

CRIMINAL LIABILITY FOR LABOR SAFETY VIOLATIONS IN THE PEOPLE'S REPUBLIC OF CHINA

I. INTRODUCTION

China's workers have fallen on hard times.¹ In the Peoples Republic of China's (PRC's) new socialist market economy State-owned enterprises, which currently employ about sixty percent of the urban population, have been forced to lay off workers to compete with the emerging private sector and international conglomerates.² China scholars have recently devoted much attention to the sad state of Chinese workers, telling tales of inefficient social insurance and rampant unemployment.³ Some scholars have found it almost impossible to count the numbers of urban unemployed in the world's most populous nation.⁴ Moreover, to add injury to insult, there are problems inside the factory as well. The Chinese government has come under considerable pressure to deal with the growing number of industrial accidents, resulting deaths, and uncountable labor law violations that plague a nation vigorously trying to conform its laws to WTO standards within the next several years.⁵ Indeed, there is a

1. See generally Marc J. Blecher, *Hegemony and Workers' Politics*, 170 CHINA Q. 283 (2002). One author comments:

To be sure, rising social frustration results partly from the hardships produced by China's economic transition. In recent years, falling income in rural areas and rapidly growing unemployment in the cities have contributed to the rising discontent among tens of millions of peasants and workers.

Min Xin Pei, *China's Governance Crisis*, 81 J. FOREIGN AFFAIRS 97, 107 (2002). The Chinese government faces a clash between east and west as well. *Id.* at 107. Eastern China has grown prosperous under the reforms while conditions in western China have stayed the same or, in some cases even deteriorated. *Id.* at 109. The rising unhappiness amongst rural workers in western China has also caused considerable strife in some of the remote areas and has caught the attention of the authorities in Beijing. See generally THOMAS BERNSTEIN & LU XIAOBO, *TAXATION WITHOUT REPRESENTATION* (2003).

2. See generally JUSTIN YIFU LIN ET AL., *STATE OWNED ENTERPRISE REFORM IN CHINA* 1-10 (2001).

3. See generally Blecher, *supra* note 1, at 283-85. Unemployment rates have been particularly bad in urban areas and steadily growing since the mid-1990s. *Id.* Figures show that there has been an increase in urban unemployment every year since 1993. UNITED NATIONS, *CHINA HUMAN DEVELOPMENT REPORT* 43-47 (1999). One scholar notes that statistics on employment are inconsistent and that there may indeed be no way for China to count its numbers of unemployed. Dorothy Solinger, *China's Uncountable Unemployed*, 168 CHINA Q. 1-30 (2001).

4. Blecher, *supra* note 1, at 283.

5. *Industrial Accidents Plague China*, N.Y. TIMES, July 12, 2002, at A9. "This year, more than 3,400 people have died in China's mines, where ventilators and other basic safety equipment are often nonexistent and explosions and flooding are common. Last year's official death toll was 5,670, though

growing realization that China faces a massive challenge in bringing its labor standards up to code for the WTO, especially while trying to make an already failing State sector internationally competitive.⁶

Over the past twenty years, China has enacted a number of labor laws and regulations aimed at dealing with labor safety problems.⁷ Most importantly, the PRC enacted a labor law in 1994,⁸ and since then, the provinces and other assorted jurisdictions have done a considerable amount of legislating at the local level on labor standards and safety.⁹ At that time, scholars were optimistic that this profuse labor legislation would work to fix some of the labor issues that have been piling up since the beginning of the reform era in 1978.¹⁰ Unfortunately, China's workers are not much safer and happier than they were before.¹¹ This continuing problem leads one to question how effective the Ministry of Labor and Social Security (MOLSS) and the Chinese courts have been at enforcing this growing body of labor and employment law. Also relevant to this discussion, is the question of how many of the labor safety violations in highly industrialized areas are actually uncovered in time to prevent accidents and save lives. The answer, unfortunately, is very few.¹² It seems then that China's labor law provides for an ineffective system for supervising and deterring production operations from engaging in illegal and unsafe labor practices.

In light of the serious deficiencies in the current civil and administrative legal mechanisms available for the enforcement of labor safety violations,¹³ this Note will argue that the PRC should strengthen existing criminal penalties and deterrents for violating labor safety laws. More specifically, the Chinese Government must consider refining and

many suggest the actual numbers could be even higher." *Id.*

6. See LIN, *supra* note 2, at 15-25.

7. See HILLARY K. JOSEPHS, LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY (1991).

8. Zhonghua renmin gongheguo laodong fa [The Labor Law of the People's Republic of China] [hereinafter *PRC Labor Law*], in XINBIAN ZHONGHUA RENMIN GONGHEGUO CHANGYONG FALU FAGUI QUANSHU (2002), at 2047 [hereinafter XINBIAN].

