development and enforcement and fining procedures, it is that OSHA's effectiveness is clearly dependent on the attitudes of the persons in charge — the Assistant Secretary of Labor for Occupational Safety and Health, the Secretary of Labor, and the President.

No federal agency, least of all OSHA, can avoid those political twists and turns. Administrative attitudes affect the way the Environmental Protection Agency acts and enforces the laws in its area no less than those same attitudes affect the ways in which OSHA enforces the laws within its jurisdiction.

IV. WHERE DO WE GO FROM HERE

The question now is: what do we do next?

Congressman Joseph M. Gaydos, chairman of the House Subcommittee on Health and Safety, says that after the GAO report

23. At present, 23 suits remain pending against OSHA's air contaminant standard, all pending before the Court of Appeals for the 11th Circuit. Several suits have already been settled. The principal case is AFL-CIO v. OSHA, No. 89-7185 (11th Cir.).
on OSHA is in hand and has been thoroughly reviewed, hearings will be scheduled.

Those hearings will be as extensive and broad as necessary. Every concern and issue that should be raised or that is raised will be fully examined. Anyone who wants to testify on any particular issue will be given some sort of opportunity to express an opinion.

But that does not mean that changes will be forthcoming.

It is unlikely that a wholesale revision of the OSH Act will occur. The general sense is that while the Act may have some shortcomings, it has served well and the problem lies more in the implementation and enforcement of the Act by OSHA, because of the way different administrations feel about regulatory activities.

The prospects for legislative amendment of the Act are fairly narrow. It is possible that a package of modifying amendments could be offered in a future Congress. Such a package certainly would focus on § 4(b)(1) of the Act which restricts OSHA’s actions when certain working conditions fall within the jurisdiction of another federal agency, especially in the context of the Atomic Energy Act.

There is serious concern about coverage for state and local employees. The argument that these employees can only be protected if they happen to work in a state operating under a §18 plan doesn’t have many supporters.

There is little doubt that a number of the issues in the enforcement/compliance category will be reviewed and, perhaps, addressed. It is very likely that an effort will be made to increase the dollar amounts of fines, that some attempt to standardize the settlement process will be forthcoming, and that a formal procedure for ensuring referrals to the Justice Department for criminal prosecution will be offered.

The underlying concern, however, is whether any or all of the changes could be brought to the Congress and be adopted without losing what is already in the Act.

For, while there is a sense that there is no serious opposition to OSHA as it now exists, that may well be a misreading of the situation.

Certainly, there are those in the Congress who are receptive to the idea of modifying the Act. Congressman Henry, ranking Republican on the House Subcommittee on Health and Safety, is
among these. In fact, he has gone a step further, and has formed
an advisory panel of five persons who have been asked to review
the Act and to offer suggestions for change.

There are others, however, who conform to the thoughts of
the Reagan administration that regulation of any sort, especially
that of OSHA, though, is an anathema to the American busi-
nessman. These members of Congress may well make it impos-
sible to effect any significant change, because of their interest
in doing away with the program entirely.

Given that legislative change is tenuous, at best, the next
question is whether OSHA can effect any significant change
through an internal administrative process. The answer is yes,
but with a caveat — OSHA’s leadership, the Department of
Labor leaders, and the President, must support the process fully.

Without a strong commitment to internal change, it will not
occur. The lesson of the air contaminants table revision should
not be lost on anyone. If there was not a determined commitment
within the agency and by those political forces in the adminis-
tration to do it, the revision would not have happened.

The same applies to legislative approaches, as well, whether
we want to accept it or not.

If an administration wants to follow a certain path, it can find
ways of doing so regardless of the legislation. When the Reagan
administration, which was committed to reducing OSHA’s effect-
iveness, took over, a means was found to reduce OSHA’s role.
Thus, even though that administration might have wanted to
abolish the agency — even though it couldn’t — ways and means
were found that made the agency less active.

If there were some way to remove OSHA from those political
swings, then the agency might be more successful in fulfilling its
mission. But there is no way to provide that isolation for OSHA
and, in any case, it is doubtful that there would be much support
for such a plan in Congress.

In the final analysis, it is unlikely that there will be a major
reform of the Occupational Safety and Health Act of 1970, at
least for the near future. This is not so much because there isn’t
a mood for making some changes, as much as it is that no one
really knows whether the changes will make the agency any more
effective than it is.

Small adjustments in the Act, fine-tuning of portions, and
strong suggestions to OSHA for administrative actions are far
more likely to be the direction taken over the next several years.

The only certainty is that the issues to be discussed in the future are likely to be the same ones so hotly debated in 1969 and 1970 when the OSH Act was on the floor of the House and the Senate and have been debated during the nearly 20 years since.
TNS, INC. AND OIL, CHEMICAL AND ATOMIC WORKERS: LABOR SECTION 502 AND WORKPLACE SAFETY

John W. McKendree*

I. INTRODUCTION

More than four decades have elapsed since Congress recognized that actions by employees against employers were not limited to the two categories of economic conditions and unfair labor practices. A third, perhaps the most important, concerns the health and safety of the employee — and, by extension, the health and safety of the American public.

Working conditions that at one time were considered safe have become a prime focus of concern for the employee, his family, and community. Section 502 of the National Labor Relations Act¹ was enacted to protect employees who commence a work stoppage in the good-faith belief, supported by objective evidence, that their working conditions are abnormally dangerous. Section 502 is even more necessary today because of the inherent dangers from use of elements and materials in the highly technical workplace whose long-term effects upon humans were unknown at the time of its enactment. By denoting the redress as a "quitting of labor" or a "work stoppage" and not as a "strike," § 502 protects employees against permanent replacement by the employer.

II. TNS, INC. AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, CASE NOS. 10-CA-17709 AND 10-CA-18785

A. Facts of the Case

The facts as set forth herein are the factual findings of the Administrative Law Judge (ALJ). TNS, Inc., filed voluminous

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exceptions to these findings, as well as to the ALJ's conclusions of law. The National Labor Relations Board's decision in this case is pending.  

TNS is a Tennessee corporation with an office and plant in Jonesboro, Tennessee. The company is in the business of manufacturing and selling armor-piercing projectiles. Depleted uranium, a substance both radioactive and chemically toxic, is used in the manufacture of this product.

At the time of the events leading to this case, TNS had approximately 100 employees, 96 percent of whom were members of the Oil, Chemical and Atomic Workers International Union. A general profile of the TNS production and maintenance personnel just before the strike indicated that they were generally young; almost three-fourths were under 30 years of age. A high school diploma was not required for employment at TNS, and no rank-and-file employee had more than a 12th-grade education. Several were illiterate, and one was brain-damaged. Employment at TNS was the first full-time employment for many; no employee had previously worked at a facility that used hazardous materials. Workers were unknowledgeable about the toxic effects of the materials used in the performance of their jobs, and uneducated concerning long-term effects of their use of those materials without proper safety measures.

The Union and TNS had signed a collective bargaining agreement that expired April 30, 1981. Prior to the expiration of the agreement, the Union brought its concerns about the working conditions and general uncleanliness of the operation to management's attention. TNS took no substantial steps to remedy these conditions.

At midnight on April 30, 1981, the date on which the collective bargaining agreement expired, 100 employees of TNS commenced a work stoppage that is believed to be the first concerted protest against abnormally hazardous working conditions in the history

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2. The NLRB's decision is based on the entire record at the hearing, the administrative law judge's decision, the exceptions thereto, and supporting briefs. After issuance of the Board's decision, any party may, in extraordinary circumstances, request reconsideration, rehearing, or reopening of the record; but such requests are rarely granted. Orders issued by the Board are not self-enforcing. Thus, securing compliance with the Board's order becomes the responsibility of the General Counsel acting through the regional offices. Enforcement actions as well as petitions for review are in the United States Courts of Appeals.
of the American labor movement, pursuant to the protection of § 502.

The production process that caused the work stoppage conjures up images of environmental horror: Dust and smoke were omnipresent and came from a variety of sources. It all began in the weighing and blending areas, where 55-gallon drums of radioactive uranium tetrafloride, known as “greensalt,” were unloaded. This powder was often accidentally spread on the floor, the result of spillage and barrels being pierced by forklifts with crab-like pinchers. The spills were not immediately cleaned up. In violation of federal regulations and the plant’s own internal operating procedures, the radioactive material was trailed throughout the plant by machines and workers alike. The greensalt was then loaded into pots, called “retorts,” prior to delivery to the furnace. During the loading process, employees were required to tamp the greensalt into the retorts. This action caused more radioactive dust emissions. Inadequate safety precautions and overfilling often caused greensalt to spill over the sides of the retorts and onto the floor. The plant had horse-collar-shaped safety devices that fit over the top of the retorts that could have prevented some of this spillage. However, these devices were often unused because they cut down on the rate of production and were only partially effective.

This situation was worsened by an ineffective ventilation system that was sometimes totally inoperative. Workers in the retort packing area often had greensalt residue lining their ears, mouths, and nostrils.

As bad as the aforementioned work areas were, they were no match for the furnaces, which were by far the most hazardous areas in the plant. Tops were bolted onto loaded retorts; the resulting apparatuses were called “bombs.” These bombs were loaded into a reduction furnace to produce “derbies,” the end product of the manufacturing process. Fires were everywhere; the ensuing smoke hung heavy in the air. Explosions in the furnace areas were commonplace. One explosion was so powerful that it hurled a steel cover, weighing between 700 and 800 pounds, with such force that it shot 15 feet into the air, smashed into and bent a steel beam in the ceiling of the plant, then fell back to the production area.

Radioactive smoke, dust, and oxides filled the air. Operation of lathes caused the suspended particles to ignite in mid-air.
Often the entire production area was filled with uranium oxide and smoke from these blow-outs. On occasion, TNS ordered the employees to evacuate.

The Tennessee Occupational Safety and Health Administration (TOSHA) conducted several on-site inspections and repeatedly warned TNS about probable contamination. TNS agreed that some corrections were necessary but did not implement any substantial changes in its mode of operation. The Union often complained about the unsafe working conditions but was told by TNS officials that things would be corrected. TNS told workers to work with what they had because it was doing the best it could under the circumstances.

This assertion proved false when a group of Jonesboro workers took a trip to a Compton, California, plant also owned by TNS. There they observed safety procedures in Compton that were not in place in Jonesboro. An adequate ventilation system and other safety equipment kept dust, smoke, and exposure to toxic chemicals to a minimum. The workers compared the Compton facility with their own and realized TNS was not using its best efforts to provide a safe and healthy working environment in Jonesboro. When they returned to Jonesboro, they asked TNS to use procedures and equipment similar to those in Compton. It refused to do so, and the work stoppage ensued.

TNS contended that the work stoppage was not within the protection of § 502 because it occurred upon the expiration of the collective bargaining agreement; thus, it was an economic "strike." Accordingly, TNS argued that it was allowed to hire permanent replacement employees to avoid business failure. It asserted that any health and safety issue alleged by the former employees was collateral, and therefore it was not obligated to rehire the former employees after the Union made an unconditional offer on the employees' behalf to return to work.

Although TNS acknowledged that some cleanup was necessary, its authorities denied that the problem was as grave as the employees and Union contended. However, the Administrative Law Judge found that the history of health and safety violations at the Jonesboro plant did not originate at the time the collective bargaining agreement expired. Testimony given by workers at the hearing before the ALJ was to the effect that radioactive soot passed through the workers' outer clothing, and particles could be found in their underwear. One worker testified to using
a toothbrush to remove these contaminated particles from his teeth and mouth.

Testimony elicited from various medical personnel qualified in the area of health-physics indicated a strong correlation between alpha radiation contamination and lung and various internal organ deterioration. A medical witness for TNS initially testified that there was no direct correlation because of an alleged dearth of evidence relating to adverse health effects from low-level uranium doses. The doctor asserted there existed a radiation threshold below which no biologic injury would occur. Upon questioning, however, the witness retreated from that position. The ALJ found his testimony, especially his failure to acknowledge the existence of scientific evidence which contradicted his own opinions, "distressing."

During the work stoppage, TNS began replacing the employees by hiring new, "permanent" employees. TNS also negotiated directly with former employees regarding their return to work at the plant. Simultaneously, TNS management began replacing old, worn machinery; began installing and replacing ventilators; began an intensive education program of health and safety for employees; and in general, began the process of modernization which, if commenced years earlier, would have eliminated the necessity for the § 502 work stoppage. Instead, the newly hired employees reaped the benefits sown by the work stoppage pursuant to § 502. The employees who engaged in the work stoppage, because of their concerns for their own health and welfare, were replaced.

B. Administrative Law Judge's Decision and Order

On July 31, 1987, Administrative Law Judge Arline Pacht entered her Findings of Fact, Conclusions of Law, Decision and Recommended Order to the National Labor Relations Board in this matter.

Judge Pacht concluded that the employees in the bargaining unit had engaged in a work stoppage based upon their good-faith belief that their working conditions were abnormally dangerous due to long-term exposure to unprecedented levels of uranium

dust caused by inadequate health and safety programs at TNS. Accordingly, Judge Pacht found that the permanent replacement of the TNS employees who engaged in the § 502-protected activity was in violation of §§ 8(a)(1) and (3) of the Act.

Moreover, Judge Pacht concluded that TNS, by assuring its workforce that the former strikers would not be reinstated with their seniority rights intact, interfered with, coerced, and restrained its employees in the exercise of their § 7 rights, thereby independently violating § 8(a)(1) of the Act. In addition, the Judge found that TNS’s refusal to meet and bargain collectively with the OCAW violated §§ 8(a)(1) and (5) of the Act.

In her order, Judge Pacht recommended that TNS cease and desist: (1) discouraging union membership by threatening to permanently replace, by refusing to reinstate employees who in good faith engaged in the work stoppage over abnormally dangerous conditions, or by discriminating in any other manner in regard to their hire or tenure of employment; and (2) refusing to bargain collectively with OCAW “with respect to rates of pay, wages, hours and terms of conditions of employment;” and, coercing, restraining or interfering with the § 7 rights of its employees vis a vis statements concerning the seniority status of reinstated employees.

Judge Pacht also ordered TNS to offer all eligible employees who participated in the work stoppage immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make whole those harmed employees. In addition, Judge Pacht ordered that TNS, upon request, bargain collectively with OCAW as the exclusive representative of all employees in the above described unit, and post notices as to this decision.

C. The Parties’ Positions

1. The Company’s Position

TNS has argued that the legislative history, case law, and overall context of § 502 as a “saving provision” demonstrates

4. ALJD p. 159, ln. 5-10.
5. ALJD p. 159, ln. 25-34.
7. ALJD p. 160, ln. 5.
8. ALJD p. 158, ln. 21-37.
that it provides only a limited exception to a contractual or statutory no-strike obligation. Thus, it has no applicability to the strike at TNS, which occurred after the expiration of the collective bargaining agreement containing a no-strike clause. Instead, TNS argued that § 502, at most, converted employee activity that otherwise would be unprotected because of the existence of a no-strike obligation into activity that is protected under § 7 of the Act. However, even if an activity is protected under § 7, that does not preclude an employer like TNS from hiring permanent replacements for those employees and does not convert § 502 strikers into unfair labor practice strikers. TNS asserted that even the existence of abnormally dangerous working conditions does not constitute an unfair labor practice. And, absent an unfair labor practice, TNS argued that it was not required to reinstate the striking employees immediately upon their unconditional offer to return to work. Rather, in accordance with longstanding labor law principles and the MacKay Radio doctrine, TNS argued that it was free to hire permanent replacements.9

In support of its position, TNS maintained that at the time of § 502's enactment, there was no doubt that Congress clearly was aware of the MacKay Radio doctrine, the impact of the doctrine on economic strikers, and the basic difference between temporary and permanent replacements. Had Congress intended to alter the application of the MacKay Radio doctrine in the setting of strikes over alleged unsafe working conditions, it would have declared the maintenance of such conditions to be an unfair labor practice under § 8(a) of the revised Act, as Congress did in the Labor Management Relations Act.10

TNS argued further that Congress, in 1947, was concerned with restricting the rights of employees, not expanding them. Viewed as a whole, TNS reasoned that the legislative history of the LMRA supports the conclusion that § 502 is designed solely to preserve the right to walk off the job where a no-strike clause in a collective bargaining agreement or statutory no-strike obligation would otherwise act as a bar to an employee walkout. TNS concluded that § 502 is wholly and utterly irrelevant where,

as in this case, there is no collective bargaining agreement impeding the employees' right to strike.

TNS cited case law in support of its proposition that § 502 has an independent purpose — that is, to protect a walkout in protest of abnormally dangerous conditions from being considered a strike in violation of a no-strike obligation in a collective bargaining agreement or other statutory no-strike obligation. TNS argued that no court or Board decision has intimated that § 502 has a broader scope than providing a limited exception to a no-strike obligation. TNS asserted that the Board has, however, consistently treated employees engaged in a work stoppage over health and safety disputes as "economic strikers," hence capable of being permanently replaced under the Mackay Radio doctrine. In the conclusion of TNS, although an employer cannot discharge employees engaged in a § 502 work stoppage if an applicable collective bargaining agreement contains a no-strike obligation, § 502 does not impede the permanent replacement of employees.

TNS also questioned the Board's statutory authority to create remedies comparable to the remedies available to unfair labor

11. See Keystone-Seneca Wire Cloth Co., 244 N.L.R.B. 398, 400 n.8 (1979) (ALJD) (noting, inter alia, that § 502 "provides only a limited exception to contractual no-strike obligations for work stoppages caused by 'abnormally dangerous conditions for work' and does not deal with the question of whether work stoppages are 'protected concerted activity' in the absence of a contract"); South Cent. Timber Dev., Inc., 230 N.L.R.B. 468, 468 n.2 (1977) (ALJD); American Homes Sys., 200 N.L.R.B. 1151, 1155 (1972) (concluding that § 502 is "totally inapplicable to the present case, where the employees have not contracted away, in whole or in part, their basic and fundamental right to strike"), enforced sub nom. N.L.R.B. v. Palumbo, 482 F.2d 947 (6th Cir. 1973); South Point Barge Co., 200 N.L.R.B. 173, 176 n.9 (1972) (ALJD).

TNS asserted that even that even the General Counsel — prior to and in contrast to the complaint in this case — opined that § 502 has a limited purpose. See Economy Tank Line, 99 LRRM. (BNA) 1198, 1199 (1978) (advice memorandum) (stating that "[i]t is settled law that if a work stoppage is caused by a concern for abnormally dangerous conditions under Section 502, the strikers are not rendered unprotected by virtue of a contract's no-strike clause") (citation omitted).

12. See, e.g., Markle Mfg. Co., 239 N.L.R.B. 1353, 1355 (1979) (complaints over safety rules); Precision Castings Corp., 233 N.L.R.B. 183 (1977); Pacific Powder Co., 84 N.L.R.B. 280, 284 (1949) (walkout concerning "allegedly unsafe condition of trucks" and "respondent's refusal to accede to the drivers' requirement that the trucks be brought up to ICC standards").

practice strikers in situations where no unfair labor practice is involved. TNS argued that the remedies afforded unfair labor practice strikers relate directly to the Board's power to bring about a restoration of the *status quo ante* where there has been an underlying unfair labor practice; therefore, the Board has no jurisdiction to restore the *status quo ante* where no underlying unfair labor practice exists.\textsuperscript{13}

In furtherance of its argument, TNS claimed that no court or Board decision has ever held that maintenance of abnormally dangerous conditions within the meaning of § 502 is an unfair labor practice. Instead TNS argued that employees engaged in a strike are entitled to reinstatement after an unconditional offer to return to work only if their strike was prompted by an already-existing unfair labor practice, or if conduct by the employer after the commencement of the work stoppage has converted the strike into an unfair labor practice strike.\textsuperscript{14} In addition, TNS asserted that in the absence of an independent unfair labor practice, no case has ever held that the mere permanent replacement of employees, in and of itself, is a §§ 8(a)(1) or 8(a)(3) violation and unfair labor practice.

