OSHA Criminal Penalty Reform Act: Workplace Safety May Finally Become a Reality

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OSHA CRIMINAL PENALTY REFORM ACT: WORKPLACE SAFETY MAY FINALLY BECOME A REALITY

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I. INTRODUCTION

On February 21, 1990, Senator Howard Metzenbaum (D-Ohio) introduced the OSHA Criminal Penalty Reform Act (Senate Bill 2154), a bill amending the criminal penalty provisions of the Occupational Safety and Health Act of 1970 (OSH Act). Senators Mikulski, Simon, Adams and Kennedy were original co-sponsors. It was referred to the Committee on Labor and Human Resources which ultimately adopted an amended version of the bill on June 27, 1990. The 101st Congress ended in December of 1990. The bill, not having been passed, was reintroduced by Senator Metzenbaum in its amended form on February 20, 1991 as Senate Bill 445. Senators Jeffords, Adams, Simon, Mikulski, Harkin, Kennedy and

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3 Senate Comm. on Labor and Human Resources, OSHA Criminal Penalty Reform Act, S. Rep. No. 409, 101st Cong., 2d Sess. 13 (1990) [hereinafter, Senate Comm.]. The Committee accepted, by an 11-5 vote, an amendment in the nature of a substitute offered by Senators Metzenbaum and Jeffords. Joining them in favor of the bill were Senators Kennedy, Pell, Dodd, Simon, Harkin, Adams, Mikulski, Bingaman and Durenberger. Senators Hatch, Kassenbaum, Cochran, Coats and Thurmond opposed the legislation. Id. at 22.
SECTION 1. SHORT TITLE.
This Act may be cited as the "OSHA Criminal Penalty Reform Act."
SEC. 2. OSHA CRIMINAL PENALTIES.
(a) IN GENERAL - Section 17 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 666) is amended -
(1) in subsection (e) -
(A) by striking "fine of not more than $10,000" and inserting "fine in accordance with section 3571 of title 18, United States Code;",
(B) by striking "six months" and inserting "10 years";
(C) by striking "fine of not more than $20,000" and inserting "fine in accordance with section 3571 of title 18, United States Code;", and
(D) by striking "one year" and inserting "20 years";
Dodd were the new co-sponsors. It was again referred to the Senate Committee on Labor and Human Resources. The legislation has not yet returned to the Senate floor.

The OSHA Criminal Penalty Reform Act attempts to improve criminal enforcement under the OSH Act by removing statutory barriers which have hindered the waging of an aggressive criminal enforcement campaign.\(^5\) It increases maximum prison terms for current criminal offenses as follows: (1) for a willful violation of an OSHA standard which results in death, from six months to 10 years for a first conviction and from one year to 20 years for subsequent convictions;\(^6\) (2) for providing advance

\begin{align*}
(2) & \text{ in subsection (f), by striking "fine of not more than $1,000 or by imprisonment for not more than six months," and inserting "fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 2 years,";} \\
(3) & \text{ in subsection (g), by striking "fine of not more than $10,000, or by imprisonment for not more than six months," and inserting "fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 1 year,";} \\
(4) & \text{ by redesignating subsections (h) through (l) as subsections (i) through (m), respectively;} \\
(5) & \text{ by inserting after subsection (g) the following new subsection:} \\
& "(h) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to this Act, and that violation causes serious bodily injury to any employee but does not cause death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years, 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 in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or by both;"; and \\
(6) & \text{ by adding at the end the following new subsection:} \\
& "(n) If a penalty or fine is imposed on a director, officer, or agent of an employer under subsection (e), (f), (g), or (h) such penalty or fine shall not be paid out of the assets of the employer on behalf of that individual.".
\end{align*}

(b) DEFINITION.- Section 3 of such Act (29 U.S.C. 652) is amended by adding at the end the following new paragraph:

"(15) The term 'serious bodily injury' means bodily injury that involves -

"(A) a substantial risk of death;

"(B) protracted unconsciousness;

"(C) protracted and obvious physical disfigurement;

or

"(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

(c) JURISDICTION FOR PROSECUTION UNDER STATE AND LOCAL CRIMINAL LAWS.-Section 17 of such Act (29 U.S.C. 666) (as amended by subsection (a) of this section) is further amended by adding at the end the following:

"(o) Nothing in this Act shall preclude State and local law enforcement agencies from conducting criminal prosecutions in accordance with the laws of such State or locality."

\(^5\) SENATE COMM., supra note 3, at 14.

notice of any OSHA inspection, from six months to 2 years; and (3) for knowingly making false statements or representations in any OSHA required document, from six months to one year.8

The bill also creates a new criminal offense for willful violation of an OSHA standard which results in serious bodily injury. It carries with it a maximum prison term of five years for a first conviction and ten years for subsequent convictions.9

In addition, Senate Bill 445 replaces existing criminal fines under the OSH Act with a provision permitting imposition of fines in accordance with 18 U.S.C. § 3571, in lieu of or in addition to a term of imprisonment.10 Section 3571 provides for significantly more stringent criminal fines than those presently available. For example, the maximum fine for a willful violation of an OSHA standard which results in the death of an employee is presently $10,000 for a first conviction and $20,000 for subsequent convictions.11 Under Senate Bill 445, § 3571 would allow for a maximum fine of $250,000 per individual and $500,000 per corporation.12 Senate Bill 445 further attempts to insure that the full force of these criminal fines are felt by the guilty party in providing that any fines imposed upon individual directors, officers or agents of an employer may not be paid out of the assets of the employer on the individual’s behalf.13

Finally, the bill expressly preserves the right of state and local law enforcement agencies to conduct criminal prosecutions under the laws of their state or locality,14 including such crimes as murder, reckless homicide and assault.15

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9 S. 445, 102nd Cong., 1st Sess. § 2(a)(5) (1991). The original version of the bill contained higher maximum prison terms of seven years for a first conviction and fourteen years for subsequent convictions. It also contained a provision which created a new criminal sanction for an employer who willfully violated an OSHA standard which resulted in the reckless endangerment of human life, but did not cause death or serious bodily injury. This offense was punishable by five years imprisonment for a first conviction and ten years for subsequent convictions. S. 2154, 101st Cong., 2d Sess. § 2(4) (1990). The amended version of the bill excluded this provision.
15 The use of these historic state police powers to prosecute employers for willful conduct that has caused workers to be killed or injured on the job stems from the state’s interest in controlling conduct which endangers the lives of its citizens. HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, GETTING AWAY WITH MURDER IN THE WORKPLACE: OSHA’S NONUSE OF CRIMINAL PENALTIES FOR SAFETY VIOLATION, H.R. REP. NO. 1051, 100th Cong., 2d Sess. 1, 4-5 (1988) [hereinafter HOUSE COMM].

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The legislation is intended to send a dual message:

To employers, the message is that willful violations of OSHA standards that kill or seriously injure workers are crimes, not just mistakes that can be written off as a cost of doing business.