9. JOSEPHS, *supra* note 7, at 50-90.

10. See generally *supra* note 7.

11. The Congressional Executive Commission on China recently published a report on the state of labor in the PRC since the promulgation of the PRC Labor Law. CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, ANNUAL REPORT 84-110 (2002), available at <http://www.cecc.gov/pages/annualRpt/annRptCombo2.php> [hereinafter 2002 CECC Report]. The Report stated that in 2001 alone over 60,000 people were killed in safety accidents in China. *Id.*

12. See *infra* Part I.A and accompanying notes.

13. Indeed, one official in the Chinese government stated that managers have turned "a deaf ear to safety regulations and management process." *Industrial Accidents Plague China*, *supra* note 5, at A10.

more frequently utilizing some of the provisions in the Labor Law and the Criminal Code to bring about a more effective system of criminal enforcement of the labor law, establish more formidable deterrents for managers and workers in enterprises in both the public and private sector, and promote a safe workplace.¹⁴ This Note will argue that this kind of reform should include more defined mens rea requirements,¹⁵ criminal liability for managers in the *enterprise or legal entity*, and criminal liability for safety violations which create a serious risk, but have not yet caused a serious accident.¹⁶

A. *The History of Labor Law in the PRC*

Until the enactment of the 1994 Labor Law, the PRC had no comprehensive labor law other than a set of regulations,¹⁷ which were

14. The Criminal Code of the PRC already includes a provision for which workers can be held liable for causing a serious accident, but the provision should, as this Note will argue, be reformed in order to improve enforcement. The provisions specifically relevant to these circumstances exist under Articles 134 and 135 of the criminal code under the heading of The Crime of Damaging the Public's Safety. *Zhonghua renmin gonghe guo xingfa* [The Criminal Law of the People's Republic of China], in XINBIAN, at 2085 [hereinafter "PRC Criminal Law"]. This Note will also examine the theory of negligent homicide which also has a place in the PRC Criminal Law under the heading of Crimes Infringing on the Rights and Safety of the Individual. PRC Criminal Law, art. 233.

15. The PRC Criminal Code includes mens rea requirements. Compare Articles 14 and 15 of the Criminal Code with the offenses mentioned in Article 134 and 135 regarding crimes to the public safety. PRC Criminal Law, arts. 14-15, 134-37. There is no mention made of the mens rea required for these crimes. *Id.* arts. 134-37. One would assume that such crimes could be either intentional under Article 14 of the criminal law or negligent under Article 15 of the criminal law. *Id.*

16. Regarding the scope of this Note, it does not deal with violations of the labor code beyond those which relate to the personal safety of the workers while on the job. There are, admittedly, many other areas such as work-time, over-time, child labor, and medical benefits which need further examination, but this discussion is focused exclusively on labor safety violations. In addition, the special protections which exist under labor law for both women and minors are not discussed here, even though the presence of a child or a pregnant woman in a factory dealing with dangerous materials might be considered a safety violation. For provisions on women and children in Chinese labor law, see generally GONGREN LUSHI [LABOR LAWYER] (1999); see also LAODONG HE SHEHUI BAOZHANG [LABOR AND SOCIAL SECURITY] 171-83 (1999).

17. The development of law in the PRC has caused a proliferation of regulations and other administrative decrees. See, e.g., XINBIAN, *supra* note 8, at 1-12. Some have even suggested that such regulations are the real meat of the law because the law enacted by the National People's Congress and its Standing Committee tends to be more of a general guiding plan than a concrete set of rules and regulations. MURRAY SCOT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS 129-30 (1999) [hereinafter LAWMAKING IN CHINA]. For a review of the development of administrative regulations in Chinese law, see Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 723. Since the publication of Mr. Keller's article, the Legislation Law of the People's Republic of China has given scholars an even better idea of how Chinese legislation works. See *Zhonghua renmin gonghe guo lifa fa* [Legislation Law of the People's Republic of China], in XINBIAN, at 198 (1994) [hereinafter PRC Legislation Law]. The Legislation Law codified the practice of first enacting a set of administrative regulations and once practice had dictated how such measures worked out, the NPC would enact an actual law on

drafted by the then Ministry of Labor within the State Council.¹⁸ In fact, the growth of the concept of labor rights as codified in the 1994 law¹⁹ has been a long time in the making, although the celebration of the worker in Chinese society was important throughout the earlier part of the communist era.²⁰ Indeed, the establishment of the Chinese Communist Party in the early 1920s century brought a worker's movement to life that prevailed throughout the Mao Era.²¹ This movement gathered momentum during the Cultural Revolution (1965-1969) when the workers were one of the groups, which were active in many of the new movements (*yundong*) that tore through Chinese society.²²