For a work stoppage to fall within the protective umbrella of § 502, employees must engage in a work stoppage because of abnormally dangerous working conditions. TNS asserted that not only must working conditions be a cause of a protected § 502 work stoppage, it must be the sole cause; working conditions must be the sole reason underlying an employee walkout. TNS maintained that "health and safety" was just one of the many bargaining issues. TNS believed that the union's highest priorities were wage differentials, increased vacations, and sick pay.\textsuperscript{15} TNS contends that even when health and safety was discussed in the negotiations, it took the form of demands for boilerplate contractual language that the International Union was trying to implement in chemical plants across the country. TNS argued that

\textsuperscript{13} TNS relied upon N.L.R.B. v. Remington Rand, Inc., 94 F.2d 862, 872 (Fed Cir.) (L. Hand, J.) (where "the loss of the men's jobs was due to a controversy that the act does not affect to regulate.... it would indeed load the scales in an industrial dispute to give (them) back their jobs...."), cert. denied, 304 U.S. 576 (1938); Columbian Enameling & Stamping Co., 1 N.L.R.B. 181, 198 (1938), enforcement denied on other grounds, 306 U.S. 292 (1939).

\textsuperscript{14} TNS cited 2 C. MORRIS, THE DEVELOPING LABOR LAW, 1007-1009 (2d ed. 1983).

\textsuperscript{15} Respondents Brief at 263, 265.
such collective bargaining demands cannot provide the impetus for a § 502 work stoppage. It reasoned that employee views and concerns about their employment generally could not be neatly dissected, separated, and compartmentalized. Employee demands about working conditions are generally inextricably related to demands about wages. TNS concluded that if employee protests over "abnormally dangerous" working conditions were accorded greater protection under § 7 of the Act than protests over inadequate wages, every employee protest or strike would be couched in terms of safety, even if its real purpose lay elsewhere.

In addition, TNS asserted that, as a practical matter, regulatory and enforcement agencies such as the federal Occupational Safety and Health Administration, the Nuclear Regulatory Commission, and their state counterparts have direct responsibility and the expertise to remedy health and safety violations. TNS maintained that the existence of these regulatory and enforcement agencies belies any emotional or "equitable" claim that employees subjected to "abnormally dangerous" working conditions must stay on the job and subject themselves to these working conditions or walk off the job and subject themselves to permanent replacement. In support of this contention, TNS noted that in the months before the work stoppage, the Tennessee Department of Radiological Health and TOSHA conducted health and safety inspections at TNS. TNS claimed that had these agencies found the existence of imminent or abnormal danger at TNS, they could and would have taken immediate steps to correct that danger. TNS argued that both the National Labor Relations Board and the courts have concluded that only "an apparent and immediate threat to employee safety ... might justify a work stoppage or other action ... under § 502 of the Act." 17 TNS

16. TNS argued to the Board that the ALJ's decision was replete with factual errors, relied upon extra-record scientific treatises concerning which there is no scientific consensus, and contained unusual rhetorical invective. Deciding what scientific evidence to believe is not an issue that turns upon credibility and demeanor. TNS denies the existence of any abnormal danger from airborne particulate caused by the melting, casting, and machining of depleted uranium. Respondent's Brief at 149. The NLRB can and should engage in de novo review of these issues on appeal. Citing, e.g., EMR Photoelectric, A Division of Sangamo Weston, Inc., 273 N.L.R.B. 256, 256 n. 2 (1984); Kele Roofing, Inc., 268 N.L.R.B. 456 (1983); Vic Koenig Chevrolet, 263 N.L.R.B. 646 n.1.

concluded, therefore, that as a matter of both law and fact, the employees' work stoppage was not in response to imminent or abnormal danger.

TNS maintained that the strike was not in response to any "immediate" threat: Employees were calling for a strike more than six months before it actually occurred; the Union minutes of its meetings demonstrate the premeditated nature of the strike. In addition, TNS claimed that employee external radiation exposures and internal radiation doses were well below levels at which there is proof of existing or latent adverse health effects. Based upon this claim, TNS argued that its health and safety program provided workers with necessary health and safety protection, that it was always dedicated to making its program better and was taking such steps when the strike began.

TNS insisted that health and safety was a pretext for the real reasons underlying the strike: It was a cleverly devised mask designed to attract nationwide attention and to become a test case that would permit the International Union to claim that all economic strikes were § 502 "work stoppages," which would preclude permanent replacement of any of its members.

2. The Union's Position

The Union has countered that the protections of § 502 of the Act are extended to employees, not to their unions. Indeed, the provision is most often applied to protect workers from the effects of contractual no-strike clauses negotiated by their bargaining representatives. The inquiry into motive dictated by Gateway Coal begins and ends with the strikers themselves, and only their perspective is relevant.18 The Union's position at the bargaining table, as well as its substantive contract language proposal, was a direct result of the employees' reasonably based belief that their working conditions were abnormally dangerous.

Tours by the TNS-Union health and safety committee are relevant to the merits of this case in three respects, according to the Union. First, along with the state inspection reports, the written reports of the committee document the onset and continuation of employee concerns about radiation safety. The reports thus support the employees' testimony concerning the conditions

18. Gateway Coal, 414 U.S. 368.
they considered abnormally dangerous in the months preceding the strike. Moreover, TNS, not the employees, generated these reports. The Union contended they therefore constitute admissions, not that the workers' concerns were valid, but that they were expressed well in advance of contract negotiations — a finding TNS sought to avoid.

The health and safety tours are important in another respect, the Union contended, because they constituted a vehicle for collective action. The tours and reports were discussed at Union meetings, where the airing of health and safety concerns became a regular item on the agenda. The monthly Union meeting surpassed the locker room as a source of information about blowouts and high radioactive urine counts, and the employees expressed their fears for their health, their families, and their community. Once the health and safety tours began, new employees entered a working environment in which radiation safety was a legitimate topic of discussion, even a matter of open controversy, in which they quickly found themselves involved.

Finally, according to the Union, the health and safety tours provided the employees with a mechanism for evaluation of their employer's response to their collective complaints. The reports were posted on the bulletin board. As month after month went by, the workers could see that only small items were repaired. The dust collectors continued to leak, and the ventilation equipment was never fixed. TNS dropped items from the reports before they were repaired; infuriated, the Union insisted that they be listed again. The workers became convinced that TNS had no intention of complying with the recommendation of the joint committee. They began to talk about striking.

When the report of the February tour was released on February 26, 1981, all the outstanding items related to radiation safety. Listed were the need for ventilation on the parts bath, lathe, and hacksaw; the dust collectors that were leaking in all areas; the locker rooms; the dangerous rod stock storage; the broken grating at a grinder, where the operators were getting their feet soaked with sludge and coolant; and the lack of any grating at the nose trim, where the same conditions prevailed. On March 10, Union committeemen told the TNS representative that if management did not take care of the mess in the locker rooms and of the other items outstanding on the February report, the employees would not work a day after April 30. The next
day, Union officers repeated the message and insisted that it be transmitted to the director of industrial relations. In November, the Union complained to the state inspectors that TNS was not attending to radiation hazards reported by the safety committee, but this complaint bore no fruit.

Other events affected workers, according to the Union. In July 1980, the local had voted to affiliate with the Atomic Energy Workers Council, and in November, it sent its President to Seattle for the semiannual meeting where Dr. Mark Nelson gave a slide show and lecture on the dangers of radiation. The Union President returned from Seattle with a sincere horror of the cancer, sterility, and birth defects he now understood might await him and his coworkers if conditions were not corrected at the Jonesboro plant. Dr. Nelson’s lecture was confirmed by what the workers were hearing from TNS, which had recently warned many of them that temporary sterility could result from sitting on uranium derbies.

The Union International Representative arrived in early December to explore any workplace concerns that needed to be addressed in contract negotiations, which would begin in late March 1981. The International Representative did not anticipate a major problem with economics, and as it turned out, there was to be none at the bargaining table, where TNS’s offer was, if anything, overly generous. In fact, the International Representative was prepared for everything he heard from the local committee except the health and safety problems. As contract termination drew nearer and he began to hear more and more about high urine counts, rotations, and dust, he realized these would be no ordinary negotiations.

Job rotations were a major concern, the Union said. TNS attempted to lay off a pregnant worker; the Union insisted that she be given work in an uncontaminated area instead. TNS put her in the laundry wearing a lead-lined flak jacket. The Union was disturbed to conclude that penetrating radiation was such a hazard in the laundry that such protection was considered necessary. Three employees developed respiratory infections and brought excuses from their doctors relieving them of the respirators for a few days. TNS sent them home without pay until they could work in a mask. The Union demanded to know how long the employees were to be kept in respirators, and why people were being rotated and sent home. Stonewalled by TNS,
the Union came to the bargaining table with an extensive health and safety proposal and with specific demands for immediate correction of the locker rooms, for identification and correction of whatever hazards were causing the high counts and rotations, and for an acceptable alternative to the respirator program.

Bargaining about health and safety was heated. TNS had opened negotiations by offering a 25 percent wage increase, across the board, effective immediately, without prejudice to further economic negotiations. The Union considered this a ruse. All members voted to strike. As one employee stated: "What good is money if you aren't going to live very long?" Thus, it is evident that the Union negotiators arrived at the table with clear instructions from their constituents that their demands for immediate correction of dangerous conditions were not to be bargained away.

Moreover, once they began the first reported plant-wide work stoppage in the United States over abnormally dangerous conditions, the employees' position was strengthened by subsequent events and experiences, according to the Union. The Union secured the workers' exposure records for Dr. Nelson's review, and the employees met Nelson on the picket line, where they learned firsthand of the kidney disease and cancer associated with internal exposure to depleted uranium metal. They were interviewed by NIOSH investigators. They saw themselves on Sixty Minutes,19 where they also saw Dr. Edward Radford commenting on the illnesses they might expect from the exposures they had received.

Congress sent for the local Union President and International representatives to testify, and the employees saw videotapes of the congressional hearings, where a physician predicted that some of them were virtually certain to die of cancer.20 Moreover, the employees had no reason whatsoever to believe that TNS had corrected existing conditions, according to the Union. They read newspaper accounts in which TNS claimed the strike was over wages, over management rights, over anything but what the employees knew to be the real concern. They heard the status of negotiations; of TNS's continuing refusal to admit the dangers

in the plant in the face of mounting evidence to the contrary; of its refusal to pay for an independent evaluation to which the workers would be privy; of its refusal to disclose to the Union a Radiation Management Corporation report it had commissioned shortly after the strike. According to the Union, when TNS threatened in July to hire permanent replacements if they did not capitulate, the employees continued their strike in the good-faith belief, based upon objective ascertainable considerations, that TNS was still an abnormally dangerous place in which to work.

The workers accomplished what they set out to do — the § 502 activity forced TNS to provide a workplace free of the overexposures about which they had complained — but lost their jobs in the process.

In the wake of the strike, TNS was excoriated by Sixty Minutes, chastised by the Gore Committee, and condemned by Karl Morgan, Paul Morrow, and the National Institute for Occupational Safety and Health for maintaining a radiation program that Morrow described as "atrocious." TNS found itself supervised personally by the Director of the Tennessee Department of Radiological Health, who has much greater enforcement power than before, and it has since been required to operate under much stricter license conditions. Given such pressure, TNS was bound to improve its radiation program.

Presently, the Jonesboro plant has been completely renovated, much of it added as new buildings since the strike, and many of the engineering controls demanded by the Union in 1981 have been installed to protect the company's new workforce. Yet even with a much larger staff and expensive new equipment, TNS's radiation safety record is far from perfect, and Leslie Cole, TNS's radiation safety officer, admitted that TNS still exceeds the maximum permissible concentration for airborne contaminants with some frequency in certain parts of the plant.

The Union's position has been that the Gateway Coal standard has been met — that the employees who engaged in the § 502

22. ALJD, p. 46, ln. 44 (n. 77).
24. NLRB trial transcript, TR. 11931, ln. 26 - Tr. 11933, ln. 2.
25. ALJD, p. 69, ln. 11.
activity believed in good faith that working conditions were abnormally dangerous, and the objective evidence demonstrates that their conclusion was factual.

**SECTION 502 OF THE NATIONAL LABOR RELATIONS ACT**

Section 502 of the National Labor Relations Act provides that:

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue a process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.26

Section 502 of the Act as finally passed is the penultimate provision of the Act, followed only by the severability provisions. Deliberately removed from § 13, it is a separate section at the conclusion of the Act. It should, therefore, be construed to modify and delimit all the foregoing provisions of the Act regulating collective activity in support of economic objectives. It saves work stoppages over abnormally dangerous conditions from the economic analysis applicable to all other refusals to work addressed by the Act. The plain language of the statute makes it clear that a § 502 work stoppage is not a strike.

The congressional intent to establish a distinction between economic and unfair labor practice strikers, at the same time declaring participants in a § 502 work stoppage to be non-strikers, is manifest. Congress intended to protect employees in abnormally dangerous working conditions in order to prevent retaliation against the employees who exercised, for their mutual aid and protection, the rights guaranteed and set forth in the express language of § 502. Moreover, Congress drafted no language in § 502 that limited its application to circumstances in which there was either a contractual or a statutory prohibition on the right to strike. Because Congress was well aware of these limitations on the right to strike, had it intended to limit § 502 it would

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have expressed such intent in the statutory language itself.

The Taft-Hartley Act\(^27\) went further than previous labor legislation in protecting individual employment rights. The statement of policy in the Norris-LaGuardia Act\(^28\) had emphasized the position of the individual worker. Both the Norris-LaGuardia Act and the Wagner Act\(^29\) had assumed that by guaranteeing associational rights and establishing a system of industry self-regulation through collective bargaining, the law would protect individual workers from exploitation by employers. In that sense, the protections of the National Labor Relations Act were, and for the most part continue to be, rights conferred in aid of a process intended but not guaranteed to achieve substantive results.

Section 7 rights in themselves confer no guarantee that employees will succeed in achieving desirable wages and working conditions. Section 502, on the other hand, directly addresses working conditions and confers individual protections. Congress remitted all health and safety issues concerning working conditions to resolution through collective bargaining, and § 502 raises no impediment to such process. Section 502 merely places a definite limit on the economic relationship established and regulated by the Act. American workers in private industry in interstate commerce are not required to risk their lives at the workplace in the service of their employers. If the workers protect themselves from an abnormal danger pursuant to § 502, a work stoppage in self-defense is not subject to the economic tug-of-war between “labor and management” otherwise sanctioned by the Act. The workers’ union, by agreeing on a no-strike clause, may not bind employees to continue working in conditions of abnormal danger.\(^30\) Employers at any time, whether a contract is in effect or not, may not treat employees who stop work due to abnormally dangerous workplace conditions as strikers and may not force them to capitulate and return to work through

the exercise of the economic pressures regulated by the Act.  

As experience accumulated under federal labor laws, and the economic relationship between management and labor envisaged by Congress became ever more increasingly a reality of the American workplace, the National Labor Relations Board and courts developed more precisely the parameters of the labor-management relationship. In MacKay Radio, employers were permitted to hire permanent replacements for strikers. The MacKay decision considerably strengthened the employers' economic position in a strike situation, particularly since it was not until 20 years after the enactment of the Taft-Hartley Act that the Supreme Court decided Fleetwood Trailer. The Board afforded no continuing job rights to replaced economic strikers and did not require their preferential hiring until it followed Fleetwood Trailer in 1968 with The Laidlaw Corporation.

In contrast, a simple reading of the Act in its totality evidences Congress' intention that the Board affirmatively enforce § 502. While § 502 work stoppages are saved from the economic arena, they are still within the purview of the Act. Otherwise, quite plainly, Congress would have declared that such work stoppages were not labor disputes; this Congress did not do. The Act clearly and concisely provides that employees engaged in a § 502 work stoppage shall not be treated as strikers. Thus, it is the function of the National Labor Relations Board, which is charged with the administration of the Act and primary responsibility to effectuate the national labor policy declared in the Act, to ensure that neither unions nor employers violate the mandate of § 502.

Yet, the protection afforded by § 502 is minimal. The dearth of precedent with respect to its operation underscores the limited circumstances in which the American worker has felt it necessary

31. Marble Prod. Co. v. Local 155, United Stone & Allied Workers of America, 335 F.2d 468, 56 L.R.R.M. (BNA) 2967 (5th Cir. 1964); Clark Eng'g, 510 F.2d 1075, 88 L.R.R.M. (BNA) 2865 (6th Cir. 1975).
to utilize § 502 protection. However, § 502 is in an act concerned with labor relations, not labor standards. The Labor Act does not require, as does for example, the Occupational Safety and Health Act, that workers enjoy a workplace free of abnormal hazards. The Labor Act does not guarantee that a refusal to work protected by § 502 will result in correction of the abnormal danger that precipitated the work stoppage. Instead the Act merely requires that employees who engage in self-help to protect their lives or their health from abnormally dangerous conditions under their employer's control not theirs, may not be terminated, locked out, or replaced by that employer.36

CONCLUSION

The evidence in the TNS proceedings underscores the proposition that nuclear workers are entitled to the same protection from § 502 of the Act as other American workers. Nuclear workers, like miners, do not have to work when the daily contamination gets worse, whether from gases generated in a mine as a result of pool air supply or from radiation hazards. When objective evidence demonstrates to chemical workers that the absence of health and safety monitoring and protections are exposing them to lead poisoning on an ever-increasing abnormal basis, they are protected by § 502. Nuclear workers have the same rights. Section 502 applies when the normal condition is worsened and where immediate harm exists even though the disease processes manifest themselves later.

The issue of risks that do not immediately manifest themselves must be addressed. As noted by experts, a single cancer seed can be created with a single dose of radiation, thus having an immediate health effect with the results being in futuro. The cumulative effects must have, by nature, a starting point. These employees were exposed to outrageous airborne contaminants as shown by all the data. A lack of present effect, especially where no evidence of effect was even gathered, cannot detract from the fact that present risks to both worker and progeny existed. Employees are not required to ride out the latency period.

contract cancers or renal problems, and only then gain the right to cease their employment without penalty.

The actions taken by the employees are clearly encompassed by the provisions of § 502 of the Act. Accordingly, the workers who engaged in these actions must be free from penalty and free from economic retaliation otherwise permitted. Thus, when TNS advised its employees that it would replace them if they continued their work stoppage, and then hired replacement employees, and refused to reinstate its employees upon their unconditional offer to return to work, TNS violated §§ 8(a)(3) and (1) of the Act.
COMMENT

STATUTORY ANALYSIS OF THE FAMILIAL STATUS PROVISION OF THE FAIR HOUSING AMENDMENTS ACT OF 1988 — OR, "WHY DO I HAVE TO LIVE WITH THOSE CURTAIN-CLIMBING RUG RATS?"

James C. Frooman

I. INTRODUCTION

The general welfare and security of the Nation and the health and living standards of its people require ... the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family ....

On September 13, 1988, President Reagan signed into law the Fair Housing Amendments Act of 1988 (hereinafter the 1988 Act). This law amends the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968, hereinafter the 1968 Act). The purpose of the amendment was threefold. First, § 6(b) of the 1988 Act extended the 1968 Act to also protect against discrimination on the basis of handicap or familial status (families with children). Second, § 8 of the 1988 Act provided an administrative and judicial enforcement mechanism. Finally, the 1988 Act provided for monetary penalties when there has been housing discrimination.