To prosecutors and to regulators, the message is that Congress is serious about protecting worker safety and health, and resources should be devoted to that effort by investigating and prosecuting OSH Act criminals.16

Present criminal penalty provisions under the OSH Act are outdated and inadequate. They provide no meaningful deterrent to potential violators of workplace safety and health standards. An effective criminal penalty system would complement civil enforcement efforts17 as well as enhance criminal enforcement efforts which have been virtually non-existent.18

This Note is written to assist the reader in understanding the statutory barriers which have hindered criminal enforcement of the OSH Act, and how the OSHA Criminal Penalty Reform Act breaks down these barriers to provide for a more effective criminal penalty structure. It begins with a brief history behind the enactment of the OSH Act and its enforcement record since 1970.

II. OSH ACT OF 1970: ENACTMENT AND ENFORCEMENT

Before 1910, most states followed the common law rules of liability in determining the legal duties owed by an employer to an employee.19 In order to recover, courts required that an injured employee establish a lack of proper diligence on the part of the employer which was typically extremely difficult to prove in court. Usual witnesses to workplace injuries were fellow workers who were reluctant to testify against the employer. In addition, numerous employer defenses such as the “fellow servant doctrine” and “assumption of risk” severely limited an employee’s right

16 Senate Comm., supra note 3, at 4.
17 The Environmental Protection Agency’s (EPA) criminal enforcement program demonstrates how an effective criminal penalty system can complement civil enforcement efforts. In fiscal year 1989, 69 defendants were convicted of environmental crimes with over 27 years of incarceration imposed and $12 million in criminal fines assessed. EPA Office of Enforcement, Overview of EPA Federal Penalty Practices: FY 89 Apr. 1990 at 10, Table 3. Yet, during that same year the EPA assessed over $35.7 million in civil fines, setting a record for the amount of civil penalties imposed. John F. Seymour, Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws, 19 O.S.H. REP. (BNA) 337 (1989).
18 In its first 18 years, only 42 cases had been referred by OSHA for criminal prosecution. Of those cases, only fourteen were prosecuted resulting in ten conviction with fines or suspended sentences. No one had ever even spent one day in jail for a criminal violation of the OSH Act. House Comm., supra note 15, at 4.
to recovery.\textsuperscript{20} Factoring in the enormous expense of protracted litigation, the worker faced overwhelming obstacles in pressing a claim.\textsuperscript{21}

As a result, beginning with New York in 1910,\textsuperscript{22} workmen's compensation statutes were enacted by states to provide for more humane and just laws to take the place of the inadequate common law system.\textsuperscript{23} Under workmen's compensation statutes, an employee need only show that he suffered a personal injury which "arose out of" and occurred "in the course of" employment. Although this system virtually guarantees employee recovery, the amount of recovery is limited by statute.\textsuperscript{24}

Besides replacing the lost income of injured employees and aiding their return to the labor force, a primary objective of workmen's compensation statutes was to prevent and reduce industrial accidents.\textsuperscript{25} It was hoped that the system would provide significant financial incentives for employers to introduce measures that would decrease the frequency and severity of accidents. However, through the years, workmen's compensation statutes have provided few incentives for employers to maintain safe workplaces. Statutes typically set fee and award schedules independent of job-site conditions. While some compensation plans provide for reduced costs to employers who have undertaken measures to reduce the frequency and severity of industrial accidents, there does not appear to be any indication that workmen's compensation statutes and premium reduction programs have succeeded in stimulating employers to provide safer work environments.\textsuperscript{26}

\textsuperscript{20} Id. at 12. The "fellow servant doctrine" permitted recovery only if the employee's injuries were the direct result of his employer's negligence. The employee’s right of recovery against his employer was no greater than against a fellow servant. Under the doctrine, the courts would proceed under the assumption that the employee and employer stood on equal footing with one another. Thus, they were considered "fellow servants" rather than master and servant. Id.

"Assumption of risk" was grounded on the premise that an employee who voluntarily accepted employment entered into an implied contract with his employer. Under this contract, the employee was considered to assume not only the ordinary risks of his occupation, but also any extraordinary risks he knew or should have known. The employee was also said to assume all risks arising from the negligence of his fellow servants. Id.

The enactment of employer liability statutes, beginning with the Georgia Act of 1855, began to eliminate these limitations on employee's right to recovery. Id. at 13.

\textsuperscript{21} Compendium, supra note 19, at 12.

\textsuperscript{22} New York's workmen compensation statutes were compulsory for certain especially hazardous jobs and optional for others. Id. at 17.

\textsuperscript{23} Id. at 14.

\textsuperscript{24} Kenneth M. Koprowicz, Note, Corporate Criminal Liability For Workplace Hazards: A Viable Option For Enforcing Workplace Safety?, 52 Brooklyn Law Review 183, 192 (1986). Under the old common law system, tort actions were brought for injuries. Even though there were many obstacles to recovery, the jury awards could run into the millions of dollars. Id. at 192.

\textsuperscript{25} Compendium, supra note 19, at 24.

\textsuperscript{26} Koprowicz, supra note 24, at 193-95.
The inability of states to insure workplace safety through common law negligence doctrines and workmen's compensation statutes led Congress, in 1970, to enact the Occupational Safety and Health Act (OSH Act), requiring nationwide compliance with federal statutes. The stated purpose of the OSH Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 27 To accomplish this goal, the Occupational Safety and Health Administration (OSHA) was created. As an administrative and enforcement agency, it is responsible for the establishment of safety and health standards and is authorized to enforce them through civil and criminal penalties.

OSHA is entrusted with inspecting worksites, 28 identifying unsafe practices and equipment, 29 issuing citations, 30 assessing civil penalties for violations, 31 and seeking injunctions in U.S. District Court when conditions of immediate danger exist. 32

OSHA also has authority to seek criminal prosecution against employers for: (1) a willful violation of an OSHA standard which results in the death of an employee, 33 (2) giving advance notice of an OSHA inspection, 34 or (3) knowingly making false statements or representations in documents required by OSHA. 35 Criminal cases are referred by OSHA to the Department of Justice; however, criminal prosecution requires the recommendation of the Justice Department and the agreement of the local U.S. District Attorney who is responsible for prosecuting the case. 36

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27 29 U.S.C. § 651(b) (1988). Congress identified the need for legislation in § 651(a), which reads:
(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
In § 651(b), Congress identifies the source of its authority to enact and enforce such legislation. It reads, in part:
(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.

This authority to regulate interstate commerce can be found in the United States Constitution, Article II, § 8, Clause 3. Case law has clarified the extent of this authority. Congress has the power to regulate interstate commerce when the activity: (1) is part of the "stream of commerce", Smith & Co. v. United States, 196 U.S. 325 (1905); (2) has a direct effect upon interstate commerce, Carter v. Carter Coal Co., 298 U.S. 238 (1936); or, (3) has an indirect but substantial effect upon interstate commerce, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

33 29 U.S.C. § 666(e).
35 29 U.S.C. § 666(g).
Despite its auspicious beginnings, OSHA has been relatively ineffective in reducing workplace injuries. Since its establishment in 1970, “more than 100,000 workers have lost their lives because of unsafe working conditions. It is estimated that annually 7,000-11,000 workers are killed on the job and thousands more die from the long-term effects of occupational illnesses.”