This comment focuses on the familial status provision in the 1988 Act and is limited to the rental housing aspects of the

5. Id.
6. Id.
provision. A brief overview of the problem facing families with children is provided, as well as an examination of the solution provided by the 1988 Act. The amended enforcement provisions and the monetary awards provided for in the 1988 Act will also be discussed. 7

II. HISTORY — THE 1968 ACT

The 1968 Act made it illegal to discriminate against persons on the basis of race, color, religion, sex, or national origin in the sale, rental, or financing of dwellings. 8 The 1968 Act allowed persons who believed they had been discriminated against to file a complaint with the Secretary of Housing and Urban Development (HUD). 9 However, the 1968 Act gave HUD the power only to investigate the complaint and to attempt to resolve the matter informally if the complaint proved to be valid. 10 If HUD was unable to resolve the problem, HUD could refer the matter to the Attorney General for initiation of a civil action. 11 Unfortunately, “Federal courts did not award individual relief to the victims of discrimination in such cases.” 12

At the time the 1968 Act was adopted, the country was in a state of social unrest caused by the assassination of Dr. Martin Luther King, Jr. 13 Discrimination against blacks was prevalent in many areas, including employment, education, and housing. Congress responded by “passing landmark legislation, which announced a national policy of nondiscrimination in housing.” 14 Although the 1968 Act included provisions prohibiting discrimination on the basis of race, color, religion, sex, or national origin, the primary intent of Congress was to prevent discrimination on the basis of race. Congress did not even contemplate discrimination on the basis of familial status at the time the 1968 Act was enacted. However, since the enactment of the 1968 Act 20 years

7. This comment does not discuss the provision in the 1988 Act concerning discrimination against handicapped persons except as it pertains to the provisions of the familial status provision or the enforcement provision.
8. See supra note 4.
9. Id.
10. Id.
11. Id.
12. Id.
14. Id.
ago, discrimination based on familial status has become increasingly prevalent in rental housing.\textsuperscript{15}

III. THE PROBLEM

Since the adoption of the 1968 Act, less housing has been available to families with children due to discrimination by landlords on the basis of familial status. HUD had estimated there were “two million instances of housing discrimination [against families with children] occurring each year.”\textsuperscript{16} HUD also conducted a national survey to determine the availability of housing for families with children.\textsuperscript{17} The results of the survey were alarming. The survey showed 25 percent of all rental units were unavailable at all to families with children and another 50 percent of the rental units were available to families with children, with some restrictions.\textsuperscript{18} HUD also found that the restrictions were greater in the newer units.\textsuperscript{19} Therefore, 75 percent of all rental units had at least some restrictions on children, and the trend is toward increasing discrimination. Furthermore, “units in predominantly white neighborhoods restricted children at a rate of 28.9\% compared with 17.5\% in predominantly black neighborhoods.”\textsuperscript{20} Consequently, the discrimination in rental housing is especially harsh on white families.

The reasons for the above statistics seem simple. Landlords do not want to rent to families with children. Children are louder than adults,\textsuperscript{21} cause more wear and tear on the rental units,\textsuperscript{22} and

\begin{flushright}
\textsuperscript{15} See infra notes 16-19 and accompanying text.
\textsuperscript{17} 134 Cong. Rec. S10544, S10553 (daily ed. August 2, 1988) (statement of Sen. Domencini). Additionally, “at least 26 percent of rental housing nationwide forbids children and 50 percent place some restrictions, such as the age or number of children, according to Joan Thompson, director of fair housing for [New York’s] Human Rights Commission.” N.Y. Times, May 22, 1986, at B17, col. 2.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{22} Id. This case involved discrimination against all families with minor children. The California Appellate Court held that California’s civil rights act, the Unruh Civil Rights Act, did not apply to discrimination against families with children because children were not a protected class under the Act. The California Supreme Court reversed holding that
cause the landlord's insurance rates to be higher. Children are immature and quite often will be irritating to adults. One pregnant New York woman who was having great difficulty finding a place to live stated, "[Landlords] will take a dog before they take a kid." Landlords in New York City have rejected bonuses of up to $4,000 rather than rent to a family with children.

In light of the reluctant attitude of landlords to rent to families with children, parents are faced with a serious problem. "The natural instinct of parents is to refuse separation from their children, [and] it is in the public interest that families be kept together and that children in their growing and adolescent years have the companionship and guidance of their parents." To avoid the problem of discrimination in housing, families with children are forced to purchase homes. Unfortunately, with the high cost of raising children today, coupled with the high cost of housing, this is often unrealistic.

The cases and statutes have attempted to deal with the problem of families with children, but the answers have been inconsistent. Some states have disallowed discrimination based on familial status under state fair housing laws, while other states have disallowed the discrimination based on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, substantive due process under the Fourteenth

the Unruh Act did apply to discrimination against children.

The Unruh Act, Cal. Civ. Code § 51 (West Supp. 1977), provides:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

28. See supra note 27.
Amendment,\textsuperscript{30} or 42 U.S.C § 1983 actions.\textsuperscript{31} The 1988 Act is an attempt to respond to this inconsistency.

IV. THE 1988 ACT

A. Protection of Familial Status

The key provisions of the 1988 Act, for purposes of this comment, add familial status to the protected classes and create the administrative enforcement mechanism. More precisely, § 6 deals with the familial status provision and states:\textsuperscript{32}

(b) Additional Protected Classes. — (1) Section 806 and subsections (c), (d), and (e) of section 804 [of the Fair Housing Act of 1968] are each amended by inserting “handicap, familial status,” immediately after “sex,” each place it appears.
(2) Subsections (a) and (b) of section 804 are each amended by inserting “familial status,” after “sex,” each place it appears.

B. Exemption to the Protection of Familial Status

The provisions of the 1988 Act making it illegal to discriminate on the basis of familial status do not apply to housing for “older persons.”\textsuperscript{33} Housing for older persons is housing "provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons,"\textsuperscript{34} housing “intended for, and solely occupied by, persons 62 years of age or older,"\textsuperscript{35} or housing “intended and operated for occupancy by at least one person 55 years of age or older per unit.”\textsuperscript{36} To qualify under the third class, the housing must be designed to meet the physical or social needs of the elderly,\textsuperscript{37} and at least

\textsuperscript{30} Halet v. Wend Inv. Co., 672 F.2d 1305, 1310 (9th Cir. 1982).
\textsuperscript{31} Id.
\textsuperscript{33} Id. This is the amended § 805(b) of the 1968 Act. The legislative history of the 1988 Act indicates that it would not have been adopted without an exception to the familial status provision for housing for older persons. See infra Section V “Discussion and Analysis” of this comment.
\textsuperscript{34} Id. This is the amended § 805(b)(2)(A) of the 1968 Act.
\textsuperscript{35} Id. This is the amended § 805(b)(2)(B) of the 1968 Act.
\textsuperscript{36} Id. This is the amended § 805(b)(2)(C) of the 1968 Act.
\textsuperscript{37} Id. This is the amended § 805(b)(2)(C)(i) of the 1968 Act.
80 percent of the units must be occupied by at least one person age 55 or older.\textsuperscript{38}

\textbf{C. Administrative Enforcement Mechanism}

1. \textit{The Complaint}

Section 8, entitled "Enforcement Changes," provides for the enforcement mechanism of the 1988 Act.\textsuperscript{39} First, § 8 requires an aggrieved party to file a complaint in writing with the Secretary of HUD within one year from the date of the alleged discriminatory practice,\textsuperscript{40} or the Secretary may file a complaint on his own initiative.\textsuperscript{41} After the filing of the complaint, the Secretary notifies the aggrieved party of his time limits and the forums available.\textsuperscript{42} The Secretary then notifies the respondent of the action, explains his procedural rights, and serves the party with a copy of the complaint.\textsuperscript{43} The respondent must file an answer to the complaint within 10 days after he receives it.\textsuperscript{44} The Secretary of HUD has 100 days after the filing of the complaint to complete an investigation unless such time constraints are impracticable.\textsuperscript{45}

2. \textit{Conciliation and Investigation of the Complaint}

The Secretary must engage in conciliation of the complaint during the pendency of the action,\textsuperscript{46} and any conciliation between the parties is subject to the Secretary's approval.\textsuperscript{47} Each conciliation agreement is made public unless the parties and the Secretary agree that "disclosure is not required to further the purposes of this title."\textsuperscript{48}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} Id. This is the amended § 805(b)(2)(C)(ii) of the 1968 Act. The owner of the units must have an intent to provide housing for persons age 55 or older.
\item \textsuperscript{39} Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 8, 102 Stat. 1623 (1988). This is the amended § 810(a) of the 1968 Act.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id. The party may choose to have the complaint heard by the administrative law judge, or the party may choose a civil action in the district court in which the alleged discriminatory practice took place.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. This is the amended § 810(b) of the 1968 Act.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\end{itemize}
\end{footnotesize}
that a conciliation agreement has been breached, he refers the matter to the Attorney General with a recommendation that civil action be commenced against the breaching party.\textsuperscript{49}

If the Secretary feels that prompt judicial action is necessary to preserve the rights of the aggrieved party, he may authorize a civil action pending the disposition of the complaint.\textsuperscript{50} If the Secretary determines that there is a basis for the commencement of proceedings against a respondent, the Secretary shall provide the appropriate information to the Attorney General.\textsuperscript{51}

To prevent the federal government from infringing upon the rights of the states, the 1988 Act provides for referral to state or local proceedings when appropriate. If a complaint arises within a jurisdiction or local agency certified by the Secretary, the Secretary must refer the complaint to that agency for resolution.\textsuperscript{52} The Secretary takes no further action on the complaint unless the certified agency fails to meet its responsibilities.\textsuperscript{53}

Within 100 days after the filing of the complaint, the Secretary determines whether there is reasonable cause to believe there has been a discriminatory housing practice.\textsuperscript{54} If reasonable cause is found to exist, the Secretary shall charge the respondent.\textsuperscript{55} If no reasonable cause is found, the complaint is dismissed.\textsuperscript{56}

To facilitate the investigation, the Secretary may issue subpoenas and engage in other forms of discovery provided for in the Federal Rules of Civil Procedure.\textsuperscript{57} Witness and mileage fees are paid by the aggrieved party unless the party cannot afford such fees.\textsuperscript{58} If the aggrieved party cannot afford such fees, the

\textsuperscript{49} Id. This is the amended § 810(c) of the 1968 Act.
\textsuperscript{50} Id. This is the amended § 810(e) of the 1968 Act.
\textsuperscript{51} Id.
\textsuperscript{52} Id. This is the amended § 810(f) of the 1968 Act. An agency is certified by the Secretary when the Secretary determines that the agency will protect the substantive and procedural rights of the parties in accordance with the 1988 Act and the remedies are equivalent to those provided by the 1988 Act. Such agency is subject to review and re-certification by the Secretary at least every five years.
\textsuperscript{53} Id.
\textsuperscript{54} Id. This is the amended § 810(g) of the 1968 Act.
\textsuperscript{55} Id. The charge shall consist of a short and plain statement of the facts, shall be based on the investigative report, and need not be limited to the facts alleged in the complaint.
\textsuperscript{56} Id. Public disclosure of the dismissal of the cause of action shall be made.
\textsuperscript{57} Id. This is the amended § 811(a) of the 1968 Act.
\textsuperscript{58} Id. This is the amended § 811(b) of the 1968 Act.
Secretary shall pay the fees. The failure to comply with any lawful discovery request results in a fine of not more than $100,000 or imprisonment for not more than one year, or both. Similar criminal penalties are imposed for intentional interference with the investigation.

3. Enforcement by the Secretary

After a complaint has been filed, the complainant, the respondent, or the person on whose behalf the complaint was filed may elect to forgo the hearing ordered by the Secretary and proceed with a civil action. The electing person has 20 days from service of process to make the choice. If no election for a civil action is made, the Secretary orders a hearing on the charge in front of an administrative law judge. The administrative law judge must commence the hearing within 120 days of the charge. The hearing conducted by the administrative law judge is conducted much like a regular trial, including counsel, evidence, witnesses, and subpoenas. The administrative law judge must make findings of fact and law within 60 days after the end of the hearing. If the administrative law judge finds the respondent is guilty of discrimination or will be guilty of discrimination if the respondent continues his present course of action, the administrative law judge orders appropriate relief. This may be in the form of damages; injunctive relief; other equitable relief; or a civil penalty of not more than $10,000 for a first offense, not more than $25,000 for a second offense

59. Id.
60. Id. This is the amended § 811(c) of the 1968 Act.
61. Id.
62. Id. This is the amended § 812(a) of the 1968 Act.
63. Id.
64. Id. This is the amended § 812(b) of the 1968 Act. The hearing takes place in the vicinity of the alleged discriminatory act.
65. Id. This is the amended § 812(g)(1) of the 1968 Act. If the hearing is not commenced within 120 days the administrative law judge must explain the reasons for his delay to the parties and the Secretary.
66. Id. This is the amended § 812(c) of the 1968 Act. The Federal Rules of Evidence apply at the hearing.
67. Id. This is the amended § 812(g)(2) of the 1968 Act. If the hearing is not commenced within 120 days the administrative law judge must explain the reasons for his delay to the parties and the Secretary.
68. Id. This is the amended § 812(g)(3) of the 1968 Act.
69. Id.
within a five year period, or not more than $50,000 for a third or more offense within a seven-year period. If the respondent is subject to governmental licensing, the administrative law judge informs the licensing agency and recommends disciplinary action. If the administrative law judge finds that no discrimination has occurred or is about to occur, the charge is dismissed with public disclosure of the dismissal. All findings by the administrative law judge are subject to review by the Secretary within 30 days of the final order, and parties have 30 days to appeal the administrative law judge's decision.

The Secretary may petition any United States court of appeals to enforce the order of the administrative law judge. The court of appeals may grant any temporary relief as it sees fit, affirm, modify, or set aside the order in whole or in part, or enforce the order as it stands. "Any party to the proceeding before the administrative law judge may intervene in the court of appeals." If a party fails to petition for review of the administrative law judge's findings within 45 days of his final order, the order becomes final.

If the Secretary has not sought enforcement of the order of the administrative law judge within 60 days, the person entitled may seek relief in the court of appeals. Once an order for enforcement has been made in the court of appeals, the clerk of the court of appeals must enter a decree enforcing the order and provide the Secretary and other parties to the action with a copy of the decree.

Any party may elect a civil action as opposed to a hearing by the administrative law judge. If a civil action is chosen, the Secretary authorizes the Attorney General to commence it on behalf of the aggrieved person in the United States district court.

70. Id.
71. Id. This is the amended § 812(g)(5) of the 1968 Act.
72. Id. This is the amended § 812(g)(7) of the 1968 Act.
73. Id. This is the amended § 812(h) of the 1968 Act.
74. Id. This is the amended § 812(i) of the 1968 Act.
75. Id. This is the amended § 812(j) of the 1968 Act.
76. Id. This is the amended § 812(k) of the 1968 Act.
77. Id.
78. Id. This is the amended § 812(l) of the 1968 Act.
79. Id. This is the amended § 812(m) of the 1968 Act.
80. Id. This is the amended § 812(n) of the 1968 Act.
81. See supra note 51 and § 812(a) of the amended Act.
court.\textsuperscript{82} Such action must be commenced within 30 days after the authorization.\textsuperscript{83}

Reasonable attorney's fees are available under the 1988 Act.\textsuperscript{84} Regardless of whether the aggrieved party elects to follow the administrative proceeding or a civil action, reasonable attorney's fees may be awarded to the prevailing party.\textsuperscript{85} The amount is determined at the discretion of the administrative law judge or the court.\textsuperscript{86}

4. Enforcement by Persons Other Than the Secretary

The 1988 Act also provides for enforcement by private persons\textsuperscript{87} or the Attorney General.\textsuperscript{88} However, a private person may not commence a civil action if the Secretary or an administrative law judge is already addressing the alleged violation.\textsuperscript{89} The court may appoint an attorney for private persons and authorize the commencement of a civil action without the payment of any fees, costs, or security.\textsuperscript{90} If the court finds a violation of the 1988 Act has occurred, it may award actual and punitive damages or other appropriate relief, including reasonable attorney's fees.\textsuperscript{91}

The 1988 Act may be enforced by the Attorney General in a civil action whenever he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the 1988 Act]."\textsuperscript{92} A civil action commenced by the Attorney General can result in preventative relief in the form of injunctions, monetary damages, and/or civil penalties of not more than $50,000 for a first offense or not more than $100,000 for a subsequent violation.\textsuperscript{93}

\textsuperscript{82} This is the amended § 812(o) of the 1968 Act.
\textsuperscript{83} Id.
\textsuperscript{84} Id. This is the amended § 812(p) of the 1968 Act.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{88} Id. This is the amended § 814 of the 1968 Act.
\textsuperscript{89} Id. This is the amended § 813(a)(B)(3) of the 1968 Act.
\textsuperscript{90} Id. This is the amended § 813(b) of the 1968 Act.
\textsuperscript{91} Id. This is the amended § 813(c) of the 1968 Act.
\textsuperscript{92} Id. This is the amended § 814(a) of the 1968 Act.
\textsuperscript{93} Id. This is the amended § 814(d) of the 1968 Act.
The 1988 Act is a significant step toward reducing discrimination in rental housing on the basis of familial status. In attempting to protect families with children from discrimination, Congress considered constitutional issues, the potential for increased liability to landlords, the potential for increased liability insurance rates to landlords, and the potential for increased housing costs to the families. However, the 1988 Act is not without its problems. The following discussion and analysis addresses some of the potential problems facing the 1988 Act. It is likely that the courts will eventually be forced to address at least some of them.

A. Constitutionality

Some of the potential problems facing the 1988 Act are constitutional in nature and will be discussed in turn:

1. Do the administrative proceedings under the 1988 Act violate the right to a jury trial under the Seventh Amendment?
2. Does discrimination on the basis of familial status violate the Equal Protection Clause of the Fourteenth Amendment?
3. Does discrimination on the basis of familial status violate the Due Process Clause of the Fourteenth Amendment?
4. Does discrimination in rental practices violate the Commerce Clause under Article I § 8 of the Constitution?

1. Seventh Amendment Right to a Jury Trial

The Seventh Amendment to the U.S. Constitution provides:

In Suits at common law ... the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.94

Several congressmen were concerned about the constitutionality of the administrative procedure because it violated the right

94. U.S. Const. amend. VII.
to a jury trial. A hearing in front of an administrative law judge, as provided by the 1988 Act, is not a jury trial because the administrative law judge is the trier of both fact and law. However, congressional sensitivity to the right to a jury trial resulted in a procedural safeguard within the 1988 Act. In addition to the administrative procedures provided, the 1988 Act allows any party to elect to move the case to a United States district court. By allowing a party this choice, the right to a jury trial is protected.

2. Equal Protection Under the Fourteenth Amendment

The Equal Protection Clause says that "no state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." To find a law unconstitutional under the Equal Protection Clause, there must be 1) state action; 2) a difference in treatment between classes of people; and 3) no rational explanation for the difference in treatment.

The Equal Protection Clause can be considered from two points of view. First, it can be asserted by those classes not protected by a statute to challenge the constitutionality of the statute (i.e., persons wishing to live in adults-only housing challenging the 1988 Act). Second, absent a statute, it can be asserted by those persons seeking some protection to show that discrimination against the class to which they belong is unconstitutional. Prior to the 1988 Act, this second point of view had been adopted by various states to protect families with children from discrimination. These parties will no longer need to assert this argument as long as the constitutionality of the 1988 Act is upheld. There-

95. Senator Sanford stated, at 134 Cong. Rec. S10544, S10553 (daily ed. August 2, 1988), that:

The only other concern that I have seen raised about the administrative procedure is one questioning its constitutionality, in terms of meeting the seventh amendment right to jury trial. I, too, had such concerns until the adoption of the statute allowing any party involved in a housing discrimination case to demand a trial in U.S. district court. This provision will still give HUD the power to effectively enforce civil rights housing violations without denying any party involved their constitutional right to a jury trial.