Ironically, OSHA’s record with respect to seeking criminal prosecution for workplace safety violations and fatalities has been appalling. In a 1988 report filed by the House Committee on Government Operations, it was reported that in OSHA’s first 18 years only forty-two cases had been referred by OSHA for criminal prosecution. Of those cases, only fourteen were prosecuted resulting in ten convictions with fines or suspended sentences. No one had ever spent even one day in jail.

OSHA’s lethargic approach towards criminal prosecution is typified by the 1983 death of a sixty-one year old immigrant worker, Stefan Golab. Golab died from inhaling cyanide fumes while working at the Film Recovery Systems plant in suburban Chicago. The company was engaged in the business of reclaiming silver from used x-ray film. Upon investigating Golab’s death, OSHA discovered numerous health and safety violations which contributed to the fatality. Contained in the plant were seventy boiling vats full of used film from which lethal cyanide vapors were being released. The floor was covered with cyanide-contaminated solutions and warning labels on cyanide containers were painted over. Immigrant workers, many unable to speak English, were unaware of the unsafe conditions. OSHA ultimately issued a citation and fined the company $4,855 which was subsequently bargained down to less than $2,400.

It was not until 1989, some nineteen years after the enactment of the OSH Act, that an employer actually served time in prison for a willful violation of an OSHA safety standard. The defendant’s company was digging a fifteen-foot deep trench to replace an eighty-foot section of sewer line when the trench walls collapsed, killing two workers. OSHA investigated the accident and discovered that the defendant company had willfully violated OSHA trenched standards. Thereupon, OSHA sent the case to the Justice Department for criminal prosecution. Despite pleading

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37 Id.
38 The report was based on a study by the Employment and Housing Subcommittee. Id. at 1.
39 Id. at 4.
guilty, the defendant received a mere six-month sentence of which only forty-five days were required to be served. 43

This meager attempt at stricter criminal enforcement was, however, short-lived. In April 1990, an OSHA criminal case involving another trench cave-in fatality ended in a plea bargain. 44 The employer, a willful and repeated violator, paid a criminal fine of $7,500 and received a four-month suspended sentence after an unsupported trench collapsed and killed a utility worker. 45

As stated by the House Committee on Government Operations:
The criminal penalty provisions of the OSH Act, as presently written and as enforced by OSHA, provides [sic] no deterrent to employers violating the statute. A company official who willfully and 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. 46

The current Department of Labor has marginally increased criminal enforcement, but this increased activity still cannot be considered a serious effort at criminal enforcement. The Department of Labor's Inspector General recently reviewed criminal enforcement efforts throughout the Department for the fiscal year 1989. While twenty-seven criminal investigations were conducted by OSHA and fifteen were referred to the Justice Department for prosecution, the Mine Safety and Health Administration (MSHA) pursued 460 criminal investigations, with twenty-five of the 100 cases reviewed by the Inspector General referred to the Department of Justice for prosecution. 47

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43 Head of South Dakota Firm Sentenced For Willful Violation of Trenching Standard, 19 O.S.H. Rep. (BNA) 716 (1989). The defendant was also placed on probation. The conditions of his probation were that he refrain from engaging in any trenching activity or excavation work for three years. In addition, he was required to make restitution to the widow of one of the employees killed in the accident. The restitution was for funeral expenses, counseling and lost wages. This amounted to $544 per month for three years or a lump sum payment of $21,452. Id. at 716.


45 Kansas Businessman Fined $7,500 For Criminal Violation Of Trenching Rule, 19 O.S.H. Rep. (BNA) 2052 (1990). The defendant was also ordered to join the Kansas Contractors Association and develop an excavation program to share with other employers. Id. at 2052.


47 Dept of Labor, Office of Inspector General, Criminal Enforcement in DOL, Final Report No. 09-90-202-01-001, 17 June 4, 1990 at 17. The Senate Committee noted that: The disparity between OSHA and MSHA criminal enforcement is particularly striking considering that the OSH Act applies to nearly 90 million workers, whereas MSHA jurisdiction is limited to 354,000 miners. Moreover, OSHA and MSHA share a philosophy, which is to rely primarily on civil enforcement to ensure prompt abatement of workplace hazards. Yet reliance on civil enforcement has not negated MSHA's willingness to pursue criminal enforcement in appropriate cases. Senate Comm., supra note 3, at 6-7.
OSHA's criminal enforcement record also fails miserably when compared to the enforcement program administered by the Environmental Protection Agency (EPA). "In fiscal year 1989 alone, sixty-nine defendants were convicted of environmental crimes, with over $12 million dollars in criminal fines assessed and some twenty-seven years of incarceration imposed."48

III. ENHANCED CRIMINAL PENALTIES

The purpose of the OSH Act is to protect the health and safety of workers.49 Although OSHA has traditionally been primarily a civil enforcement agency,50 the existence of meaningful criminal sanctions would enhance conformance to OSHA standards by deterring potential violators. The need for effective criminal penalties has been acknowledged by the Department of Justice: "[C]riminal sanctions for violations . . . should be adequate to insure effective enforcement. While the civil provisions are the primary method of enforcing the [OSH] Act, criminal sanctions in appropriate cases are an important component of the enforcement scheme."51

The Department of Labor's Acting Inspector General has been even more emphatic on the need for criminal sanctions under the OSH Act: "It is essential . . . that criminal investigations and criminal remedies be factored into the OSHA equation to deter needless injuries and deaths."52

Even OSHA has realized the shortcomings of the criminal sanctions under the OSH Act. In a 1989 interview with the National Safe Workplace Institute, future OSHA Administrator Gerald F. Scannell stated that he favored using more criminal penalties against employers who violate the

48 EPA OFFICE OF ENFORCEMENT, Overview of EPA Federal Penalty Practices: FY 89, Apr. 1990 at 10, Table 3.
49 The OSH Act states in pertinent part:
   The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.
50 Statement of Joseph A. Kinney, Executive Director, National Safe Workplace Institute, Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources 5 (May 1, 1990) [hereinafter Kinney].
51 Letter from Carol Crawford, Assistant Attorney General For Legislative and Intergovernmental Affairs, Dept. of Justice, to The Honorable Tom Lantos, Chairman, Subcommittee on Employment and Housing of the House Committee on Government Operations 2 (January 16, 1990) (on file with author) [hereinafter Crawford].
OSH Act. He supported the “develop[ment] of a penalty [which would] be more representative of the seriousness of the violation.”

Effective criminal enforcement, coupled with meaningful criminal sanctions, would create a significant incentive for employers to provide safe and healthful working conditions for their employees. Evidence from local prosecutors in California and Texas who have aggressively pursued OSH Act violators supports this conclusion. Texas experienced more than fifteen construction trench fatalities in 1987. A local district attorney in Austin County, Texas responded by instituting a highly publicized criminal prosecution campaign against employers who willfully violated construction safety standards. In 1988, there were only two reported construction trench fatalities in Texas.

In 1984, Los Angeles established the first occupational and safety section in a local prosecutor’s office in the country. Its purpose was to provide a more aggressive program aimed at responsive identification and investigation of potential criminal cases. The program provided an investigator who was on call twenty-four hours a day to respond to the scene of traumatic occupational fatalities in Los Angeles County.

In only its first five years, district attorney personnel have responded to more than 200 workplaces, resulting in the filing of twenty-seven criminal cases. Surprisingly, none of the cases filed by the occupational and safety section involved intentional violations of established safety or health standards. The fatalities were the result of either a reckless or negligent act, or a failure to act. Nevertheless, in each case the defendant violated his duty of care to another human being which, under California law, is criminal.

As noted by the Los Angeles District Attorney, “[the] 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. . . . The number of prosecutions may be small, but like a barking dog, their very presence may deter thousands of violations.”

The provisions of the OSH Act permit the imposition of criminal sanctions where there has been a willful violation of an OSHA standard which resulted in the death of an employee. However, the maximum penalty is only a $10,000 fine and six months imprisonment, a mere misdemeanor. By contrast, the Resource Conservation and Recovery Act (RCRA), which deals with the transportation, storage and disposal of hazardous waste,

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53 Id., note 50, at 5-6.
55 Id. at 95-96.
56 Id. at 96.
57 Id. at 103.
58 Id.
provides for a penalty of up to $250,000 and/or fifteen years imprisonment for knowingly placing another person in imminent danger of death or serious bodily injury.\textsuperscript{61} The Clean Water Act contains a similar "knowing endangerment" provision.\textsuperscript{62} The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) establishes a felony for knowingly failing to report a hazardous substance release by providing for a maximum prison term of three years.\textsuperscript{63} Originally, these Acts did not provide for such severe penalties. They were amended by Congress in response to increased concern that environmental offenses be punished more severely.\textsuperscript{64} The OSH Act is in desperate need of similar amendments.

The lack of meaningful criminal sanctions under the OSH Act provides no deterrent effect upon potential violators. They are weak and in need of strengthening before any significant deterrence can be realized. As concluded by Johannes Andenaes in \textit{The General Preventive Effects of Punishment}, "the general preventive effect of the criminal law increases with the growing severity of penalties."\textsuperscript{65}

The Department of Labor's comments support this conclusion:

\begin{quote}
Achieving a credible deterrent, practically speaking, is the only way to achieve broad-based compliance with the law. An inordinate reliance on civil and administrative remedies does not promote deterrence. That approach fosters nothing more than an environment in which the transgression is worth committing because the benefits are so high, the risk and costs of being caught are so low. Those who would consider committing crimes within this environment . . . need pause and ask only one question, 'Can I afford the fine?' There is a visible odium that accrues to being indicted, convicted and jailed. I submit that it is the specter of precisely this kind of disgrace which will add to the credible deterrent.\textsuperscript{66}
\end{quote}

As compared to the sanctions provided for under the Clean Water Act and CERCLA, those established under the OSH Act are a mere slap on

\textsuperscript{63} 42 U.S.C. § 9603(c) (1987).
\textsuperscript{64} RCRA was amended in 1984, increasing the maximum incarceration penalty for knowingly placing a person in imminent danger of death or serious bodily injury from 5 to 15 years. John F. Seymour, \textit{Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws}, 19 O.S.H. Rep. (BNA) 337, 346 (1989). See 42 U.S.C. § 6928(e). CERCLA and the Clean Water Act were amended in 1986 and 1987, respectively, increasing criminal penalties and raising certain violations of the act to the level of felonies. \textit{Id}. at 337. See 42 U.S.C. § 6928(e) (imprisonment for not more than 15 years for knowingly placing another person in imminent danger of death or serious bodily injury); \textit{and} 33 U.S.C. § 1319 (c)(3)(A) (imprisonment for not more than fifteen years for knowing violation of various provisions of the Clean Water Act).
\textsuperscript{66} Maria, \textit{supra} note 52, at 84.
the hand. In addition to providing no deterrent effect upon potential violators, they provide no incentive for prosecutors to aggressively pursue prosecuting the cases. This problem was acknowledged by Cynthia Attwood, Associate Solicitor for Occupational Safety and Health, Department of Labor: "My perception is that very often the attitude in the U.S. Attorney's offices is that misdemeanors are just not as important as felonies. They don't count as much on their ledger in terms of, 'What did we accomplish this year?'" 

This perception is supported by the general guidelines for prosecutorial discretion established by the Justice Department. Since federal judicial resources are not sufficient to prosecute every case, prosecutors must decide which cases are worth pursuing. The guidelines for prosecutorial discretion include: (1) whether there will be sufficient deterrent value gained through prosecution, (2) whether the sentence is sufficiently related to the seriousness of the crime and (3) whether, in the event of conviction, the sentence would be sufficient to cover the necessary investment of prosecutorial resources.

Under the OSHA Criminal Penalty Reform Act, increased maximum criminal fines and terms of imprisonment are consistent with similar penalty provisions within other federal criminal codes. In addition, a willful violation resulting in the death of an employee, presently a misdemeanor under the OSH Act, would be reclassified as a felony. These increased criminal sanctions not only better reflect the serious nature of the offenses, but provide added incentive for prosecutors to pursue criminal prosecution, resulting in a more effective deterrent to potential willful violators.

Obviously, an essential element of the OSH Act provision which establishes criminal sanctions for causing the death of an employee is the presence of a "willful" violation. However, no definition of "willful" appears in the OSH Act. Senate Bill 445 was not intended to change the current interpretation of the term "willful" by the courts under the OSH Act and general principles of criminal law. This interpretation was explained by the court in Brock v. Morello Brothers Construction, Inc.

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66 SENATE COMM., supra note 3, at 9, citing Letter from Thomas M. Boyd, Assistant Attorney General for Legislative and Intergovernmental Affairs, Department of Justice, to The Honorable Tom Lantos, Chairman, Subcommittee on Employment and Housing of the House Committee on Government Operations 3-4 (Dec. 9, 1988).

67 See criminal codes cited supra note 64.

68 Felony is defined as "[A]ny offense punishable by death or imprisonment for a term exceeding one year." BLACK'S LAW DICTIONARY 555 (5th ed. 1979).

69 SENATE COMM., supra note 3, at 16. The Committee's comments were in reference to an amended revision of Senate Bill 2154, which was ultimately adopted. See SENATE COMM., supra note 3, at 22. The amended version was later reintroduced as Senate Bill 445. See supra note 4 and accompanying text.