96. See supra notes 62 and 81, referring to the 1988 Act's provision that allows a party to elect a U.S. district court instead of a hearing by the administrative law judge.

Therefore, only the first point of view — that of those persons not protected by the 1988 Act — will be discussed.

Persons not protected by the familial status or other provisions of the 1988 Act and who do not fall within exception to the familial status provision for housing for older persons are being treated unequally. However, the Equal Protection Clause was not intended to prevent all unequal treatment. Persons may be treated unequally if there is a rational explanation for the difference in treatment. For example, no one would question the constitutionality of a law making it illegal for blind people or young children to obtain driver's licenses even though such a law prevents a given class from equal treatment. Such a law is necessary to protect the public. Therefore, the relevant question is whether there is a rational explanation for allowing older persons to be exempted from the familial status provision.

There is some question as to whether Congress had a rational explanation for treating persons not protected by the 1988 Act differently from older persons. Although it was not concerned about infringing upon the rights of those persons who wished to live in an adults-only community, Congress was quite concerned about infringing upon the rights of the elderly.\textsuperscript{98} As one senator observed:

Equitable access to housing should be assured. Yet, we must make absolutely sure that in our effort to provide such protection, we do not impinge upon the right of older Americans to enjoy peace and quiet in their retirement years within communities established for that purpose.\textsuperscript{99}

The general feeling of Congress was that older persons comprised a special class that deserved to live in communities without children if they so chose.\textsuperscript{100}

Despite widespread support for maintaining an exception to the familial status provision for older persons, little explanation is provided for the exception. The legislative history to the 1988

\textsuperscript{100} This is not to say that older persons are a class entitled to heightened scrutiny under the Equal Protection Clause. Under the Equal Protection Clause, only three classes have been classified as suspect classes entitled to strict scrutiny. These classes are race, national origin, and alienage. Comment, \textit{Landlord Discrimination Against Children: Possible Solutions to a Housing Crisis}, 11 \textit{Loy. L.A.L. Rev.} 609, 629 (1978).
Act contains numerous references to the rights of "senior citizens ... to live out their retirement years in an environment that may be more peaceful than one which includes young children." 101 "There are some safeguard exemptions to the familial status language to protect legitimate housing for the elderly, and that is as it should be." 102

Despite these references to the rights of older persons, Congress provides no real explanation why older persons receive special protection under the 1988 Act while adults who simply wish to live away from children for basically the same reasons as older persons are not afforded such protection. The rationale for the exemption may be a reverence for the elderly, or it may be just a matter of simple politics (voting power and strong lobbying). However, until a clear, rational explanation for the unequal treatment of older persons and other adults can be found, the Equal Protection Clause may be a valid constitutional challenge to the 1988 Act.

3. Substantive Due Process Under the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment says "no state shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law." 103 In order to have a constitutional violation of the Due Process Clause there must be 1) state action; 2) a deprivation of life, liberty, or property; and 3) an arbitrary or irrational law.

Individuals likely to seek the protection of the Due Process Clause are those persons wishing to live in adults-only communities and landlords. In order to sustain a challenge on due process grounds, both of these groups must show a deprivation of liberty or property (life certainly not being at issue) and that the provisions of the 1988 Act are arbitrary or irrational.

Landlords seeking Due Process Clause protection might argue a violation of their property right in their apartments or a violation of a liberty right to contract with whomever they choose in the rental of their apartments. Adult tenants wishing to live in apartments limited to adults might argue a violation of their

102. Id.
liberty interest (probably a right to privacy). Regardless of the right asserted, and assuming such a right is being deprived, there is still no violation of the Due Process Clause. The 1988 Act provides a rational means to meet a legitimate end. The legitimate end is to provide housing for families with children. Making it illegal to discriminate in the rental of housing on the basis of familial status is a rational means to meet the stated legitimate end. Therefore, the 1988 Act is not unconstitutional based on the Due Process Clause.

4. The Commerce Clause

Although the primary constitutional support for the 1968 Act was the Equal Protection Clause, the “[c]onstitutional underpinnings of the law are also rooted in the Commerce Clause.”104 The Commerce Clause states: “The Congress shall have power to ... regulate commerce with foreign nations, and among the several states ....”105 It seems to stretch the language of the Commerce Clause to apply it to the 1968 Act or the 1988 Act. However, the power of Congress to regulate commerce is plenary,106 and the motive of Congress in regulating commerce is irrelevant.107 Congress may choose any means reasonably adapted to the attainment of a permitted end, even though such means may involve the control of intrastate activities.108

The Department of Justice explained the support for fair housing legislation under the Commerce Clause as follows:

Discrimination in housing affects this interstate commerce in several ways. The confinement of Negroes and other minority groups to older homes in ghettos restricts the number of new homes which are built and consequently reduces the amount of building which moves across state lines. Negroes, especially those in the professions or in business, are less likely to change their place of residence to another state when housing discrimination would force them to move their families into ghettos. The result is both to reduce the interstate movement of individuals and to hinder the efficient allocation of labor among the interstate components of

107. Id.
108. Id. at 118.
the economy.
The Commerce Clause grants Congress plenary power to protect interstate commerce from adverse effects such as these. The power is not restricted to goods or persons in transit. It extends to all activities which affect interstate commerce, even if the goods or persons engaged in the activities are not then, or may never be, traveling in commerce. The power exists even when the effects upon which it is based are minor, or when taken individually, they would be insignificant. It is sufficient if the effects taken as a whole are present in measurable amounts. And it does not matter that when Congress exercises its power under the Commerce Clause, its motives are not solely to protect commerce. It can as validly act for moral reasons.¹⁰⁹

This quotation could as easily apply to families with children as it does to blacks. If families with children are limited as to where they can find housing, they are less likely to change their place of residence, thus limiting interstate movement of individuals.

The 1968 Act is not the first time that the Commerce Clause was used to justify civil rights legislation. In 1964, the U.S. Supreme Court held in Heart of Atlanta Motel v. United States that it was unconstitutional for a motel to refuse to rent rooms to blacks.¹¹⁰ The Court reasoned that discrimination in motel room rentals discouraged travel by the black community, and thus was subject to Commerce Clause regulation.¹¹¹ In another 1964 case, Katzenbach v. McClung, the Supreme Court held it was unconstitutional for a restaurant to refuse to serve blacks because a substantial portion of the food served in the restaurant had moved by interstate commerce.¹¹²

Although discrimination on the basis of familial status does not rise to the same level as discrimination on the basis of color, the same rationale used in the 1968 Act to support the unconstitutionality of discriminating against blacks may also apply to discrimination on the basis of familial status under the 1988 Act. If housing is not readily available to families with children, they will be forced to remain in whatever areas have housing for them. This would restrict commerce in the same way envisioned

¹⁰⁹. 54 Fed. Reg. 3232, 3236, supra note 4 (citing 114 Cong. Rec. 2536-37 (February 7, 1968)).
¹¹¹. Id.
by the Department of Justice in the above quotation\textsuperscript{113} and by
the Supreme Court in \textit{Heart of Atlanta Motel} \textsuperscript{114} and McClung. \textsuperscript{115}

\textbf{B. Higher Insurance Costs and Greater Tort Liability}

In addition to raising several constitutional issues, the 1988
Act raises other concerns. Several lobbyists voiced concerns
during the congressional debates regarding the potential for
higher insurance costs due to a perceived increased risk of tort
liability.\textsuperscript{116} The argument is that certain previously adults-only
apartment complexes have facilities such as pools, saunas, and
weight rooms that are inherently dangerous to children; because
these facilities pose a greater risk of injury to children, the
landlord's cost for insurance will necessarily increase.

Those who would advance this argument fail to comprehend
the main purpose of the 1988 Act's provisions, which make it
illegal for apartment owners to discriminate on the basis of
familial status. Although it may be true that previously adults-
only complexes may be more dangerous to children than other
apartment complexes, the purpose of the familial status provision
is to provide housing for families with children. The mere fact
that some of the housing may, at the present time, be somewhat
more dangerous to children than desired is irrelevant. Landlords
will either need to eliminate the potential dangers to children or
implement rules to deal with such dangers. Congress did not
"intend to limit the ability of landlords or other property man-
gerers to develop and implement reasonable rules and regulations
relating to the use of facilities associated with dwellings for the
health and safety of persons."\textsuperscript{117}

Furthermore, "there is nothing in the provisions of the [1988
Act] or its legislative history that indicates that Congress sought
to impose any new liability on the owners and managers of
housing."\textsuperscript{118} As Senator Kennedy pointed out:

Congress does not intend to alter vicarious or secondary State
tort law through the provisions of this bill. There is no objective

\begin{flushright}
\textsuperscript{113} See \textit{supra} note 109 for the citation of this quote.
\textsuperscript{114} See \textit{supra} note 110.
\textsuperscript{115} See \textit{supra} note 112.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\end{flushright}
evidence to link concerns about increased liability with any of the protected classes, and none should be assumed.  

C. Increase in Cost of Rental Property

Several people have argued that the 1988 Act may actually be self-defeating: It may hurt the people it was intended to help due to anticipated increased costs of obtaining rental housing. There is some logic to this argument. As previously discussed, it is possible that the cost of liability insurance will increase for landlords due to the risks of children being injured. Children also cause more wear and tear on apartments, thus increasing maintenance costs for landlords. As a matter of simple economics, this cost is likely to be passed on to the rental customer.

As previously noted, one of the factors that led to including familial status as a protected class in the 1988 Act was the high cost of new housing. If the 1988 Act results in increased rental prices to the extent that families with children can no longer afford rental housing in addition to not being able to afford to own their own homes, it will have been a complete failure. However, due to the extent of the current problem, it is a risk that must be taken.

D. Time and Money

If an administrative procedure is prohibitively time consuming or expensive, it is counterproductive. Such is not the case with the 1988 Act. Although the administrative procedure provided by the Act is detailed and arguably cumbersome, the procedure stipulates strict time constraints within which specific steps must be completed. The 1988 Act also gives the Secretary of HUD or the district court judge (depending on the forum chosen) the power to grant immediate, equitable relief in the form of an

120. Although this argument may be logical, it is not necessarily true. It is too early to tell if the argument is true.
121. See the discussion herein under "Higher Insurance Costs and Greater Tort Liability."
123. See supra note 25.
injunction. Therefore, although the procedure may take some
time to reach a final order, appropriate relief can be granted
immediately if necessary.

The cost to persons seeking relief under the 1988 Act is not
prohibitive. Prior to the 1988 Act, persons may have been ap-
prehensive to pursue a remedy for discriminatory practices. One
reason for this was the prohibitive cost to the injured party of
pursuing a legal remedy. Under the 1988 Act, reasonable attor-
eey's fees are available to the prevailing party124 regardless of
whether the aggrieved party elects a civil action or the admin-
istrative procedure.125 Therefore, attorneys will be willing to
represent a party with a valid cause of action. This does not
mean that the cost of the administrative procedure is not high.
It only means that the cost is not prohibitive to the intended
protected class. If the cause of action has merit, the ultimate
cost of the administrative procedure will fall where it belongs —
on the party violating the 1988 Act.

VI. CONCLUSION

The Fair Housing Amendments Act of 1988 is landmark leg-
islation. It is the first major piece of civil rights legislation in 20
years. While the 1988 Act is likely to withstand constitutional
challenges, it remains to be seen whether congressional hopes
are ultimately realized. The administrative enforcement mecha-
nism provided by the Act and the substantial civil penalties
imposed for violations are strong steps in curbing discrimination
against families with children. If the administrative costs in terms
of money and time are not too prohibitive, the 1988 Act is likely
to succeed in at least reducing discrimination on the basis of
familial status.126

124. Id. This is the amended § 812(p) of the 1968 Act.
125. Id.
126. Since the writing of this comment, three cases have mentioned the Fair Housing
Amendments Act of 1988: Howard County Human Rights Comm'n v. Great Oaks Apart-
ments, No. 177, slip op., 1989 Md. LEXIS; Schmidt v. Superior Court of Santa Barbara
County, 48 Cal. 3d 370, 769 P.2d 932, 256 Cal. Rptr. 750 (1989); Verland C.L.A. v. Zoning
Hearing Bd., 556 A.2d 4 (Pa. Commw. Ct. 1989). None of these cases has addressed any
issue under the 1988 Act. The 1988 Act was mentioned in dicta for purposes of recognition
only.
NOTES

PUBLIC SECTOR AGENCY SHOP AGREEMENTS
IN THE SIXTH CIRCUIT AFTER
TIERNEY V. CITY OF TOLEDO

James D. Allen

I. INTRODUCTION

Union security agreements in the public sector have been the

1. The terms union shop, agency shop, fair share, and service fee agreements will be used interchangeably.
2. 824 F.2d 1497 (6th Cir. 1987).
3. The types and differences of union security agreements may be described as follows:
   - Closed Shop Agreement: An individual must be a member of the union in order to be eligible for hire and must retain this membership as a condition of continued employment with the contracting employer.
   - Union Shop Agreement: An individual who is not a member of the union may be hired but within a specified time after hire must become and remain a member as a condition of continued employment with the contracting employer.
   - Maintenance-of-Membership Agreement: An employee who is a member of the union at the beginning of the contract or who becomes a member during the term of the contract is obligated to remain a member until the termination of the contract.
   - Agency Shop Agreement: An individual who is not a member of the union may be hired and retained in employment without the necessity of becoming a member of the union, but he is required to tender the equivalent of initiation fees and periodic dues to the union as a condition of his continued employment with the contracting employer.
   - Service Fee Agreement (Fair Share Fee Agreement): An individual who is not a member of the union may be hired and retained in employment without the necessity of becoming a member of the union, but as a condition of employment he is required to tender to the union his pro rata share of the costs incurred by the union in performing its statutory function as the exclusive bargaining representative.
   - Irrevocable Checkoff Authorization Agreement: An individual who elects to discharge his financial obligation to the union by authorizing the employer to deduct money from his paycheck and forward it to the union is bound to continue this authorization (and the employer is bound to honor it) for a specified term.

The topic of many recent court decisions. The agency shop or fair share fee agreement is authorized by the Railway Labor Act, the National Labor Relations Act, and many state statutes.


5. Railway Labor Act § 2, Eleventh provides:

Notwithstanding any other provisions of this chapter, or of any statute or law of the United States, or Territory thereof, or of any State, any carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.


6. Section 8(a)(3) of the National Labor Relations Act provides:

It shall be an unfair labor practice for an employer

... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.... Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]


Under an agency shop agreement, a union that acts as the exclusive bargaining representative may charge members of the bargaining unit, who can not be compelled to become union members, a fee for acting as their exclusive bargaining representative.\textsuperscript{8} The purpose of such a union security arrangement is to eliminate the so-called "free rider."\textsuperscript{9} A "free rider" is one who obtains the benefit of the union's exclusive representation because he is in the bargaining unit, but does not pay his fair share of the costs incurred by the union in its collective representation.\textsuperscript{10} The union, acting as the exclusive bargaining representative, is legally obligated to represent each member of the bargaining unit, including those who do not become union members, without discrimination.\textsuperscript{11} Without union security agreements, non-union employees would be able, at no expense to themselves, to receive all of the benefits the union obtained through collective bargaining.

The Supreme Court has upheld the power of the government to authorize agency shop arrangements in the private\textsuperscript{12} and public sectors.\textsuperscript{13} These arrangements have been sustained despite allegations that they constitute a violation of an employee's freedom of conscience, freedom of speech, freedom of association, and freedom of religion.\textsuperscript{14} However, the Court has held that agency shop fees may not be used to finance political or ideological activities unrelated to collective bargaining.\textsuperscript{15}

The principle is firmly settled that, although public sector agency shop or fair share fee arrangements impinge upon the

\begin{itemize}
  \item \textsuperscript{8} R. Gorman, \textit{Basic Text on Labor Law: Unionization and Collective Bargaining} at 642 (1976).
  \item \textsuperscript{9} N.L.R.B. v. General Motors Corp., 373 U.S. 734, 742 (1963).
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} See Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944). This duty of fair representation is breached when "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." Vacca v. Sipes, 386 U.S. 171 (1967). See also Humphrey v. Moore, 375 U.S. 335 (1964).
  \item \textsuperscript{12} Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956).
  \item \textsuperscript{13} Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
  \item \textsuperscript{15} Hanson, 351 U.S. at 235; International Ass'n of Machinists v. Street, 367 U.S. 740, 764 (1961); Abood, 431 U.S. at 225.
\end{itemize}
First Amendment rights of non-union agency fee payors, they are constitutional with proper procedural safeguards. Specific procedural requirements of such agreements were delineated by the United States Supreme Court in *Chicago Teachers Union v. Hudson.*  

The Sixth Circuit, in *Tierney v. City of Toledo,* has constricted and clarified the *Hudson* decision. This case note will analyze the *Tierney* decision as it relates to public sector agency shop agreements in the Sixth Circuit. Specifically, emphasis will be placed upon the independent audit requirement, the duty of a public sector employer, and the type of union expenditures that may be chargeable to agency fee payors. The line drawing between chargeable and non-chargeable expenditures is particularly difficult in the public sector because, as one Justice of the Supreme Court observed: "Collective Bargaining in the public sector is 'political' in any meaningful sense of the word."

II. BACKGROUND

A. The Railway Labor Act Trilogy of Cases

The United States Supreme Court first examined the constitutionality of a union security agreement in a case arising under the Railway Labor Act. In *Railway Employes’ Dept. v. Hanson,* the employees of a railroad in Nebraska sought an injunction against enforcement of a union shop agreement authorized by the Railway Labor Act and entered into by the company and union. The Court held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments."

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18. 824 F.2d 1497 (6th Cir. 1987).
21. See supra note 5.
22. *Hanson,* 351 U.S. at 238.
The Court was careful to note that there was no allegation in the record that the union was expending funds extracted from employees for political purposes.\(^{23}\) The Court concluded that non-members could be required to financially support union activities that are “in the realm of collective bargaining.”\(^{24}\) However, the non-members may not be compelled to support union activity that is “not germane to collective bargaining.”\(^{25}\)

Five years after *Hanson*, the Court, in *International Ass'n of Machinists v. Street*,\(^{26}\) was faced with a record containing detailed information concerning the union’s expenditures of money exacted from non-member agency fee payors for political purposes with which they disagreed.\(^{27}\) The Court, although avoiding the constitutional issue,\(^{28}\) construed the Railway Labor Act to prohibit the union from forcing the employees “to support political causes which they opposed.”\(^{29}\)

In yet another Railway Labor Act case, the Court dealt with the burden of proof and remedies available in litigation involving

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\(^{23}\) Id.

\(^{24}\) Id. at 235.

\(^{25}\) Id. The Court stated that “if the exaction of dues, initiation fees or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.” Id. at 238. The Court also noted that “[i]f ‘assessments’ are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.” Id. at 235 (footnote omitted).


\(^{27}\) The non-members objected to the use of their funds “to promote the propagation of political and economic doctrines, concepts and ideologies.” Id. at 744. The record disclosed that the union had used funds exacted from the objectors to support the campaign of candidates for President, Vice President, U.S. Senate and House of Representatives. Id. at 744 n.2.

\(^{28}\) Id. at 749-50. The Court in *Hanson* had concluded that governmental action was present because there was a “federal statute authorizing union shop agreements on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.” *Hanson*, 351 U.S. at 232. For an excellent analysis of the governmental action issue under the RLA and NLRA, see *Haggard*, supra note 3 at 239-47. See also *Summers, Union Powers and Workers' Rights*, 49 Mich. L. Rev. 805 (1951).