70 809 F.2d 161, 163-64 (1st Cir. 1987).
which held that “willful” requires not only that the offender intended to perform the unlawful act, but also that he knew what he did was unlawful.

The Committee accepted leaving the existing interpretation of “willful” intact to avoid confusion and uncertainty. They reasoned that employers are already familiar with the types of conduct that would be considered willful under the OSH Act and may result in criminal prosecution. Accordingly, they will be better able to plan their activities to avoid the criminal sanctions provided for in the new legislation.\textsuperscript{73}

IV. SERIOUS BODILY INJURY

An even more glaring example of the deficiency of the criminal provisions under the OSH Act is the absence of any criminal sanction for a willful violation that does not result in death but causes serious bodily injury. The Pymm Thermometer\textsuperscript{74} case dramatically illustrates this inadequacy. In October 1985, an OSHA inspector discovered that the Pymm Thermometer plant in Brooklyn, N.Y. was exposing workers to dangerous levels of mercury which had actually resulted in permanent brain damage to one employee and posed serious health risks to many others. The hidden cellar operation where the employees worked was virtually without ventilation. It was filled with broken thermometers, pools of mercury were on the floor and noxious vapors were in the air.

OSHA had previously inspected the plant in March, 1981, and issued citations for serious health violations. No protective gear such as gloves, respirators or aprons were being used to reduce workers’ exposure to mercury. OSHA assessed a fine of $1,400 and set a deadline of October, 1981, for the company to clean up the factory; but the deadline was regularly extended over the next few years. As a result of overexposure to noxious mercury vapors, an employee sustained permanent brain damage. Because the employer’s willful violation of OSHA standards did not result in an employee’s death, but “merely” permanent brain damage, OSHA could not statutorily pursue criminal prosecution.

The use of death as a trigger point completely undermines the deterrent effect of the OSHA criminal enforcement system.\textsuperscript{76} As noted by the Committee on Labor and Human Resources:

\textsuperscript{72} Senate Comm., supra note 3, at 16.

\textsuperscript{74} People v. Pymm, 546 N.Y.S.2d 871 (1989); House Comm., supra note 15, at 6. Under New York law the defendants were found guilty of conspiracy, falsifying business records, assault and reckless endangerment. These convictions were upheld on appeal. The New York Supreme Court held that the OSH Act does not preempt the state from criminally prosecuting defendants for conduct which is regulated by OSHA. Id.

\textsuperscript{76} Senate Comm., supra note 3, at 10.
[If an employer willfully violates the OSH Act, thereby killing a worker, criminal sanctions under the OSH Act apply. If that same employer engages in the same willful violation and the worker suffers permanent brain damage or paralysis, but is not killed, then there is no criminal penalty whatsoever under the OSH Act. The availability of a criminal sanction should not turn on factors that may be completely outside the control of the perpetrator and in some cases may be a matter of sheer luck.76]

The use of trigger points other than death for imposition of criminal sanctions is not unusual in federal legislation, especially in the area of environmental law. The Resource Conservation and Recovery Act provides for a maximum fifteen year penalty for disposing of hazardous wastes knowing that such action places another person in imminent danger of death or serious bodily injury.77 The Clean Water Act contains a similar “knowing endangerment” provision.78

The Environmental Protection Agency (EPA) is not hesitant to pursue these criminal sanctions when appropriate. On May 20, 1988, a Philadelphia-based chemical company and four of its corporate officials were indicted for failing to correct known structural weakness in a holding tank which resulted in its collapse.79 Similarly, on February 23, 1989, three civilian managers at a U.S. Army Department’s proving ground were convicted of knowingly storing and disposing of hazardous wastes without a permit in violation of RCRA.80

The OSHA Criminal Penalty Reform Act establishes a new criminal sanction for “willful” violation of an OSHA standard which causes “serious bodily injury” to an employee, but does not result in death.81 To emphasize the seriousness of the offense, Senate Bill 445 provides for imposition of a fine in accordance with 18 U.S.C. § 3571 and imprisonment of up to five years for a first conviction and ten years for subsequent convictions. This offense is therefore classified as a felony. The addition of a criminal sanction for serious bodily injury would not only close a glaring loophole in the current law, but it would also lead to a more equitable and predictable system of sanctions, and improve the deterrent impact of OSHA’s criminal enforcement effort.82

Though “willful” appears in the OSH Act, it is not defined. “Serious bodily injury” does not appear in the OSH Act and has never been interpreted nor defined by the courts under the OSH Act for OSHA purposes. The term appears dozens of times in the United States Code and is defined

76 SENATE COMM., supra note 3, at 10.
79 SEYMOUR, supra note 64.
80 Id. at 337.
82 SENATE COMM., supra note 3, at 11.
for sentencing purposes by the United States Sentencing Commission.\textsuperscript{83} The courts have interpreted the term as it applies to general principles of criminal law, and have provided detailed jury instructions on the meaning of “serious bodily injury.” In \textit{U.S. v. Johnson},\textsuperscript{84} the court determined that the absence of a detailed explication of “serious bodily injury” in a statute which employs the term implies that Congress never intended rigid, limiting definitions to be applied to the phrase.\textsuperscript{85} The court favored a “weighing process” in which the jury would consider certain factors in determining whether the injuries constituted serious bodily injury. Among these factors were whether the victim suffered a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member, organ, or mental faculty; protracted unconsciousness; and significant or substantial internal damage.\textsuperscript{86} The court held that “[t]he presence or absence of any of these factors is not determinative, since the jury must use its own judgment to access the severity of the injuries.”\textsuperscript{87}

As previously noted in discussing the interpretation of the term “willful” under the OSH Act, an important consideration was that the application of the term would be fairly consistent to allow employers the ability to ascertain what types of conduct would be considered willful and subject to criminal prosecution.\textsuperscript{88} The problem with the definition for “serious bodily injury” in \textit{Johnson} was that it included terms which were overly subjective and which left their relative significance up to the discretion of the jury on a case by case basis. This would limit its predictability and therefore the deterrent value of the new offense.

Under Senate Bill 445, “serious bodily injury” must involve actual bodily injury as well as: (1) a substantial risk of death; (2) protracted unconsciousness; (3) protracted and obvious disfigurement; or (4) protracted impairment or loss of a bodily member, organ or mental faculty.\textsuperscript{89} This is consistent with existing definitions so as to further uniformity of federal criminal law, but somewhat more restrictive to enhance its predictability.


\textsuperscript{84} 637 F.2d 1224 (1980).

\textsuperscript{85} \textit{Id.} at 1245.

\textsuperscript{86} \textit{Id.} at 1246.

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{SENATE COMM.}, supra note 3, at 18.

\textsuperscript{89} S. 445, 102nd Cong., 1st Sess. § 2(b) (1991).
The Department of Labor has expressed concern that the creation of a criminal offense for “serious bodily injury” would hinder OSHA’s civil enforcement and abatement efforts.\textsuperscript{90} Their concern centered around what they believed would be a changing of OSHA’s focus from primarily a civil enforcement program to a criminal one. Employers would react to this heightened criminal focus by refusing to cooperate with OSHA in obtaining prompt abatement of workplace safety and health hazards. They feared that employers would demand that OSHA secure search warrants pursuant to the Fourth Amendment before entering their plant for even routine inspections. In addition, civil as well as criminal cases would have a much higher contest rate, resulting in expensive and protracted litigation.\textsuperscript{91}

These fears are unsubstantiated and inconsistent with the experience of state and local officials who have been active in prosecuting workplace crimes under state and local criminal laws. As noted earlier, the Los Angeles District Attorney’s occupational safety and health criminal enforcement program had a substantial impact “in convincing corporate managers and supervisors that safety in the workplace should be given high priority.”\textsuperscript{92}

In Texas, the Travis County (Austin) District Attorney instituted an aggressive criminal enforcement program aimed at criminal prosecution of employers who willfully violated construction standards. This well-publicized program succeeded in reducing the annual number of construction trench fatalities from fifteen to two in only one year.\textsuperscript{93}

\textsuperscript{90} Statement of Gerald F. Scannell, Assistant Secretary Occupational Safety and Health Administration, United States Department of Labor, Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources 8-12 (May 1, 1980) [hereinafter Scannell]. These statements were quite a retraction from his comments as a nominee for the position of Occupational Safety and Health Administrator less than one year earlier. In an interview with the National Safe Workplace Institute in August of 1989, Scannell said he intended to revamp OSHA’s criminal penalty system, giving greater emphasis to criminal prosecution. He favored using more criminal penalties against employers who violate OSHA standards and the “develop[ment] [of] a penalty structure which [would] be more representative of the seriousness of the violation.” OSHA Nominee, supra note 53, at 603.

\textsuperscript{91} Scannell, supra note 90, at 8-12. These fears were shared by the minority members of the Senate Committee on Labor and Human Resources who opposed the adoption of amended Senate Bill 2154:

The objective of S. 2154 is to punish violators by means of criminal penalties. Conversely, the objective of the Occupational Safety and Health Act of 1970 is to eliminate all foreseeable and preventable workplace hazards through civil enforcement efforts that will lead to the quick abatement of those hazards. The crux of this policy issue is abatement versus penalty. This legislation will do nothing but upset the balance envisioned for OSHA; the result being a long string of lengthy court proceedings and appeals. This, in turn, will only serve as a counterproductive measure in OSHA’s attempt to protect the safety and health of the American workplace.

\textsuperscript{92} Senate Comm., supra note 3, at 26.

\textsuperscript{93} Reiner & Chatten-Brown, supra note 55, at 103.

\textsuperscript{93} Kinney, supra note 50, at 5-6.
There is no evidence that increased criminal enforcement in the environmental area has hurt the EPA's ability to obtain civil enforcement or abatement. "In fiscal year 1989 alone, sixty-nine defendants were convicted of environmental crimes, with over 12 million dollars in criminal fines assessed and some twenty-seven years of incarceration imposed." However, during that same period the EPA set records in the amount of civil penalties assessed, with civil-based judicial and administrative penalties topping $35.7 million.

V. STATE PREEMPTION

The lack of criminal prosecutions for willful violations of the OSH Act stem from OSHA's reluctance to proceed and the Justice Department's lethargic handling of those cases actually referred by OSHA. While the federal government has failed to seek criminal penalties for workplace safety violations, state and local prosecutors have attempted to use the states' historic police powers to prosecute employers for willful conduct that has resulted in workers being killed or injured on the job. This

94 DEPT OF LABOR, supra note 47, at 17.
95 Seymour, supra note 64, at 337.
96 HOUSE COMM., supra note 15, at 4-5.

Los Angeles Assistant District Attorney Jan Chatten-Brown described one such prosecution:

Our first involuntary manslaughter prosecution was against the president of a small drilling company who sent a worker down a 33-foot hole - if you can envision this - that was only 16 to 18 inches in diameter. The worker was lowered into the hole that was being drilled for an elevator shaft with his foot through a sling. He had no safety harness. The air was not tested. And the sides of the well were not encased. When the worker went into seizures and the rescue personnel responded, they were told that they could not pump oxygen into the hole because the sides of the wall might collapse.

Therefore, by the time they were able to remove the victim, he was dead. HOUSE COMM., supra note 15, at 8.

Cook County, Illinois State's Attorney Richard Daley explained why Illinois has taken an active role in prosecuting workplace injuries and fatalities as criminal acts: "We are not enforcing Government standards, as OSHA does. Rather, we are enforcing our criminal code to protect the people of Cook County from gross misconduct." Id. at 10.
stems from the state's interest in controlling conduct which endangers the lives of its citizens, whether it be recklessly operating an automobile or an automobile plant.98 Unfortunately, many state court convictions have been challenged or appealed on the ground that the Federal OSH Act preempts State prosecution for workplace injuries and fatalities.99

The preemption issue surrounds Article VI, Clause 2 of the United States Constitution, commonly referred to as the Supremacy Clause, which states in part that the "[C]onstitution, and the Laws of the United States . . . made in pursuance thereof . . . shall be the supreme Law of the Land. . . ." Furthermore, the States "shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Case law has clarified the practical application of this clause. Under the Supremacy Clause, federal law may preempt state law in several ways. Congress may preempt state law by expressly stating so on the face of a statute.100 In the absence of explicit language to the contrary, preemption is implied where federal legislation is so comprehensive in a given area that it leaves no room for supplemental state legislation.101 Preemption may also be found where it is physically impossible to comply with both federal and state regulations,102 or where a state law interferes with the purposes and objectives of a congressional statute.103

Defendants have raised the preemption claim in state courts seeking to use the Federal OSH Act as a shield against state criminal prosecution.104 Preemption advocates contend that the OSH Act expressly preempts state prosecution under general criminal statutes for workplace-related fatalities or injuries over which Federal OSHA has jurisdiction.

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98 George H. Cohen, Pre-emption: A Union Lawyer's View, 17 N. KY. L. REV. 153, 162 (1989). 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) ([P]reventing 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 responsibility for defining and prosecuting crimes.").

99 See cases cited supra note 97. All of the reported cases were appealed on grounds of state pre-emption, except for People v. O'Neil, 550 N.E.2d 1090 (Ill. App. Ct. 1990). The defendants in O'Neil appealed on grounds that the judgments rendered were inconsistent and the evidence presented at trial was insufficient to support the convictions of murder, involuntary manslaughter and reckless conduct.


103 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

104 HOUSE COMM., supra note 15, at 8.
Whether state law is preempted by the OSH Act is a question of congressional intent. This determination turns on two sections of the OSH Act: § 667(a) which provides: "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" and § 667(b) which reads:

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.

Where a state occupational safety and health plan has been approved, there is no issue of preemption. Preemption only becomes an issue in those states without an approved OSHA plan. Twenty-seven states do not have such a plan. State courts that have addressed the preemption issue have split.