\(^{29}\) Id. at 764. The Court stated that “§ 2, Eleventh [of the Railway Labor Act] contemplated compulsory unionism to force employees to share the cost of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.” Id. The Court, in great detail, discussed the purpose of the 1951 amendment to the RLA, which was to eliminate the free rider. Id. at 761-64. The Court noted that “the primary congressional concern was with the elimination of the ‘free rider’ who did not support his representative’s performance of its function under the Act.” Id. at 763 n.15. This construction operates “to deny the unions, over an employee’s objection, the power to use his exacted funds to support political causes which he opposes.” Id. at 768-69.
an agency shop agreement. In *Brotherhood of Railway & Steamship Clerks v. Allen*, the Court concluded that a dissenting employee need only "manifest[ ] his opposition to any political expenditures by the union" that he opposed.

When employees protest the purpose of certain expenditures, the union has the burden to calculate and prove the amount that the union's political expenditures bear in proportion to total union expenditures. However, "[a]bsolute precision in calculation" of such amount is not required because of the difficulty in drawing a line between those union expenditures that are political in nature and those germane to collective bargaining.

The remedy to be imposed on a union for expending money obtained from employees for impermissible purposes — i.e. those not germane to collective bargaining — is a refund to the employee of such proportion of total union expenditures that are political and a future reduction of the agency fee by the same

31. *Id.* at 118 (emphasis in original). To be entitled to relief a dissenter must prove that he objects to the union's use of his funds for political purposes he opposes. However, the employee will not be required to "allege and prove each distinct union expenditure to which he objects" because this would presumably violate his right against compelled disclosure. *See also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977) ("To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.") (footnote omitted); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). For a discussion of the constitutional issues involved in an agency shop agreement, see Cantor, *Forced Payments to Service Institutions and Constitutional Interest in Ideological Non-Association*, 36 Rutgers L. Rev. 3 (1983).

The dissenting employees, however, are not entitled to relief until a final judgment is rendered in their favor. *Allen*, 373 U.S. at 120. The Court has been reluctant to grant the dissenting employees an injunction relieving them of the obligation to pay the entire amount due under the agency shop agreement. The reason advanced is that the agreement in and of itself is not illegal under the Railway Labor Act, but is applied in a fashion not authorized by the Act. Also, an injunction would severely hinder the union's ability to perform its admittedly complicated function under the Act as the exclusive bargaining representative. *See Allen*, 373 U.S. at 119-20; *Street*, 367 U.S. at 771-72.

33. *Id.* The Court stated:

Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise.
The Court also encouraged the unions to adopt some type of plan that would give the dissenters an "internal union remedy." 35

B. The Seminal Public Sector Agency Shop Decision of Abood v. Detroit Board of Education 36

The United States Supreme Court was first faced with a challenge to an agency shop arrangement in the public sector in Abood v. Detroit Bd. of Educ. 37 In Abood, several employees of the Detroit Board of Education challenged the agency shop clause that the Board and the Detroit Federation of Teachers had negotiated into their collective bargaining agreement. The plaintiffs alleged such an agreement was invalid on constitutional grounds because it deprived them of their freedom of association protected by the First and Fourteenth Amendments. 38 Noting that although compelling employees "to support their collective-bargaining representative has an impact upon their First Amendment interest," 39 the Court upheld the forced exaction of an agency fee where it is "used to finance expenditures by the Union for the purpose of collective bargaining, contract administration, and grievance adjustment." 40 However, the Court also concluded that the Board and union may not compel a dissenting

34. Id.
35. Id. The Court further stated that:
   If a union agreed upon a formula for ascertaining the proportion of political
   expenditures in its budget, and made available a simple procedure for allowing
   dissenters to be excused from having to pay this proportion of moneys due from
   them under the union-shop agreement, prolonged and expensive litigation might
   well be averted.
   Id. at 123.

37. Id.
38. Id. at 213.
39. Id. at 222.
40. Id. at 225-26.
agency fee payor "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher."\footnote{41}

The Court discussed the Hanson and Street Railway Labor Act cases extensively and found them to be "controlling" in this public sector agency shop case.\footnote{42} The justification for impinging on the dissenters' First Amendment right in the public sector is said to be the same as that in the private sector under the Railway Labor Act: The agency shop arrangement prevents industrial strife and eliminates the "free riders" who would otherwise obtain the benefit of the union's exclusive representation without cost to themselves.\footnote{44}

The Court refused to draw lines between collective bargaining activities, which are chargeable, and political or ideological activities unrelated to "collective bargaining, contract administration, and grievance adjustments," which are not chargeable.\footnote{45} The line-drawing in the public sector "may be somewhat hazier" than that in the private sector under the Railway Labor Act because of the inherent political nature of public sector collective bargaining.\footnote{47}

The appropriateness of a given remedy — if it is shown that a union has used compulsory agency fees to support political or ideological activities unrelated to its duties as the exclusive bargaining representative — was then assessed. The Court then enunciated what is now oft-cited language: "[T]he objective must

\footnotesize{41. Id. at 235.}
\footnotesize{42. Id. at 232. The plaintiffs contended that since they were public sector employees, where state action is admittedly present and constitutional protections implicated, they should receive a higher degree of protection under the First and Fourteenth Amendments. They contended that any type of forced compulsion to support a union was per se unconstitutional; no matter what activities such funds were expended (i.e. those unquestionably related to collective bargaining as well as those political in nature). Id. at 225-32. The Court, while conceding that public sector employment is inherently political, held that this does not give "a public employee . . . a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation." Id. at 229.}
\footnotesize{43. The Court stated that these justifications were "important governmental interest." This suggests that an intermediate level of scrutiny is being applied. Id. at 225.}
\footnotesize{44. Id. at 220-24.}
\footnotesize{45. Id. at 236.}
\footnotesize{46. Id.}
\footnotesize{47. See Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 U. CIN. L. REV. 669 (1975).}
be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities."

Thus, an agency shop agreement entered into between a public employer and a union pursuant to state statute is constitutional in the public sector to the extent that funds are expended for purposes, possibly political in nature, which are related to collective bargaining, contract administration, and grievance adjustment. However, the union may not constitutionally spend such fees on "political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 

C. The Modern Railway Labor Act Standard

In Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, the Court again examined an agency shop agreement entered into by a railroad and a union pursuant to the Railway Labor Act's authorization. The agreement provided that all employees in the bargaining unit pay an agency fee equal to members' dues. The employees were not required to become formal union members. The dissenting employees objected to certain expenditures of their compelled dues and to the union's rebate scheme for such improper expenditures.

The record was sufficiently detailed to allow the Court to determine what expenditures made by the union were chargeable to non-member fee payors in specific categories of union activities. The employees opposed the use of their compulsory agency fee to support six union expenses: the quadrennial Grand Lodge Convention; litigation not involving the negotiation of agreements or settlements of grievances; union publications, social activities,

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51. Id. at 439-41. 

52. Id. at 439-40.
death benefits for employees; and general organizing efforts. These union expenses were deemed to be ones that "fell between the extremes identified in Hanson and Street."

The Court first addressed the union's rebate procedure for refunding that part of the fee spent for improper purposes to which the employees objected. The union had implemented what is commonly known as a pure rebate approach. A pure rebate approach is where the agency fee is presumed to be equal to members' dues. The amount is collected in the year prior to which the union will expend these funds in its representative capacity. There is no advance reduction of the estimated proportion of the union's expenditures that will be directed toward improper purposes. The union will use the fee during the year for both permissible and impermissible purposes. The union would then calculate the percentage of the dissenters' agency fee that was spent on non-chargeable activity. This amount would then be refunded to the dissenter in the year after it was extracted from them.

The Court held that such a system was "inadequate" because it allowed the union the ability to charge the objecting employees for union activity that was not within the Railway Labor Act's statutory authorization. This type of system would effectively allow the union to obtain an "involuntary loan for purposes" that the agency fee payor opposes. An administrative convenience argument advanced by the union would not justify this type of system in light of at least two "readily available alternatives:" (1) an advance reduction of dues in proportion to the amount estimated to be spent on improper activities; or (2) an interest-bearing escrow of the agency fee. The procedure adopted must be one that does not enable the union "to commit dissenters' funds to improper uses even temporarily."

The Court then addressed the enumerated expenditures objected to by the agency fee payors. The Court discussed the Railway Labor Act and its purpose; again noting that the essen-

53. Id. at 440.
54. Id.
55. Id. at 443-44.
56. Id. at 444.
57. Id.
58. Id.
59. Id.
The Court noted that it had never before attempted to draw a line between permissible and impermissible union expenditures of the agency fee nor set out a test to determine where the line would fall. The Court then proceeded to set forth a test to determine whether a particular union expenditure could be properly taxed against objecting employees under the Railway Labor Act. The test was stated as follows:

[W]hen employees ... object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

The Court then applied its test, in light of the purpose of the Railway Labor Act, to each expenditure objected to by the agency fee payors. The Court upheld the use of the agency fees to defray the cost of the union's national conventions, social activities, union publications, and litigation expenses. However, the union's
use of objecting employees' funds for general organizing efforts was considered to be outside the intent of Congress in enacting the Railway Labor Act and thus not taxable against such employees.\textsuperscript{67} The elimination of the free rider did not apply to the union's efforts in attempting to organize employees outside the bargaining unit.\textsuperscript{68} The non-member agency fee payors did not benefit from such organizing.\textsuperscript{69} The Court concluded that "[u]sing dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefit to collective bargaining on behalf of the dues payer."\textsuperscript{70} Finally, the Court found it unnecessary to decide the objection involving the use of agency fees to support the union's death benefits program because the point was moot.\textsuperscript{71}

The Court then proceeded to analyze the constitutionality of the union's expending the agency fee to help defray the cost of conventions, social activities, and the union's magazine.\textsuperscript{72} The

\textsuperscript{66} Id. at 453. These expenses were held to be chargeable to objecting non-members as long as the expenses concerned "litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit." Id. The Court noted several examples of litigation which could be chargeable to objecting non-members: fair representation issues; jurisdictional disputes with other unions; and litigation before agencies and courts concerning bargaining unit employees which is normally conducted by the exclusive representative. Id. However, where the bargaining unit is not directly concerned in the litigation, the objecting employees may not be compelled to share in the costs. The examples listed by the Court are: union challenge to the legality of airline industry mutual aid pact; litigation of airline employees in Bankruptcy proceedings; and defending suits alleging violation of Title VII. Id.

\textsuperscript{67} Id. at 451-53.

\textsuperscript{68} Id. at 452.

\textsuperscript{69} Id. at 453.

\textsuperscript{70} Id. at 452. The Court also noted that "it would be perverse to read [the Railway Labor Act] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." Id. at 452 n.13.

\textsuperscript{71} Id. at 454-55. The point was moot because the union had been decertified and the plaintiffs were no longer involved in the program. However, the Court did note that the employees were not entitled to a refund of any percentage spent on death benefits because they were still entitled to the benefits, thereby enjoying a type of insurance. Id.

\textsuperscript{72} Id. at 455-57. Many courts and commentators have interpreted the Ellis test to be applicable in the public sector under the constitution. See, e.g., San Jose Teachers Ass'n v. Superior Court, 38 Cal. 3d 839, 700 P.2d 1252, 215 Cal. Rptr. 250 (1985); Abels v. Monroe County Educ. Ass'n, 489 N.E.2d 533 (Ind. Ct. App. 1986); Henkel & Wood,
Court reasoned that there was no First Amendment violation because the significant impingement on protected constitutional interests was justified by a governmental interest in industrial peace.\textsuperscript{73} However, Justice Powell, in a concurring opinion, felt that the cost of the union's conventions could not be constitutionally assessed against the objecting employees.\textsuperscript{74} Justice Powell felt that the majority had not engaged in standard constitutional analysis as it relates to the First Amendment and merely gave a "conclusory disposition" to the objecting employees' First Amendment argument.\textsuperscript{75}


In \textit{Chicago Teachers Union v. Hudson},\textsuperscript{77} the Supreme Court was faced with an attack by dissenting non-members to the procedure used by the Chicago Teachers Union to determine the amount of the fair share fee and the procedure for adjudicating a dissenter's claim that the fair share fee was being used for impermissible purposes.\textsuperscript{78}

The union had adopted a three-stage procedure for considering objections made by non-members. However, no objection could be raised before the deduction was made.\textsuperscript{79} The non-member, within 30 days after the first deduction was made, could submit a letter of protest to the president of the union. The union's executive committee would render a decision. The non-member could appeal this decision to the union executive board. Finally, if the non-member continued to protest, an arbitrator would be

\textsuperscript{73} Ellis, 466 U.S. at 455-57.
\textsuperscript{74} Id. at 457 (Powell, J., concurring). Justice Powell disagreed because he felt that the unions having many prominent politicians, including Senator Kennedy, speak at the conventions was not shown to be reasonably related to the union's performance of its statutory function. \textit{Id.} at 459. Justice Powell also stated that "[e]ven if Congress had intended the Act to permit such use of compulsory dues, it is clear that the First Amendment could not." \textit{Id.} at 461.
\textsuperscript{75} Id.
\textsuperscript{76} 475 U.S. 292 (1986).
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 299.
\textsuperscript{79} Id. at 296.
selected by the union's president and consider the objection.  

The Court found "three fundamental flaws" with the union's procedure. First, the Court noted that the union may not exact dissenters' funds even temporarily for improper purposes. The union will not be permitted to exact a fair share fee without establishing a procedure which will eliminate the possibility that non-members' funds will be used, even temporarily, to support union activities that are unrelated to collective bargaining.

Secondly, the union's advance reduction of the fee from 100 percent of regular union dues to 95 percent was inadequate because it did not provide non-members with an adequate amount of information about the basis of such calculation. The non-members must be given a sufficient amount of information that allows them to "gauge the propriety of the union's fees." The union must identify expenditures for collective bargaining activities that benefit and may be charged to non-members and not merely acknowledge that the non-members are not required to pay five percent of total union expenditures that are considered unrelated to collective bargaining. Such information is inadequate because it fails to disclose the reason the non-members are being compelled to pay 95 percent of regular union member dues.

Finally, the Court held that the union's procedure was defective because it did not "provide for a reasonably prompt decision by an impartial decisionmaker." The union may not retain the "unrestricted choice" of selecting the decisionmaker where a challenge is brought against the union's calculation of the fee.

80. Id.
81. Id. at 304-05.
82. Id. at 305.
83. Id.
84. Id. at 306.
85. Id.
86. Id. at 306-07.
87. Id. at 307. The Court stated that "expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice." Id. at 308 n.21.
88. Id. at 308. There is overwhelming support in the decisions that selection pursuant to the procedures of the American Arbitration Association meets the "impartial decisionmaker" requirement. See, e.g., Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987); Damiano v. Matis, 830 F.2d 1363, 1371 (6th Cir. 1987); Lowary v. Lexington Bd. of Educ., 127 L.R.R.M. 2223 (N.D. Ohio 1987); Ellis v. Western Airlines, 127 L.R.R.M. 2250, 2253 (S.D. Cal. 1987).
The Court concluded that the union's procedure was constitutionally inadequate under the First Amendment because it failed to minimize the risk that non-union employees' contributions might be used for impermissible purposes, it failed to provide adequate justification for the advance reduction of dues, and it failed to offer a reasonably prompt decision by an impartial decisionmaker.\(^9\)

These constitutional procedural safeguards are required for two reasons. First, although the government's interests in eliminating the free rider and in promoting labor peace are sufficient to justify the infringement on dissenters' constitutional rights, the fact that such rights are constitutionally protected requires the procedure to be "carefully tailored to minimize the infringement."\(^0\) Second, the non-union employee must be accorded a "fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim."\(^1\)

The union contended that since it had escrowed 100 percent of the dissenters' contribution, it had eliminated any constitutional objection to the procedure and had provided an adequate remedy because such escrow avoided the possibility that the funds could be used improperly.\(^2\) The Court held that the mere fact that the union escrowed 100 percent of the dues exacted from the non-members did not cure the constitutional defects in the procedure because there remained two flaws.\(^3\) Although such escrow would eliminate the possibility that exacted funds would be used for improper purposes, the Court noted that it was inadequate because the union had failed to give the constitutionally required information concerning the advance reduction of dues and did not allow a reasonably prompt decision by an impartial decisionmaker.\(^4\)

However, a 100 percent escrow of the agency fee is not a constitutional requirement because this would deprive the union of access to funds it is "unquestionably entitled to retain."\(^5\) Such

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89. *Hudson*, 475 U.S. at 309.
90. *Id.* at 303.
91. *Id.*
92. *Id.* at 309.
93. *Id.*
94. *Id.*
95. *Id.* at 310. The Court noted that: "If, for example, the original disclosure by the
funds are those related to the union's duty as the exclusive bargaining representative. The union is, however, constitutionally required to escrow those "amounts reasonably in dispute" during the time the dissenters' challenge is pending.\footnote{96}

The Court succinctly stated its holding to be:

[T]hat the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.\footnote{97}

III. PUBLIC SECTOR AGENCY SHOP AGREEMENTS IN THE SIXTH CIRCUIT: TIERNEY V. CITY OF TOLEDO\footnote{98}

A. Facts

The City of Toledo enacted an ordinance that established an agency shop for its police officers and recognized the Toledo Police Patrolmen's Association (TPPA) as the exclusive bargaining representative for city police officers. Toledo police officers were required to become members of the TPPA or to pay a service fee that would not exceed the amount of dues paid by members of the TPPA.\footnote{99} In addition, the ordinance mandated the following: that TPPA give notice to non-members of financial obligations and the procedures for collection of the service fee; and a union procedure allowing non-members to recover portions of the service fee expended for political purposes "only incidentally related to wages, hours and conditions of employment."\footnote{100} The union established an escrow/rebate plan that required non-members to pay the TPPA during the first year a monthly agency shop fee equal to 100 percent of regular union dues.\footnote{101} This was

\footnote{96. Id.}
\footnote{97. Id.}
\footnote{98. 121 L.R.R.M. 3346 (N.D. Ohio 1985), rev'd, 824 F.2d 1497 (6th Cir. 1987).}
\footnote{99. 824 F.2d at 1500.}
\footnote{100. Id.}
\footnote{101. Id. at 1501.}
required even though the non-members were not given any information as to how the forced exaction was to be spent. The funds were not available to the union for any purpose. Non-members were required to make an objection in order to receive a copy of the refund procedure and the union budget. 102

During the first year of the union's plan, if an employee made an objection to the agency fee, the entire amount would be placed in escrow pending resolution at the end of the year by the umpire. The umpire would make a determination of the amount required to be rebated to the agency fee payor as that proportion which the union expended for political and ideological purposes unrelated to collective bargaining. The percentage of the escrowed funds which related to the proportion of total union expenditures that were determined to be germane to the TPPA's collective bargaining activity would be paid to the union. The umpire was to be selected by the union from a list of members of the National Academy of Arbitrators. The total amount of time between the exaction of the fee and resolution by the umpire could be well over one year. 103

The union's plan was changed for years subsequent to the first year of operation. The agency fee payors were required to continue to pay the monthly service fee equal to union dues. However, only a portion of those payments were escrowed. A non-member's objection would cause the union to place in escrow only the proportion of the agency fee that the umpire determined was expended for purposes unrelated to collective bargaining and was refunded to the non-member based on the previous year's expenditures. An additional five percent would be added to this figure as a cushion. 104 Only after objecting would the dissenter be informed of the amount placed into escrow and the basis for how the figure was ascertained. Thus, the union's procedure required the non-member to object in order to receive any information regarding the rebate procedure, the union budget of the prior year, or how the fee was calculated. 105

At the end of the year, the umpire would again determine the proportion of total union expenditures that were spent during

102. Id.
103. Id.
104. Id.
105. Id.
the year for activities not germane to collective bargaining. The non-member would receive a refund from the escrow account in that proportion. If that amount exceeded the escrow, the non-member would be paid directly by the TPPA.  

Seventeen police officers who were non-members of the TPPA challenged the ordinance and union plan. They alleged that the required payment of an agency fee in an amount equal to regular union dues violated 42 U.S.C. § 1983. They contended that the ordinance and plan constituted a deprivation of property without due process and violated their constitutional rights under the First Amendment.  

B. Procedure

The United States District Court for the Northern District of Ohio held that neither the ordinance nor union procedure violated the non-members’ constitutional or statutory rights. The court reached its conclusion even though it conceded that the union’s escrow procedure did not eliminate the possibility that the union might use some portion of the exacted fees for political purposes. The amount of the year-end refund could possibly exceed the amount escrowed in the beginning of the year. Thus, in such years, the union would be able to use the amount retained by it and not escrowed for activities unrelated to collective bargaining. The court determined that the amount of such excess would have a “de minimus [sic] impact upon the First Amendment” rights of the agency fee payors.  

C. The Sixth Circuit’s Decision

The Court of Appeals for the Sixth Circuit reversed and remanded the district court’s decision. The Sixth Circuit, after extensively discussing the Supreme Court’s decision in Chicago Teachers Union v. Hudson, held that “neither the [union’s] plan

107. Id.
108. Id. at 3349.
109. Id. at 3348.
110. Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987).
111. 475 U.S. 292 (1986). For a discussion of this decision, see supra notes 76-97 and accompanying text.
nor the ordinance complies with the requirements of Hudson."\(^\text{112}\) Noting that the objective of any procedural requirement is to "prevent[] compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities,"\(^\text{113}\) the court proceeded to address the Hudson requirements.

The court noted that the union's procedure must be implemented in a fashion in which the dissenters' funds would not, even temporarily, be used for improper purposes.\(^\text{114}\) The court reasoned that this requirement, along with the requirement of an escrow of the amount reasonably in dispute, mandates that the union is unable "to compel a non-consenting, non-union member to have any sum collected, even if placed in escrow, which would unquestionably represent ideological expenses of the union."\(^\text{115}\) However, the union may obtain and use that proportion of the union's expenses which are unquestionably related to collective bargaining, contract administration, and grievance adjustment.\(^\text{116}\) As to the amount reasonably in dispute, this must be escrowed pending a determination by an impartial decision-maker as to whether the expense is sufficiently related to the union's duty as exclusive bargaining representative and, thus, is chargeable to the non-members.\(^\text{117}\)

Addressing the requirement that the union must provide "adequate information" concerning the basis of the agency fee,\(^\text{118}\) the court determined that this information must be given to the potential objector "before it collects any fees from non-members."\(^\text{119}\) The union may not require a non-member to assert an

\(^{112}\) Id. at 1500.

\(^{113}\) Id. at 1502 (Hudson, 475 U.S. at 302 (quoting Abood, 431 U.S. at 237)).

\(^{114}\) Id.

\(^{115}\) Id. at 1502-03.

\(^{116}\) Id. at 1502.

\(^{117}\) Id. at 1504.

\(^{118}\) Id. at 1503. The Supreme Court in Allen reasoned that:

Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic consideration of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise.

\(^{119}\) Tierney, 824 F.2d at 1503.
objection before he or she is given the information and must provide non-members with a list of its “major categories” of expenditures for the previous year, verified by an “independent auditor.” A non-member, upon receipt of this information, must make his or her own informed decision of whether he or she objects to any expenditure considered by the union to be chargeable, but which he or she feels is unrelated to collective bargaining and non-chargeable. The non-members retain the burden of simply making their objections known to the union.

The court next considered the contention of the non-members that they must be granted an immediate advance reduction of that portion of the agency fee which is determined by the independent audit to be “unquestionably ... spent for ideological purposes.” In essence, the Sixth Circuit interpreted Hudson to require a delineation of a trichotomy of expenditures. First are those that are unquestionably related to the union’s duty as the exclusive bargaining agent. The union may extract “an immediate payment of those sums which according to the independent audit ‘it is unquestionably entitled to retain’ as undoubtedly agreement-related.” The second category of union expenditures are those determined by the independent auditor to “represent monies clearly expended for ideological purposes” unrelated to the negotiation and administration of the collective bargaining agreement. As to these expenses, the union must provide an immediate advance reduction and not merely an escrow of the percentage in which they relate to total union expenditures.

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120. Id. The Supreme Court in Hudson determined that:

Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fees. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in Abood.

Hudson, 475 U.S. at 306 (emphasis added).

121. Tierney, 824 F.2d at 1503 (quoting Hudson, 475 U.S. at 307 n.18).

122. Id. at 1503.

123. Id. See Allen, 373 U.S. at 118; Street, 367 U.S. at 774.

124. Tierney, 824 F.2d at 1503.

125. Id.

126. Id. (quoting Hudson, 475 U.S. at 310).

127. Id. at 1504.

128. Id. The Sixth Circuit stated: “We therefore believe that the Supreme Court’s
The final category of union expenses are those in the "gray area." These types of union expenditures are those that are reasonably in dispute and, according to Tierney, are expenditures for which the independent auditor is unable to make a determination. Such expenditures are those not clearly related to the union's duty as exclusive bargaining agent nor political or ideological in nature. The percentage of such expenses must be placed into escrow and are resolved as chargeable or non-chargeable to the agency fee payors by the impartial decisionmaker.

The Sixth Circuit then noted that Hudson requires a union procedure for objecting to agency fee expenditures which provides dissenters with a "reasonably prompt decision by an impartial decisionmaker." The court approved arbitration as a possible method to satisfy this requirement. However, the selection of such arbitrator must not be "left to the untrammeled discretion of the union."

The Sixth Circuit concluded that the "following provisions are essential for any plan [to meet] the constitutionally minimum requirements." First, the union or employer may not cause a non-member to pay an agency fee until it has adopted a procedure that complies with Abood and Hudson. This means that the potential objectors must be given an independently accounted analysis of the union's budgeted expenses. The audit must set forth the major categories of expenses of the union. This is required to enable the non-member to gauge what percentage of his or her fee will be allocated to defray the union's cost of negotiating and administering the collective bargaining agreement. Such an adequate accounting will also enable the non-member to intelligently apprise the portion of union expenses

approval of 100% escrow as satisfying Hudson's first requirement [of a remedy that offers dissenters an advance reduction to avoid even temporary use of funds improperly] refers to escrowing 100% of the remaining, non-clearly ideological proportion of the fee which the union may collect." Id.

129. Id.
130. Id.
131. Id.
132. Id. at 1503 (quoting Hudson, 475 U.S. at 307).
133. Id. at 1507.
134. Id.
135. Id. at 1504.
136. Id.
137. Id.
that will be spent for political and ideological purposes. The auditor is required to verify the union's budget and to determine whether or not the expenses are related to collective bargaining.\textsuperscript{138} As noted, this requires the independent auditor to pigeonhole the expenses as being: (1) sufficiently related to collective bargaining (chargeable); (2) not related to collective bargaining or political or ideological (non-chargeable); and (3) those that fall in the gray areas on which the impartial decisionmaker must make the final determination. An advance reduction for the amount non-chargeable is required.

The Sixth Circuit then proceeded to do what the Supreme Court has repeatedly refrained from doing.\textsuperscript{139} The Supreme Court has refused to explicitly determine whether expenses that are not germane to collective bargaining, nor political and ideological in nature, are assessable against the non-members.\textsuperscript{140} The Sixth Circuit held that "the union may not claim a right to receive from the non-union member full union dues covering all expenses except those items which are ideological in purpose."\textsuperscript{141} The union "may collect only for those expenses affirmatively related to the bargaining agreement because these constitute the only expenditures that, consistent with the First and Fourteenth Amendments under \textit{Abood} and \textit{Hudson}, the union may collect to prevent non-members' 'free riding.'"\textsuperscript{142} Thus, the union may not use exacted fees for any union activity that is not germane to collective bargaining, whether or not the activity is political or ideological in nature.

In applying its doctrine to the facts of the case, the court first determined that the public sector employer as well as the union is under a duty to ensure that the ordinance or agency shop agreement will not deprive the non-members of their First and Fourteenth Amendment rights.\textsuperscript{143} Thus, the City of Toledo has

\textsuperscript{138} Id.
\textsuperscript{139} See, e.g., \textit{Hudson}, 475 U.S. at 301; \textit{Abood}, 431 U.S. at 235 n.33.
\textsuperscript{140} Id.
\textsuperscript{141} \textit{Tierney}, 824 F.2d at 1505 (emphasis in original).
\textsuperscript{142} Id. (emphasis in original).
\textsuperscript{143} Id. See also \textit{Hudson}, 475 U.S. at 307 n.20, where the Supreme Court stated: "Since the agency shop itself is 'a significant impingement on First Amendment rights,' the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." (citation omitted).
as much of a duty as the union to protect non-members' constitutional rights. Furthermore, the plan adopted by the union failed to prevent temporary use by the union of agency fees for activities not related to negotiating and administering the collective bargaining agreement. The ordinance and plan required the agency fee payor to pay a fee equivalent to regular union dues. They did not provide for an advance reduction and caused the entire agency fee to be placed into escrow. This was inadequate, the court said, because it amounted to a "forced exaction" that was followed by a rebate more than a year later. Such an involuntary loan is impermissible under *Hudson* and *Ellis*. The plan adopted by the union must provide an escrow only of those amounts reasonably in dispute. The union may obtain only that portion of the agency fee which is unquestionably related to collective bargaining activities. However, the proportion of total union expenses that are not "affirmatively related" to negotiating and administering the collective bargaining agreement must be offset against the agency fee. Therefore, this amount must be reduced in advance from the fee and not exacted from the agency fee payors. The court's interpretation and application of *Hudson* means that an agency fee may not be equivalent to union dues.

The court found a second infirmity with the union's plan. The court determined it did not require a detailed list of union expenditures, including all major categories of union expenses, and was not audited by an independent auditor. Additionally, the plan required the non-member to object in order to receive any information regarding the calculation of the agency fee and was so vague that an individual reading it would not know how to make an objection. The plan, to be constitutional, must provide the non-member with adequate information concerning the calculation of the agency fee, and this information must be presented to all non-member agency fee payors before any fees may be collected from them. This requirement enables the non-members to evaluate the union's determination of the fee before

144. *Tierney*, 824 F.2d at 1505.
145. Id.
146. *Hudson*, 475 U.S. at 309; *Ellis*, 466 U.S. at 444.
147. *Tierney*, 824 F.2d at 1506.
148. Id.
149. Id.
entering an objection.\textsuperscript{150} In addition, the procedure to appeal the amount determined must be sufficiently clear and not excessively complex or cumbersome because this would deter non-members from exercising their right to object.\textsuperscript{151}

Finally, the court determined that the plan was unconstitutional because it “failed to provide for a reasonably prompt decision by an impartial decisionmaker.”\textsuperscript{152} The plan allowed the union the “untrammeled choice” in selecting the arbitrator from the National Academy of Arbitrators.\textsuperscript{153} An arbitrator selected and paid by the union is not considered to be an “impartial decisionmaker” as required by \textit{Hudson}.\textsuperscript{154} Additionally, the court found that the procedure, which prevented dissenters from receiving a refund until more than a year after they objected, was not “reasonably prompt.”\textsuperscript{155} Disputes concerning the basis of the fee must be resolved in an expeditious manner in order to avoid any constitutional infirmity.\textsuperscript{156}

The relief granted by the Sixth Circuit was an injunction preventing union collection of agency fees until a “constitutionally adequate plan consistent with the holdings in \textit{Abood}, \textit{Hudson}, and this opinion is functioning.”\textsuperscript{157} This determination is wholly consistent with the \textit{Hudson} ruling that procedural requirements must be implemented in such a fashion which is “carefully tailored to minimize the infringement” on dissenters’ First Amendment rights.\textsuperscript{158}

\textsuperscript{150}. “Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in \textit{Abood}.” \textit{Hudson}, 475 U.S. at 306.

\textsuperscript{151}. \textit{Tierney}, 824 F.2d at 1506. \textit{Hudson} requires the procedure to be one which “facilitate[s] a nonunion employee’s ability to protect his rights.” \textit{Hudson}, 475 U.S. at 307 n.20.

\textsuperscript{152}. \textit{Tierney}, 824 F.2d at 1506.

\textsuperscript{153}. \textit{Id.} at 1507.

\textsuperscript{154}. Several jurisdictions have upheld union plans which invoke the American Arbitration Association’s Rules for Impartial Decisionmaking. \textit{See}, e.g., \textit{Andrews v. Education Ass’n of Cheshire}, 829 F.2d 335 (2d Cir. 1987); \textit{Gillespie v. Willard City Bd. of Educ.}, 128 L.R.R.M. 2945 (N.D. Ohio 1988).

\textsuperscript{155}. \textit{Tierney}, 824 F.2d at 1507. \textit{See also Gillespie}, 128 L.R.R.M. 2945 (holding that a period of six months is reasonably prompt).

\textsuperscript{156}. \textit{See Hudson}, 475 U.S. at 308 n.21.

\textsuperscript{157}. \textit{Tierney}, 824 F.2d at 1507. As previously indicated, the Supreme Court has been reluctant to enjoin the union’s collection of the agency fee. \textit{See supra} note 31. However, since the \textit{Hudson} decision many courts, as did \textit{Tierney}, have issued an injunction requiring the union and employer to implement a procedure which meets the standard enunciated in \textit{Hudson}. \textit{See}, e.g., \textit{Andrews v. Education Ass’n of Cheshire}, 829 F.2d 335 (2d Cir. 1987).

\textsuperscript{158}. \textit{Hudson}, 475 U.S. at 303.
IV. IMPLICATIONS OF THE TIERNEY DECISION

A. The Independent Audit Requirement

As previously indicated, the Sixth Circuit has placed the burden of making the judgment of whether a specific union expense is chargeable or non-chargeable on the independent auditor.159 This independent verification requires the auditor to make a determination, legal in nature, of whether the union's allocation of the expense as related (chargeable) or not germane to collective bargaining (non-chargeable) is appropriate.160

The Supreme Court, in Hudson, while specifically stating that an independent audit of the union's major categories of expenditures must be verified by an independent auditor, did not require an auditor to determine the appropriateness of the union decision of chargeability.161 The Court implied that the function the auditor would perform is one that is within his knowledge: merely verifying that the union's books are accurate in delineating the type of expense and that such expenditure was really made.162 Thereafter, the non-member who looks at the verified accounting may gauge the propriety of the union's breakdown of expenditures and determine if the allocation of chargeable and non-chargeable categories is appropriate. If a non-member objects to the union's allocation of expenditures, then the requirement that the dispute be considered by an impartial decisionmaker becomes operative. The impartial decisionmaker, an expert in the field of labor relations, will then scrutinize the union's allocation of categories to determine the propriety of the union's determinations. Thus, the Sixth Circuit's reading of Hudson seems to miss the exact nature of the independent audit requirement. The court has also rendered the impartial decisionmaker requirement meaningless regarding expenditures deemed to be related or unrelated to collective bargaining by the independent auditor.

B. The Duty of the Public Employer

The Sixth Circuit, echoing the Hudson decision, places a duty on the public sector employer as well as the union to establish

159. See supra notes 124-131 and accompanying text.
160. See Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987).
162. See Andrews, 829 F.2d 335.
the requisite procedural requirements when implementing an agency shop arrangement. This duty helps safeguard non-members' constitutional rights, but it also reduces the impetus of the public sector employer to negotiate an agency shop arrangement. Prior to Tierney and Hudson, the employer's only obligation was to make a payroll deduction pursuant to a dues checkoff authorization. While the courts have not specifically addressed the exact nature of the duty, it seems likely that the public sector employer will be required to ensure the constitutionality of the union's plan or establish its own. Also, it is unclear if the employer will be held liable for damages in relation to a non-member's contest of an agency fee. Therefore, if a public sector employer includes an agency shop provision in the agreement, the employer should include a "hold harmless clause" as protection. Such a clause, however, will not protect the employer from the incidental costs associated with being brought into the litigation.

C. Chargeable v. Non-Chargeable Union Expenditures

The Sixth Circuit has determined that the union may collect from non-members only for those expenses that are "affirmatively related" to negotiating and administering the collective bargaining agreement. The Supreme Court has never explicitly determined whether the union may exact funds from non-members to defray costs that are neither related to collective bargaining nor political and ideological in nature. However, in all of its agency shop cases, the Court has espoused the general rule that the agency fee may not be expended for any activity which does not relate to the union's duty as exclusive representative for collective bargaining, contract negotiations, and the adjustment of grievances. Consequently, the Court has established a dichot-

163. Tierney, 824 F.2d at 1505; Hudson, 475 U.S. at 307 n.20.
164. Tierney, 824 F.2d at 1505.
165. See Dixon v. City of Chicago, 669 F. Supp. 851 (N.D. Ill. 1987)(holding that the indemnification clause included in the bargaining agreement shifting liability arising from employer's compliance with the agency fee agreement onto the union, does not entitle the employer to be dismissed from the suit).
166. Tierney, 824 F.2d at 1505.
167. See supra notes 61, 139-140 and accompanying text.
168. In Hanson, the Court stated that the non-members may be compelled to support to union activities which "relates . . . to the work of the union in the realm of collective bargaining" and may not spend exacted funds for "purposes not germane to collective
omy of expenditures: (1) those expenditures necessary to enable the union to carry out its duty as the exclusive bargaining representative (i.e. to defray the expense of collective bargaining, contract negotiation, and grievance adjustment); and (2) any other expenditure (i.e. those unrelated to the union’s duty and/or political or ideological in nature). The Court has repeatedly held that the justification for the impingement on the non-members’ constitutional rights is the desire to eliminate the “free rider.” Thus, union expenditures that are not even tangentially related to collective bargaining do not benefit those taking a free ride and may not be justifiably charged to non-members. Clearly, certain union expenditures in the public sector are political in nature, yet sufficiently related to collective bargaining to be assessed. However, the approach in *Tierney* is sound because it has concluded explicitly what the Supreme Court has determined by implication: that the union should be allowed to collect an agency fee only for those expenses which it proves to be “affirmatively related” to collective bargaining.

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169. See HAGGARD, supra note 3 at 140.

170. See, e.g., *Abood*, 431 U.S. at 222.

171. Lobbying, for example, has been held to be necessary for a public sector union to carry out its role as the exclusive bargaining representative. See, e.g., *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985) (holding that a public employee union unable to lobby the state legislature would be severely handicapped in performing its duties as a bargaining representative). The Third Circuit established the following test:

So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees.

741 F.2d at 609.

172. *Tierney*, 824 F.2d at 1505. See also Justice White’s concurring opinion in *Hudson*, 475 U.S. at 301-02.
V. Conclusion

The Supreme Court has held that agency shop agreements, though admittedly an infringement on non-members' First Amendment rights, are constitutional if adequate procedural safeguards are implemented. This procedure must prevent the compelled subsidization of activities unrelated to the union's duty as exclusive bargaining agent, yet not inhibit the union's ability to require all employees to contribute to the cost of collective bargaining.

The Sixth Circuit has interpreted the Supreme Court's decisions in the agency shop area to allow the union to collect from non-members only for those expenses affirmatively related to the bargaining agreement. As indicated, this is a sound interpretation of the rationale employed in the agency shop line of cases.173

While the Tierney holding imposes a duty on the public sector employer to assure or establish a procedure that meets constitutional requirements, the exact nature of the duty is unclear. Thus, further enunciation from the court will be necessary to facilitate compliance by public sector employers. In the meantime, any public sector employer entering into an agency shop agreement should obtain an indemnification agreement from the union in case of liability assessment.

Finally, the Sixth Circuit's decision has created an independent audit requirement that places a heavy burden on auditors. These individuals, many of whom are untrained in the area of labor-management relations, are required not only to verify union expenditures but also to categorize such expenditures as union activities that are "chargeable" or "non-chargeable." For this reason, the court should carefully re-examine its interpretation of Hudson with regard to the independent audit requirement. An auditor should be required to engage only in traditional auditing functions — namely, determining whether the union has actually made the expenditures on the items of expense listed in its budget. The court should leave the more complicated germane/non-germane and chargeable/non-chargeable determination to the

where though agreeing that the Court need not consider the issue, he stated that the "nongermane, nonideological expenditures ... are also very questionable" under the Supreme Court's cases. Hudson, 475 U.S. at 311 (White, J., concurring).