The preemption argument is grounded on the assumption that § 667(a) and § 667(b) of the OSH Act demonstrate congressional intent to preempt all state laws that in any way could relate to workplace safety or health, including criminal laws of general application. In Sabine Consol., Inc. v. State, the Texas Court of Appeals held that § 667(a) "absolutely preempts all state regulation of workplace safety where such regulation would effectively establish state safety standards in areas governed by OSHA." The defendants, a corporate employer and its president, succeeded in having the Texas Court of Appeals overturn their criminally negligent homicide conviction.

The charges stemmed from the deaths of employees caused when a trench the employees were working in collapsed as a result of its construction in violation of OSHA standards. The court reasoned that:

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107 Senate Comm., supra note 3, at 12. See, e.g., People v. Hegedus, 443 N.W.2d 127 (Mich. 1989). The court felt that the OSH Act contained only a few very minor criminal sanctions that could hardly be intended to compose a comprehensive and exclusive scheme. They concluded that the interpretation which was most consistent with the OSH Act's goal of insuring safe and healthful workplaces is that "Congress did not intend to preclude state penalties but [rather] intended to allow states to supplement OSHA penalties with their own sanctions." Id. at 137. See Note, Getting Away With Murder: Federal OSHA Pre-emption of State Criminal Prosecutions for Industrial Accidents, 101 Harv. L. Rev. 535, 542-43 (1987). See also State ex rel. Cornellier v. Black, 425 N.W.2d 21, 24 (Wis. Ct. App.), reh'g denied, 430 N.W.2d 351 (1988) (stating that "the state's authority to enforce its criminal laws in the workplace has not been barred or abridged by OSHA.").
109 Id. at 868.
while the criminal actions . . . [did] not literally purport to establish worker safety standards, the criminal charges were based on a failure to perform a duty found in a statute which does prescribe safety standards. The practical effect of such charges is to set up a body of state law affecting workplace safety issues already governed by federal standards promulgated pursuant to § 655 of OSHA.\textsuperscript{110}

The Colorado District Court took a similar approach in \textit{Colorado v. Kehran}.\textsuperscript{111} This case involved a trench cave-in which resulted in the death of four workers. The defendants were charged with criminally negligent homicide for negligent construction of trenches which caused the death of the workers. The court held that:

[t]he determinative factor is not whether the State is seeking to enforce a criminal law of general application rather than specific workplace health and safety regulations but rather what conduct the State is seeking to regulate. . . . [T]he conduct the People here seek to regulate is the conduct related to working conditions which is exactly the same as that regulated by OSHA.\textsuperscript{112}

In \textit{Environmental Encapsulating Corp. v. New York City},\textsuperscript{113} the U.S. Court of Appeals held that "the OSH Act deprives states and their political subdivisions only of their jurisdiction over those occupational safety and health issues covered by a federal standard. The Act . . . leave[s] states free to regulate when their purpose is to safeguard public - as opposed to occupational - health and safety."\textsuperscript{114}

Despite such case history to the contrary, a close review of the OSH Act supports a finding that the OSH Act was never intended by Congress to preempt state criminal prosecutions of workplace injuries. The Savings Clause (§ 653(b)(4)) found in the Act precludes an interpretation of the OSH Act that would result in express preemption. Section 653(b)(4) states:

Nothing in [the OSH Act] shall be construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.\textsuperscript{115}

\begin{itemize}
  \item \textsuperscript{110} \textit{Id}.
  \item \textsuperscript{111} 13 O.S.H.C. 1898 (1988).
  \item \textsuperscript{112} \textit{Id.} at 1900.
  \item \textsuperscript{113} 855 F.2d 48 (2nd Cir. 1988).
  \item \textsuperscript{114} \textit{Id.} at 60.
  \item \textsuperscript{115} 29 U.S.C. § 653(b)(4) (1988).
\end{itemize}
This logically follows from the very intent behind the enactment of the OSH Act itself. Congress made it clear that it did not intend to occupy the field.\textsuperscript{116} State criminal prosecution of workplace safety violations support and complement, rather than conflict with, the Federal OSH Act.\textsuperscript{117}

The Wisconsin Court of Appeals echoed these feelings in \textit{State ex rel. Cornellier v. Black}.

\textsuperscript{116} \textit{People v. Chicago Magnet Wire Corp.}, 534 N.E.2d 962 (Ill. 1989). The purpose underlying [the OSH Act] was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards. \ldots it was not feared that 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.

\textit{Id.} at 967. "[P]rosecutions 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 'assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions.'\textit{ Id.} at 969. See supra Part II.

\textsuperscript{117} \textit{HOUSE COMM.}, supra note 15, at 9. The Committee stated:

\begin{quote}
It would have been most illogical for Congress specifically to authorize a private right to employees to pursue claims under State tort law for injuries incurred in the course of employment while at the same time prohibiting States from using their police power and criminal laws to punish the intentional acts that caused these same injuries.
\end{quote}


The OSH Act established a federal scheme to accomplish what the states seemed unable or unwilling to do on their own: create effective standards to prevent accidents and diseases in the workplace. Congress intended to fill err in the existing state-by-state regulatory framework, not to replace it with a narrower framework. A system of OSHA regulation supplemented by state criminal prosecutions thus provides an appropriate range of governmental responses to dangerous employer practices. In practice, state criminal prosecutions are likely to play only a limited role in the overall enforcement scheme. They do not confront the same problems that stymied state enforcement schemes before OSHA: the difficulty of overcoming the procedural barriers and higher burden of proof under criminal statutes, and the economic pressure to police industry less vigorously than competing states. State criminal prosecutions, therefore, are by no means a substitute for a strong and effective OSHA. They do, however, provide a useful supplement to ensure that workers are more adequately protected and that particularly egregious employer conduct does not go unpunished.

\textit{Id.} at 554. \textit{See also}, Cohen, supra note 98.

\begin{quote}
[I]t 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' nevertheless enacted a statute that deprived employees of the longstanding protection provided by state criminal laws.\textit{ Id.} at 175.
\end{quote}

\textsuperscript{118} 425 N.W.2d 21 (Wis. Ct. App. 1988).

\textsuperscript{119} \textit{Id.} at 25.
The Michigan Supreme Court reached a similar conclusion in *People v. Hegedus.* It viewed OSHA as "primarily regulatory in nature, designed to prevent workplace deaths and injuries before they occur... [I]ts emphasis is on the promulgation of health and safety standards and enforcement and review procedures, rather than the assessment of penalties for injuries already suffered." In contrast, general state criminal laws were viewed as "ex post, reactive measures, focusing on conduct after an injury has occurred." With this distinction in mind, the court interpreted § 667(b) as expressly limiting only the development and enforcement of state standards, and did not therefore affect the enforcement of state criminal laws.

The Department of Labor expressly endorsed the need to protect the efforts of state and local prosecutors by acknowledging that "[s]tates should not be preempted from enforcing criminal laws of general applicability, such as those dealing with murder, manslaughter, or assault." Limited criminal penalties provided by the Act to deprive employees of the protection provided by State laws of general applicability.

The Department of Labor expressly endorsed the need to protect the efforts of state and local prosecutors by acknowledging that "[s]tates should not be preempted from enforcing criminal laws of general applicability, such as those dealing with murder, manslaughter, or assault."

There has been and continues to be considerable uncertainty in the courts regarding the issue of state preemption. The uncertainty surrounds confusion as to whether Congress intended the OSH Act to preempt state criminal prosecutions. This confusion has had the effect of contravening state criminal prosecutions. The continued threat of state or local prosecution is essential for effective deterrence of potential violators. Therefore, it is imperative that Congress expressly reaffirm its intent under the OSH Act not to preempt state enforcement of its criminal laws of general applicability in prosecutions related to workplace injuries or fatalities. Senate Bill 445 would expressly preserve a state and locality's right to prosecute employers for acts against their employees which constitute crimes under state or local law.

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120 443 N.W.2d 127 (Mich. 1989).
121 *Id.* at 129.
122 *Id.* at 132.
123 *Senate Comm., supra* note 3, at 13, citing letter from Thomas M. Boyd, Assistant Attorney General for Legislative and Intergovernmental Affairs, Dep't of Justice, to the Honorable Tom Lantos, Chairman, Subcommittee on Employment and Housing of the House Committee on Government Operations, 2-3 (December 9, 1988).
125 S. 445, 102nd Cong., 1st Sess. § 2(c) (1991). The bill provides: "Nothing in this Act shall preclude State and local law enforcement agencies from conducting criminal prosecutions in accordance with the laws of such State or locality."
VI. CORPORATE PERSONAL LIABILITY

Under the OSH Act, criminal fines levied against corporate offenders can be paid out of the assets of the organization. This “loophole” reduces the deterrent effect of the criminal sanctions on individual corporate offenders by allowing fines to be passed on to the corporation and written off as a cost of doing business. The OSHA Criminal Penalty Reform Act attempts to enhance the deterrent impact of criminal fines by holding convicted individuals personally responsible for the payment of any such fine imposed.\(^{126}\)

Problems have plagued the imposition of criminal sanctions against individual corporate offenders. Under the OSH Act, criminal sanctions apply only to employers “engaged in a business affecting commerce who [have] employees.”\(^{127}\) Some defendants have successfully contended that only the corporation has employees and affects commerce; and therefore, corporate officers are not subject to punishment under the OSH Act.\(^{128}\)

Since a corporation cannot be jailed, imputing broad criminal responsibility on them would merely make available additional money fines. Therefore, success by a defendant on this issue would provide a shield against criminal prosecution and significantly reduce the deterrent effect of the criminal sanctions. For this reason, the Committee on Labor and Human Resources, in adopting amended Senate Bill 2154 (subsequently reintroduced as Senate Bill 445), explicitly adopted the Department of Justice’s position on corporate criminal liability: \(^{129}\) “[C]ulpable supervisors and corporate officers, as well as other persons who have a responsible share in the prohibited conduct, may be punished as principals under [the OSH Act] for aiding and abetting or for willfully causing an employer’s violation.”\(^{130}\) This stance ensures that culpable corporate individuals will be subject to criminal sanctions, regardless of whether they technically meet the definition of “employer” within the OSH Act.

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\(^{126}\) S. 445, 102nd Cong., 1st Sess. § 2(a)(6) (1991). The bill provides: “(n) If a penalty or fine is imposed on a director, officer, or agent of an employer . . ., such penalty or fine shall not be paid out of the assets of the employer on behalf of that individual.”


\(^{128}\) Michael H. Levin, Crimes Against Employees: Substantive Criminal Sanctions Under The Occupational Safety and Health Act, 14 AMER. CRIM. L. REV. 717, 730-31 (1977). See United States v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975). The district court orally granted a motion to dismiss all counts of the indictment against the company’s president as an individual, holding “the evidence . . . quite clear that the corporation was the employer” despite testimony that the president was intimately involved in daily operations and “might have been out on the [fatal] site that day.” Dye Constr. Co., 510 F.2d at 87-88.

\(^{129}\) SENATE COMM., supra note 3, at 21.

\(^{130}\) Crawford, supra note 51, at 5.
Deterrence theories are founded on the belief that punishment should be designed to deter the commission of future offenses rather than to exact retribution on convicted offenders. The most plausible way to increase the deterrent effect of punishment is to increase both the risk of conviction and the severity of punishment.\textsuperscript{131} The OSHA Criminal Penalty Reform Act focuses on increasing the severity of punishment; however, it is essential that an active enforcement program be established to increase the risk of conviction and thereby maximize the deterrent effect of the criminal sanctions.\textsuperscript{132} As noted by the House Committee on Government Operations:

There is an institutional reluctance by OSHA, the Justice Department, and the U.S. Attorney’s Office to pursue criminal prosecutions in workplace safety cases. There is a need for OSHA to be more aggressive and timely in using available criminal sanctions. Unless the OSH statute is beefed up \textit{and} vigorously enforced by OSHA to punish criminally those who show willful disregard for worker safety, some employers will continue ‘to get away with murder.’\textsuperscript{133}

\section*{VIII. Conclusion}

The Occupational Safety and Health Act of 1970 was enacted “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”\textsuperscript{134} In its twenty year history, it has fallen well short of this auspicious goal. Its failure to insure safer working conditions is a result of statutory limitations as well as a reluctance by OSHA and the Justice Department to pursue criminal prosecution.

The OSHA Criminal Penalty Reform Act (Senate Bill 445) was introduced by Senator Howard Metzenbaum on February 20, 1991. The legislation is necessary to modify the criminal penalty provisions of the OSH Act to eliminate the statutory barriers which have not only failed to provide an adequate deterrent to potential violators of workplace safety and health standards, but which have also hindered OSHA’s ability to enforce the Act.

\textsuperscript{131} Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and its Processes 149 (5th ed. 1989). Opponents of the deterrence theory attack its practice of punishing one individual for the potential acts of another as unjust and inhumane. \textit{Id.} at 149.

\textsuperscript{132} \textit{Id.} at 150-51.

\textsuperscript{133} House Comm., supra note 15, at 11.

\textsuperscript{134} 29 U.S.C. § 651(b) (1988).
“Beefed up” criminal sanctions are, however, only one-half of the formula. Achieving safer workplaces require not only appropriate criminal penalties, but also the presence of an aggressive criminal enforcement campaign to provide for the maximum deterrent effect of the sanctions.

Passage of the OSHA Criminal Penalty Reform Act is essential to the establishment of safe and healthy workplace conditions for this Nation’s workers. A goal established by Congress some twenty years ago. A goal we have yet to achieve.

TIMOTHY G. GORBATOFF