173. See supra note 168.
impartial decisionmaker who has the necessary expertise to make these decisions.
I. INTRODUCTION

In 1979, Kevan Berkovitz, a two-month-old infant, was given a dose of Orimune, an oral polio vaccine manufactured by Lederle Laboratories.1 Within one month after the administration of the vaccine, he contracted a severe case of polio.2 The disease left him permanently and severely paralyzed.3 Berkovitz filed suit against the Food and Drug Administration (FDA) under the Federal Torts Claims Act (FTCA).4 The suit claimed that the FDA negligently issued a license to Lederle to manufacture and distribute the vaccine and that the FDA was negligent in allowing the release of the particular lot of vaccine administered to Kevan Berkovitz, even though the lot did not comply with FDA standards for safety, purity, and potency.5

The FDA filed a motion for summary judgment on the basis that it was immune from suit under the discretionary function exception of the FTCA.6 This exception bars suit under the FTCA for acts of government employees that are based upon the exercise of a discretionary function. In an early decision interpreting discretionary functions, the Supreme Court held that “[w]here there is room for policy judgment and decision there is discretion.”7 A finding that a government employee rightfully acted with discretion would bar suit under the FTCA.

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
The district court (W.D. Pa.) denied the government’s motion for summary judgment, holding that agency employees had no discretion to license or release a vaccine that did not meet agency regulatory standards. The government filed an interlocutory appeal, and the decision of the lower court was reversed in the Third Circuit. The Supreme Court granted certiorari based on different interpretations by the circuit courts on the licensing and release provisions of FDA and on the scope of the discretionary function exception.

In Berkovitz v. United States, the Supreme Court significantly narrowed the scope of the discretionary function exception by holding that the FDA may be liable for negligently following mandatory regulations. Further, the Court held that even FDA actions arising from procedures that are not couched in mandatory regulations could be subject to a tort claim if those procedures do not empower the employee to act with discretion.

This casenote will outline the prior judicial history of the discretionary function exception with a focus on the interpretations that led to the decision in Berkovitz. In addition, this note will examine the Court’s rationale in narrowing the scope of the exception beyond that of prior decisions and analyze its application to the particular facts presented in Berkovitz. Finally, the note will discuss the impact of this decision on the FDA and other agencies regarding their ability to promulgate future regulations and guidelines that affect private industry.

II. BACKGROUND

A. Federal Torts Claims Act and the Discretionary Function Exception.

In 1946, the United States government statutorily waived its sovereign immunity from suit by enacting the Federal Torts Claims Act (hereinafter FTCA). The act permits suits against the United States for:

8. 108 S. Ct. at 1957.
9. Id. The appellate court decision can be found at 822 F.2d. 1322 (3d Cir. 1987).
11. Id. at 1957.
12. Id.
injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.\textsuperscript{14}

The purpose of the Act is to "compensate the victims of negligence in the conduct of governmental activities in circumstances like those in which a private person would be liable."\textsuperscript{15}

The waiver of sovereign immunity of the United States afforded by the FTCA is not absolute. A number of statutory exceptions were drafted by Congress in which waiver of sovereign immunity under the FTCA does not apply.\textsuperscript{16} One of the most heavily litigated exceptions to the FTCA is the "discretionary function exception," which grants immunity to the government for:

\begin{quote}
[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.\textsuperscript{17}
\end{quote}

Legislative history suggests that Congress intended to preserve a separation of power between the executive and judicial branches by enacting an exception to the FTCA that limits the liability of the government for acts of a governmental nature or function.\textsuperscript{18} The discretionary function exception was designed to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."\textsuperscript{19} Congress did not

\textsuperscript{14} 28 U.S.C. § 1346(b) (1982).
\textsuperscript{15} Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955).
\textsuperscript{18} 346 U.S. at 27-28.
define the term “discretionary function,” leaving it up to the courts to determine the breadth of this exception.20

B. The Court’s Interpretation of the Discretionary Function Exemption.

The Supreme Court’s first look at the discretionary function exemption came in 1953 in Dalehite v. United States.21 In Dalehite, the United States was sued for damages resulting from an explosion of ammonium nitrate fertilizer.22 The fertilizer had been produced and distributed according to specifications under the control of the United States.23 Plaintiffs sued under the jurisdiction of the FTCA for negligence charging that the United States permitted shipment of the explosive material in a congested area without warning local citizens of the possibility of explosion.24 The explosion leveled much of the city and killed many people.25 The suit alleged the government was negligent in (1) its cabinet-level decision to institute the fertilizer export program, (2) the failure to determine the possibility of explosion, (3) the drafting of the manufacture plan, and (4) the failure to properly police the storage and loading of the fertilizer.26

Focusing on the cabinet-level decision to implement this export plan, the Court concluded that, if nothing else, discretionary functions include “determinations made by executives or administrators in establishing plans, specifications or schedules of operations.”27 Cabinet-level decisions by administrators often involve policy decisions and, as the Court stated, “[w]here there is room for policy judgment and decision there is discretion.”28

21. 346 U.S. 15 (1953). This 4-to-3 decision was written by Justice Reed. Justice Jackson, who wrote the dissent, was joined by Justices Black and Frankfurter.
22. Id. at 18.
23. Id. The War Production Board, acting under Executive Order, was responsible for the production of the fertilizer in plants previously used for the production of ammunition. The Army’s Bureau of Ordnance was charged with the administration of the fertilizer production. The Tennessee Valley Authority set the specifications for and advised the Army on the production of the fertilizer. Id. at 18-19.
24. Id. at 17.
25. Id. at 23.
26. Id. at 23-24.
27. Id. at 35-36.
28. Id. at 36.
The Court in *Dalehite* formulated a broad interpretation of the exception by extending the protection from tort liability throughout the regulatory chain (from the planning level of high government officials through the level at which the plan is implemented by low-ranking government employees). The Court concluded that not only are high level planning decisions of government officials discretionary but that the "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." In *Dalehite*, the plan was established at high levels where policy judgments are made. But the manufacture and distribution of the fertilizer (implementation level) was also found to be discretionary because these functions were "performed under the direction of a plan developed at a high level under the delegation of plan-making authority...."  

Justice Jackson, in his dissent, argued that policy functions must be separated from operational functions in determining whether the discretionary function should apply. He argued that "many acts of government officials deal only with the housekeeping side of federal activities"; therefore, immunity should not be carried all the way down the line of the regulatory chain.  

In *Indian Towing Co. v. United States* the Supreme Court retreated somewhat from its broad interpretation of the discretionary function exception and further developed the planning-versus-operational distinction that was introduced in *Dalehite*. In *Indian Towing*, plaintiffs brought suit against the government for damages caused by the Coast Guard's negligent operation of a lighthouse. The Court held that although the government had discretion in its decision to undertake the lighthouse service (clearly a policy decision), once undertaken, the government is obligated to use due care in its operation. "If the [government] failed in its duty and damage was thereby caused... the United States is liable under the Tort Claims Act."  

29. *Id.*  
30. *Id.* at 40.  
31. *Id.* at 60.  
32. *Id.*  
34. *Id.* at 62.  
35. *Id.* at 69.  
36. *Id.* The majority opinion of *Indian Towing*, holding the government liable under the provisions of the FTCA, was written by Justice Frankfurter, who had joined the Justice Jackson's dissenting opinion in *Dalehite*.
The Supreme Court reinforced the planning-versus-operational level distinction of regulatory functions in *United States v. Union Trust Co.* 37 In affirming the appellate court decision, the Court found the government liable for the negligence of air traffic controllers in clearing two planes to land on the same runway at the same time, which caused a collision. 38 The appellate court held that the controllers “merely handle operational details which are outside the area of the discretionary functions . . . referred to in § 2680(a).” 39

In *United States v. Varig* — three decades after *Dalehite, Indian Towing, and Union Trust* — the Supreme Court once again tried to precisely define the discretionary function exception. 40 In *Varig*, a commercial airline brought suit against the Federal Aviation Administration (FAA) seeking damages for an airplane destroyed by fire. 41 The airline charged that the Civil Aeronautics Agency (CAA), predecessor of the FAA, negligently inspected and certified the designs, plans, specifications and performance data for the airplane, even though these items did not comply with CAA fire protection standards. 42

After a lengthy discussion of its earlier decisions of *Dalehite, Indian Towing, and Union Trust* (Eastern Airlines), the court isolated two factors useful in determining when governmental actions are protected under the discretionary function exemption:

First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.

Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. 43

The Court determined that the basic responsibility of satisfying air safety standards rested with the manufacturer and not the

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39. 221 F.2d 62, 76.
40. 467 U.S. 797.
41. Id. at 800.
42. Id. at 801.
43. Id. at 813.
FAA. The FAA polices private conduct by a "spot check" monitoring program. The Court held that FAA employees who conducted these "spot checks" were empowered by FAA regulations to make policy judgments regarding the extent of these inspections.\textsuperscript{44} Therefore, the employees exercising discretion were immune from suit. "When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind."\textsuperscript{45} The Court's holding in \textit{Varig} barred the plaintiffs from bringing a tort action against the government under § 2680(a) of the FTCA.

Some courts have interpreted \textit{Varig} as implying that regardless of whether the acts are regulatory in nature, the conduct must be discretionary to carry immunity.\textsuperscript{46} If the agency does not confer discretion to the regulatory employee, then the government is liable for all negligent acts flowing from execution of nondiscretionary functions.\textsuperscript{47}

Other courts, however, have interpreted \textit{Varig} to mean that all regulatory activity is exempt from tort liability under the discretionary function exemption.\textsuperscript{48} These courts seem to focus on the holding in \textit{Varig} that "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."\textsuperscript{49}

Recently, the Supreme Court dispelled this broad immunity interpretation in \textit{Westfall v. Erwin}.\textsuperscript{50} In \textit{Westfall}, a civilian employed by the government brought suit claiming the agency's negligence caused him to inhale improperly stored toxic soda ash, which resulted in chemical burns to his throat and eyes.\textsuperscript{51} The district court granted summary judgment barring governmental liability, holding that "any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their

\textsuperscript{44} Id. at 820.
\textsuperscript{45} Id. at 819-20.
\textsuperscript{46} Comment, \textit{supra} note 17, at 1319.
\textsuperscript{47} Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187, 1196 (D.C. Cir. 1986).
\textsuperscript{48} Comment, \textit{supra} note 17, at 1320.
\textsuperscript{49} Id. at 1318.
\textsuperscript{50} 108 S. Ct. 580 (1988).
\textsuperscript{51} Id. at 582.
The court of appeals reversed, holding that immunity from liability for a federal employee is granted “only if the challenged conduct is a discretionary act,” as well as being within the employee’s scope of duties.

In upholding the lower court decision, the Supreme Court found that the critical factor in determining whether the discretionary function exemption should apply is an analysis of the discretion exercised. Since the government did not present any evidence relating to its official duties or “to the level of discretion” the employees exercised in the scope of their duties, the Supreme Court reversed and remanded to the appellate court. Summary judgment was not appropriate because a material issue of fact remained.

In Westfall, the federal government argued that even if discretion is required before absolute immunity attaches, this requirement is satisfied if the government employee exercises only “minimal discretion.” The Court rejected this argument, contending that “all official acts involve a modicum of choice” and that this interpretation would leave the discretionary function exemption almost meaningless. The Court was unwilling to define the precise boundaries of official immunity in this case, stating that the relevant factual background was not sufficient to make the determination.

The question left open in Westfall, and not addressed in Varig, was whether the discretionary function exemption would bar a claim against an agency employee who negligently follows mandatory regulations, guidelines, or standards. It is precisely this issue that the Supreme Court addressed in Berkovitz v. United States, and it concluded that the exemption would not apply.

52. Id.
53. Id.
54. Id. at 584.
55. Id. at 585.
56. Id.
57. Id.
58. Id.
59. The Court in Varig relied heavily on the fact that the extent of the “spot check” inspection, as described in the regulations and agency manuals, was to be determined by the CAA employee based on the experience of the manufacturer, and the confidence of the CAA employee in that experience. 467 U.S. at 818. The Court determined that these regulations and guidelines are not mandatory and empowered the employees with more than a modicum of discretion.
III. Berkovitz v. United States

A. Facts and Procedure Below

On May 10, 1979, Kevan Berkovitz, a two-month-old infant, was
given a dose of Orimune, an oral polio vaccine manufactured by
Lederle Laboratories.60 Within one month of the administration
of the vaccine, he contracted a severe case of polio.61 The disease
left him paralyzed and unable to breathe without a respirator.62
Berkovitz and his parents filed suit in federal district court,
under the Federal Torts Claims Act (FTCA), claiming negligence
by the Division of Biologic Standards in licensing the live polio
vaccine to Lederle, and by the FDA in approving release of the
specific lot of vaccine for distribution.63

The government moved for dismissal, arguing lack of subject
matter jurisdiction, on the grounds that the action was barred
by the discretionary function exception under the FTCA.64 The
district court denied the motion and held that "neither the
licensing of Orimune nor the release of that vaccine to the public
was a 'discretionary function' within the meaning of the FTCA."65

The government appealed to the Third Circuit, which reversed
the district court decision and granted the government summary

60. 108 S. Ct. at 1957.
61. Id.
62. Id.
63. Id. Petitioners specifically claimed that the DBS was negligent in issuing a license
to Lederle without first receiving data that Lederle was required to submit showing the
product met all regulatory standards. Additionally, petitioners alleged that the DBS was
negligent in issuing a license to Lederle even though the vaccine did not comply with
certain regulatory standards. Finally petitioners alleged that the FDA's Bureau of Biol-
ogics was negligent in releasing the particular lot of vaccine that was administered to
Kevan Berkovitz without having requested a sample of the lot and testing it. When the
license was issued to Lederle, the DBS was a division of the National Institute of Health.
The DBS was transferred as a division of the FDA in 1972.
64. Id.
65. Id. The district court relied on the Third Circuit opinion of Griffin v. United States,
500 F.2d 1059 (1974), which was decided before Varig. In Griffin, plaintiff sustained
personal injuries from ingestion of oral polio vaccine that did not conform to regulations.
The Third Circuit concluded that the government was not immune to suit since the
employee's conduct required scientific evaluation of test results, and not the formulation
of policy. In denying the motion for summary judgment, the district court in Berkovitz
rejected the government's argument that the Griffin holding does not survive the decision
in Varig. 822 F.2d 1322 (3d Cir. 1987).
The circuit court interpreted *Varig* to require that the courts "distinguish between those FTCA suits based on regulatory actions which are discretionary . . . . and those based on alleged negligence in the performance of a non-discretionary regulatory action." If the actions are discretionary, then the suit is barred under the discretionary function exemption of the FTCA.

In following the *Varig* decision (and relying on the broad language of *Dalehite*), the appellate court found that the discretionary function exception affords the government immunity from claims based on (1) planning level acts, (2) discretionary operational acts, and (3) non-discretionary operational acts "taken in furtherance of planning level discretionary decisions...." The dissent interpreted the statute and regulations as imposing a mandatory duty upon the DBS and FDA and differentiated this duty from the discretionary "spot check" found in *Varig*. Concluding that federal officials do not possess discretion to violate binding laws, regulations or policies, the dissent argued that "the majority expanded the discretionary function exemption beyond the boundaries of any case reported to date."

Noting the conflict between the circuits regarding the application of the discretionary function exception on claims arising from the government's regulation of polio vaccines, the Supreme Court accepted certiorari, and reversed and remanded the appellate court decision.

**B. Oral Polio Vaccine and Applicable Federal Statutes and Regulations**

Prior to 1955, polio was a widespread disease that crippled children in the United States and throughout the world. Polio...
is caused by a virus that results in severe damage to the nervous system and muscular paralysis.\textsuperscript{73} The first major step in combating this disease was the development of the Salk vaccine in 1955.\textsuperscript{74} The Salk vaccine is a chemically killed strain of polio virus incapable of replicating and causing infection in human beings.\textsuperscript{75} Once injected into the body, this "killed" virus stimulates the production of antibodies that block the growth of the live virus and prevent the contraction of polio.\textsuperscript{76}

Although effective in sharply reducing the number of cases of polio, there were still some disadvantages to the Salk vaccine, and further medical research resulted in the development of the Sabin oral polio vaccine.\textsuperscript{77} Unlike the killed virus of the Salk vaccine, the Sabin vaccine utilized a weakened but live polio virus.\textsuperscript{78} This live-virus vaccine offered several major advantages over its predecessor and replaced the Salk vaccine by the early 1960s.\textsuperscript{79} Because of the live nature of the Sabin vaccine, there was a very slight risk that the vaccinee or someone in close contact with him would contract the disease.\textsuperscript{80}

In producing the live vaccine, the manufacturer first obtains the original strain from Dr. Sabin and grows a seed virus from that strain.\textsuperscript{81} The seed virus is then used to produce a monopool, which when used in combination with other monopool types, makes up the actual vaccine ingested by individuals.\textsuperscript{82} The manufacturer is responsible for conducting the appropriate tests to measure product safety at each stage of the manufacturing process.\textsuperscript{83}

\textsuperscript{73.} Id.
\textsuperscript{74.} Id.
\textsuperscript{75.} Id.
\textsuperscript{76.} Id.
\textsuperscript{77.} Id. at 3. In 1957 the number of cases of paralytic polio reached a record low of 2,499, but then rose to 6,289 in 1959 using the Salk vaccine.
\textsuperscript{78.} Id.
\textsuperscript{79.} Id. The Sabin vaccine is administered orally and does not require subsequent booster shots. Additionally, the Sabin vaccine protects against infection as well as disease, insuring that infected persons will not become transmitters. Finally, because of the live nature of the vaccine, its therapeutic effect can be transmitted from one person to another in close contact.
\textsuperscript{80.} Id. at 4. Despite this disadvantage, the number of cases of polio reported in the United States had declined to between 10 and 20 per year under the Sabin vaccine immunization.
\textsuperscript{81.} Id. at 32.
\textsuperscript{82.} Id.
\textsuperscript{83.} Id. at 30.
Before marketing the live oral polio vaccine, the manufacturer must receive a product license from the Division of Biologic Standards (DBS), a branch of the FDA.\textsuperscript{84} In order to become eligible for a license, the manufacturer is required to conduct a variety of tests to measure the safety of the product at each stage of the process, and to submit the data, along with a sample of the finished product to the DBS.\textsuperscript{85}

The DBS is required to comply with certain statutory and regulatory provisions before issuing a license to the manufacturer.\textsuperscript{86} The Public Health Service Act provides that licenses for the manufacture of products (including polio vaccines) may be issued by the DBS “only upon a showing that the establishment and the products for which a license is desired meet standards designed to insure the continued safety, purity, and potency of such products, prescribed in regulations...”\textsuperscript{87}

Regulations governing the licensing of a polio virus vaccine provide that “[a] product license shall be issued only upon examination of the product and upon a determination that the product complies with the standards proscribed in the regulations...”\textsuperscript{88}

Under the statute and regulations, manufacturers must submit an application to the DBS which includes data that demonstrate the product meets the prescribed standards of safety, purity, and potency.\textsuperscript{89} Further, “[a]n application for license shall not be considered as filed until all pertinent information and data shall have been received from the manufacturer by the Division of Biologic Standards.”\textsuperscript{90}

Once the product license is issued by the DBS to the manufacturer, each particular lot must meet federal release requirements

\textsuperscript{84.} 42 U.S.C. § 262(a) (1982), which provides in part that no biological product “applicable to the prevention, treatment, or cure of diseases or injuries of man” may be sold in the United States that has not been “manufactured and prepared at an establishment holding an unsuspended and unrevoked license....”

\textsuperscript{85.} 108 S. Ct. at 1961.

\textsuperscript{86.} Id.

\textsuperscript{87.} Id. (citing 42 U.S.C. § 262(d) (1982).

\textsuperscript{88.} Id. 42 C.F.R. § 73.5(a) (Supp. 1964). In 1972, the DBS was transferred from the National Institute of Health (NIH) to the FDA and was renamed the Bureau of Biologics, and subsequently renamed the Office of Biological Research & Review in 1984. The regulations have been amended accordingly. See 21 C.F.R. § 601.4 (1987).

\textsuperscript{89.} 108 S. Ct. at 1961.

\textsuperscript{90.} 42 C.F.R. § 73.3 (Supp. 1964); 21 C.F.R. § 601.2 (1987).
before being distributed and marketed. Particularly, "[n]o lot of any licensed product shall be released by the manufacturer prior to the completion of tests for conformity with standards applicable to such product." 91

The Bureau of Biologics, also a division of the FDA, may require the manufacturer to submit samples and test results for inspection before the licensed product can be distributed.92 The manufacturer must then wait for approval by the Bureau Director before distributing the product. The regulations provide that the Director "shall not issue such notification except when deemed necessary for the safety, purity, or potency of the product."93

In Berkovitz, the petitioners alleged two claims against the government under the FTCA.94 The first asserted that DBS violated a federal statute and accompanying regulations in issuing a product license to Lederle Laboratories without first receiving data from Lederle showing that the product complied with regulatory standards.95 The second claim asserted that the Bureau of Biologics violated federal regulations and its own policy in approving the particular lot that contained the dose that was administered to Kevan Berkovitz.96

C. The Court's Holding and Reasoning

The Court began its decision by emphasizing the purpose of the discretionary function exception in light of the sovereign immunity waiver of the FTCA. Quoting its decision in Varig, the Court stated that the exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals."97

In determining whether the discretionary function exception bars a suit against the government, the Court focused on the first part of the two-factor analysis recited in Varig: It is the nature of the conduct, rather than the status of the actor, that

91. Id. at 1963, (citing 21 C.F.R. § 610.1 (1978)).
92. Id.
93. 21 C.F.R. § 610.2(a) (1978).
94. See supra note 63.
95. Id.
96. Id.
97. Id. at 1958.
governs whether the discretionary function exception applies in a given case.” 98 The conduct must be discretionary before it is protected.

The Court specifically rejected the government’s argument that the discretionary function exception should bar the plaintiffs’ suit. The FDA’s principle functions are to set standards for safety, potency, and purity of vaccine products, and to police compliance of those standards. 99 Both the setting of standards and review of compliance are discretionary functions resulting from policy choices at high government levels. In clarifying the scope of the discretionary function exception, the Court rejected the government’s argument that the exception precludes liability for all acts arising out of regulatory programs of federal agencies. 100 In reviewing the legislative history of the FTCA, the Court concluded that Congress intended to apply the exception to discretionary acts of regulators, rather than to all regulatory acts. 101

The Court’s view was that this narrowing of the exception would more adequately strike the balance Congress desired by allowing liability for common law torts committed by agency employees while preventing “judicial intervention in...the political, social, and economic judgments.” 102

The Court’s analysis of the scope of the discretionary function exception began with the principle holding in Varig: that a determination of the application of the exception must turn on the “nature of the conduct” rather than the “status of the actor.” 103 In examining the nature of the challenged conduct, courts must “first consider whether the action is a matter of choice for the acting employee.” 104 Citing Dalehite, the Court found that there is discretion in an action if it “involves an element of judgment or choice.” 105 Therefore, if the regulation prescribes a specific course of action, then the discretionary function exception does not apply. 106

98. Id.
99. Id.
100. Id. at 1959-60.
101. Id. at 1960.
102. Id. (citing United States v. Varig Airlines, 467 U.S. 797, 820 (1984)).
103. Id. at 1958.
104. Id.
105. Id.
106. Id.
In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.\(^{107}\)

In further narrowing the scope of when to apply the exception, the Court went on to hold that the function must not only be one of judgment, but the judgment must be "of the kind the discretionary function exception was designed to shield."\(^{108}\) Because Congress desired to prevent judicial second-guessing of legislative and administrative decisions grounded "in social, economic, and political policy..." the Court construed the exception to protect "only government actions and decisions based on considerations of public policy."\(^{109}\)

Having concluded that the discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment, the Court proceeded to a determination of the discretionary nature of the government's activities in licensing Lederle and the release of the product lot. To determine the level of discretion given to the DBS employees for licensing Lederle, the Court focused in on the language of the Public Health Service Act and two regulations stemming from that statute.\(^{110}\) The Public Health Service Act, originally drafted by Congress in 1944, provides that licenses for the manufacture and preparation of products including viruses, serums, toxins, antitoxins, and analogous products:

... may be issued only upon a showing that the establishment and the products which a license is desired meet standards, designed to insure the continued safety, purity, and potency of such products, prescribed in the regulations....\(^{111}\)

One of the two regulations the DBS follows provides that "[a] product license shall be issued only upon examination of the product and upon a determination that the product complies with the standards proscribed in the regulations."\(^{112}\) The other regu-

\(^{107}\) Id. at 1958-59 (citing Westfall v. Erwin, 108 S. Ct. 580 (1988)).
\(^{108}\) Id. at 1959.
\(^{109}\) Id.
\(^{110}\) Id. at 1960.
\(^{111}\) 42 U.S.C. § 262(d) (1982).
\(^{112}\) 108 S. Ct. at 1961 (citing 21 C.F.R. § 601.4 (1987)).
lation requires DBS to receive all test data that the manufacturer must submit before the application for license can be considered filed.\textsuperscript{113}

In interpreting the statutory and regulatory language proscribing the duties of the DBS officials, the Court found that the provisions require the DBS to receive all data, examine the product, and make a determination that the product complies with safety standards.\textsuperscript{114} The Court then concluded:

The DBS has no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive.\textsuperscript{115}

Therefore, the discretionary function exception imposes no bar to petitioners' claim that the DBS negligently issued a license to Lederle without requiring the submission of all appropriate test data.\textsuperscript{116}

The Court found petitioners' second allegation, concerning the negligent licensing of Orimune, to be confusing.\textsuperscript{117} Petitioners claimed that the data submitted by Lederle did not comply with the standards provided by the regulations. The Court explained that the charge could be understood in any of three ways: \textsuperscript{118}

(1) That DBS licensed Orimune without first making a determination as to whether the vaccine complied with the appropriate regulatory standards.

(2) That DBS found that Orimune failed to comply with certain regulatory standards and issued the license anyway.

(3) That DBS made a determination of compliance, but that the determination was incorrect.

The Court surmised that if DBS licensed Orimune without first making a determination that it complied with regulatory standards or that DBS found that Orimune failed to comply and licensed the product regardless (1 & 2 above), then the discretionary function exception is not a bar.\textsuperscript{119} The Court interpreted

\textsuperscript{113} Id. (citing 21 C.F.R. § 601.2 (1987)).
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 1962.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
the regulations as placing a nondiscretionary burden on DBS to issue a license *only upon* a determination that the product complies with regulatory standards.\(^{120}\) Failure on the part of the agency to perform its duties in accord with a specific mandatory directive is actionable under the FTCA and does not fall within the scope of the discretionary function exception.\(^{121}\)

If the claim is to be read as alleging that DBS made a determination of compliance based on the submitted data, and that determination was incorrect (3 above), then a different analysis is required. It would require a finding that the "manner and method" of determining compliance with regulatory standards involves "agency judgment of the kind protected by the discretionary function exemption..."\(^{122}\) This judgment must involve the exercise of policy choice. Since neither of the parties addressed this issue in detail, the Court remanded this question to the district court if the petitioners opted to pursue the claim.\(^{123}\)

In considering the petitioners' charges that the Bureau of Biologics negligently released the defective lot of Orimune, the Court found the regulations to impose no duty on the Bureau to examine each and every lot of polio vaccine.\(^{124}\) On the contrary, the Court likened this regulatory scheme to that of the FAA "spot check" inspections found in Varig.\(^{125}\) The Court determined that "[a]lthough the regulations empower the Bureau to examine any vaccine lot and prevent distribution of a non-complying lot, they do not require the Bureau to take such action in all cases."\(^{126}\)

The petitioners charged that the Bureau has made it a policy to test all lots for compliance and to prevent any lots from being distributed that do not comply with regulatory standards.\(^{127}\) Thus, petitioners assert that the Bureau action involved no discretion and that its actions are mandated by the Division's own policy.

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Id. at 1963.

\(^{125}\) Id. at 1964.

\(^{126}\) Id.

\(^{127}\) Id.
The Court remanded this issue to the district court holding that

[If] the Bureau's policy did not allow the official who took the challenged action to release a noncomplying lot on the basis of policy considerations — the discretionary function exception does not bar the claim.128

IV. Analysis

A. The Court's Interpretation of Prior Decisions

In holding that the DBS may be liable for the negligent licensing of the polio vaccine in Berkovitz, the Court has limited the discretionary function exception beyond that of Dalehite, Indian Towing, and Varig. To bar a claim against a regulatory agency by applying the exception, the government must show not only that the action being challenged requires an element of judgment, but that the judgment is based on public policy considerations. In the Court's words, the action challenged, to be discretionary, must involve "the permissible exercise of policy judgment."129

The Court's decision is twofold. First, it holds the DBS may be liable for negligently following a mandatory regulation. Second, if a regulation is not mandatory, but the agency has a standard operating procedure which is not based on policy judgment, then failure to follow that procedure will not afford the agency the protection of discretionary immunity. The outcome in Berkovitz denying immunity for negligently following mandatory regulations is not surprising. As the Court's previous holdings in Dalehite and Varig implied, if the conduct does not involve discretion, then there is no immunity.

In Dalehite, although the Court would not precisely define the limits of the exception, it clearly stated that "[w]here there is room for policy judgment and decision there is discretion."130 Notwithstanding the Court's holding to grant immunity to low-level employees carrying out tasks implementing high-level "policy judgment," the decision is nonetheless based on legislative

128. Id.
129. Id.
130. 346 U.S. at 36.
The scope of the exception was never interpreted to be any broader than this. This was the essence of the FDA's argument in Berkovitz and was rejected by the Court, relying on Varig.

In Varig, the Court focused on the nature of the conduct and not the status of the actor, eliminating the broad scope defined in Dalehite. The exception applies to all agency levels if the challenged conduct is discretionary. Hence, the Court focused on the action of the individual to determine if he had discretion. However, the Varig Court made it clear that the Dalehite interpretation of the exception is still valid.132

The FDA argued that if the function of the DBS is determined by an administrative plan based on public policy discretion, then the actions of the DBS are immune from suit. Dalehite, which survived Varig, specifically held that "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."133 The FDA ignored the part of the Varig analysis which provided that the basic inquiry is whether the acts of the employee, whatever his rank, are of the nature and quality that Congress intended to shield from tort liability.

The Court in Varig held that a regulation must be interpreted as empowering the actor with discretion before he is immune from suit.134 This holding implies that if the regulation is interpreted not to involve discretion (i.e. mandatory), then the agency employee will not be immune from suit. This result seems to suggest that a court, in evaluating the application of the exception, must first interpret the specific regulation acted under and determine whether that regulation affords the actor "discretion." Discretion, as defined in Berkovitz, however, is more than the ability to make a decision; the decision must also be based on a permissible policy determination.

Absent from the Court's analysis in both Varig and Berkovitz is a discussion of the planning/operational conduct distinction first seen in Dalehite and further developed in Indian Towing.135

131. Id. at 27.
132. 467 U.S. at 811, 812.
133. 346 U.S. at 36.
134. 467 U.S. at 820.
135. See supra notes 21-35 and accompanying text.
The decision in Berkovitz seems to suggest that even a planning-level action by a high official, if not flowing from permissible policy judgment, will not be immune from suit. The implication in Berkovitz is that if the act was truly a planning-level action, then it, by definition, is based on policy judgment and, thus, is discretionary. Therefore, there is no need for the planning/operational distinction developed in Indian Towing. Regulatory actions will be tested individually for the amount of discretion afforded the specific action challenged.

In both Dalehite and Indian Towing, the plaintiffs' suits were based on a negligent breach of the duty to undertake certain actions flowing from policy-level determinations. In Dalehite there was the negligent storing of explosive fertilizer, and in Indian Towing, the action was based on the negligent operation of a lighthouse. In neither fact situation was the conduct mandated by regulation or statute. In Varig, the action arose from an alleged negligent inspection. The regulations were interpreted to empower the employee to make broad inspection determinations. Until Berkovitz, the Supreme Court has not had the opportunity to apply the discretionary function exception to an action under the FTCA involving a mandatory regulation. The Court now holds that the discretionary function exception of the FTCA will not shield an agency from immunity when it fails to follow mandatory regulations.

Probably the most significant holding by the Berkovitz Court was its decision not to dismiss petitioner's allegation that FDA's Bureau of Biologics had adopted a policy to test all lots of polio vaccine before releasing them for distribution. The Court held that even if the policies of the FDA are not embodied in specific mandatory regulation, the discretionary function exception will not bar agency liability if those policies fail to provide the employee "discretion" in testing and releasing specific lots. Therefore, an agency employee may be held liable for negligent acts arising out of unwritten guidelines if nondiscretionary standard operating procedures have developed that leave the agency employee without discretion in applying those procedures. The discretionary function exception, as interpreted in Dalehite, Indian Towing, and Varig, has never been so limited.

B. The Impact of Berkovitz on Future Actions of FDA

The Court in Berkovitz looked specifically at the statute and regulations guiding FDA employees in licensing and releasing
the polio vaccine, and found them to mandate a proscribed set of actions. Because these actions were mandatory, they precluded discretion as defined by the Court. Therefore, because the agency failed to follow these mandatory regulations, the discretionary function exception could not be applied to grant the agency immunity under the FTCA. Further, if the agency has adopted a standard operating procedure, leaving the employee no discretion based on policy judgment, then the discretionary function exception may not bar suit, regardless of the fact that a "mandatory" regulation is nonexistent.

The FDA argued that allowing petitioner's claim would frustrate Congress' prime motivation for the discretionary function exception. The purpose was to protect federal agencies from broad tort claims arising from their regulation of private industry. The FDA claims that all regulations could be found to involve some mandatory duties left unperformed.

While there is a strong possibility that the decision in Berkovitz will open regulatory agencies to more litigation, it is not necessarily true that this will frustrate the motives of Congress. Congress' intent in granting immunity for governmental actions was to protect the government's function of promulgating and executing regulations based in public policy from judicial "second-guessing." The legislative history suggests that it was only "policy driven" actions that Congress wished to protect. These government actions will still be protected under the Berkovitz holding, as they would have been under Dalehite and Varig.

Following the decision in Berkovitz, some commentators believe that the FDA will be subjected to more litigation resulting in a closer scrutiny of implementation by FDA employees of regulations, guidelines, and procedures. The FDA Associate Chief Counsel does not believe that the decision will have any impact on actions involving the approval and marketing of drugs where

137. Id.
139. Id.
140. 467 U.S. at 814.
drug safety is at issue.\textsuperscript{142} One reason is that the Public Health Service Act mandated that specific product standards and regulations be developed for polio vaccines. These regulations were not originally promulgated under the FDA.\textsuperscript{143} The Food, Drug and Cosmetic Act, and the regulations promulgated by the FDA in reference to the Act, are all generally based on a policy of evaluating the benefit-risk ratio of a given drug product.\textsuperscript{144} This evaluation is not mandated to include specific tests and standards but, "instead, the agency has promulgated regulations describing general information for [new drug] applications and general criteria for acceptable studies."\textsuperscript{145} Prior cases before the appellate court alleging negligence by the government based on the negligent approval of marketed drugs have been barred by the discretionary function exception of the FTCA.\textsuperscript{146}

The FDA also argued that denying application of the discretionary function exception to this particular set of regulations and guidelines may provide the agency with incentive to avoid promulgating regulations that mandate clear and specific procedures.\textsuperscript{147} One option is for the FDA to reexamine and perhaps revise current formal and informal guidelines and policies.\textsuperscript{148} By injecting some amount of discretion into its procedures, the FDA may be able to meet the Berkovitz standard for discretionary function immunity. However, if the FDA were to choose this path, the result may be to deny industry clear and objective regulations and guidelines to follow.

The FDA, and other governmental agencies, should not have to consider potential tort liability when developing regulations,

\textsuperscript{142} F-D-C REPORTS, December 5, 1988, T&G-8. See also Wion, Potential Implications of the Supreme Court's Decision in Berkovitz v. United States, 44 FOOD DRUG COSM. L.J. 145, 153 (1988).

\textsuperscript{143} The Public Health Service Act mandated the promulgation of specific regulations concerning the licensing of biologic products under the auspices of the Division of Biologic Standards, which until 1972, was a division of the National Institute of Health. In 1972, the DBS transferred to the FDA, and was renamed the Bureau of Biologics.

\textsuperscript{144} See generally 21 U.S.C. § 505; 21 C.F.R. part 314.

\textsuperscript{145} F-D-C REPORTS, December 5, 1988, T&G-8.


\textsuperscript{148} See Smith, supra note 141.
policies, and procedures. Congress' intent in enacting the discretionary function exception was to grant agencies freedom from judicial oversight when developing and following regulations and guidelines.\textsuperscript{149} There may be situations where specific, nondiscretionary procedures are desirable for both public policy and regulation of private industry. After Berkovitz, it is unclear whether agencies will continue to proscribe specific, nondiscretionary procedures when necessary, or broaden regulations to include some form of protected discretion.

V. CONCLUSION

The Supreme Court in Berkovitz has clearly defined the scope of the discretionary function exception of the Federal Torts Claims Act (FTCA) with regard to government employees functioning in a regulatory environment. To apply the exception to bar liability, the employees' conduct must be the product of judgment or choice based on considerations of public policy. There is no longer a distinction between planning level and operational level activities. All acts of government employees, whether of officials or implementers, will be judged by the same definition. Where there is judgment, there is discretion. When the discretion is based on public policy, there is immunity, regardless of the level of the acting employee.

The decision in Berkovitz can be interpreted by lower courts to mean that the government can be held liable for negligent acts of employees flowing from regulations that do not involve discretion based on policy judgment. Furthermore, if the agency has adopted a standard operating procedure with no inherent discretionary aspect, the employee deviating from that procedure may not be immune from suit.

This decision would appear to be consistent with the intent of Congress in enacting the FTCA along with the exception — that is, to strike a balance between compensating the public for wrongful or negligent acts of the government while preventing judicial second-guessing of administrative decisions. This separation-of-powers theory is relevant where the government official is acting at such a level or under such circumstances that social, economic, and political policy decisions are inherent in his actions.

\textsuperscript{149} 467 U.S. at 814.
The executive branch of the government relies on the expertise of agency employees to evaluate policy in regulating industry. However, where the employee is following agency regulation, guidelines, or policies that leave no room for policy decisions, then the immunity offered by the exception does not further the intent of Congress.

The Berkovitz decision will have a lasting effect on regulatory agencies, regulated industries, and the private individual suffering tortious injury through the negligent acts of government employees. Regulatory agencies must evaluate whether there is a need to reexamine and revise their operating procedures based on regulations and policies, in order to protect themselves from future liability. This, in turn, could affect private industry by leaving it with less than clear, concise, and objective standards to work with in complying with agency policy. Finally, private individuals will be tempted to take the Berkovitz decision "to court" and see how far they can stretch government liability.
ERRATUM

The name of author Jeemes L. Akers was inadvertently omitted from the casenote on Boyle v. United Technologies Corp. in Volume 16-3. The first page of that article is being run again.