Then, with the death of Mao Ze Dong in the late 1970s and the beginning of the reform era under Deng Xiao Ping, the place of workers in the PRC began to fall.²³ Deng's market reforms brought about a new

the subject. PRC Legislation Law, arts. 9-11. Indeed, it appears this is what happened with regard to China's Labor Law, because there was a large amount of administrative regulation before there was a labor code. JOSEPHS, *supra* note 7.

18. The State Council is what one might think of as the executive department of the Chinese Government. WANG CHENGUANG & ZHANG XIANCHU, AN INTRODUCTION TO CHINESE LAW 20-35 (1997). The State Council may delegate power to the departments to draft regulations. LAWMAKING IN CHINA, *supra* note 17, at 129. The more specific contours of this arrangement may be found in Chapter Three of the Legislation Law. PRC Legislation Law, ch. 3.

19. PRC Labor Law, ch. 1.

20. Traditionally workers were in the middle of a social hierarchy of the common people (*Ping min*) which was farmers (*nong*), laborers (*gong*) and then merchants (*shang*). GUO JIAN ET AL., ZHONGGUO FALU SHI [CHINESE LEGAL HISTORY] 148-51 (2000). Since the beginning of the communist party in 1922 a more cohesive workers movement began to develop. Li Fang Zhi, *Xin zhongguo chengli qian de laodong fa* [Labor Law Before the Establishment of the New China], in LAODONG FA LUNWEN JI [A COLLECTION OF ESSAYS ON LABOR LAW] 226 (1984) [hereinafter LABOR ESSAYS]. One author comments: "In ancient China . . . the safety and health of worker was not protected at all . . . After the establishment of the People's Republic of China . . . laborers became the leaders of the nation." Xiao Liang & Zhang Yi, *Min Shilun jiaqiang woguo anquan weisheng lifa de yiyi* [Debating the Significance of Legislation on Safety Standards] 167, 167, in LABOR ESSAYS, *supra*.

21. The Mao Era here refers to the time (1979-1976) during which Mao was the de jure and de facto ruler of the People's Republic of China. RICHARD BAUM, BURYING MAO 1-10 (1995).

22. During the Cultural Revolution there was a workers' movement, and Mao Ze Dong and his wife Jiang Qing encouraged a sort of second revolution amongst lower level workers. The leader of the workers movement was Wang Hongwen, who eventually became a member of the infamous Gang of Four (*sirenbang*) and was prosecuted in the early 1980s with the rest of his cohorts. For an excellent description of the role that the workers played during the Cultural Revolution, see generally ELIZABETH PERRY & LI XUN, PROLETARIAN POWER: SHANGHAI AND THE CULTURAL REVOLUTION (1994).

23. For an excellent analysis of the trials and tribulations of growing out of the Maoist economy and the effect on workers and other segments of society, see generally BARRY NAUGHTON, GROWING OUT OF THE PLAN (1993). For a more current analysis of the problems facing labor in the PRC, see Minxin Pei, *supra* note 1, at 105. Indeed, scholarship in the United States has been increasingly focused on the plight of the workers, once the most important part of the Chinese State, during the reform era. *Id.* An entire issue of CHINA QUARTERLY, a prominent Journal published by the School of

private sector, which created competition for the enormous, inefficient State enterprises, and the workers were hit from two angles. First, in the private sector labor was no longer protected by the State, or at least not to the same extent that it was under Mao's command economy.²⁴ Second, due to changing economic conditions and the growth of a market economy in China, the State sector began to suffer²⁵ and to lay off workers. Also, workers in the State sector were no longer protected and provided for to the same extent that they were under Mao's "Iron Rice Bowl" (*datiewan*).²⁶ The gap between the rich and the poor grew fast, and the gap between eastern and western parts of the PRC began to appear more pronounced as well.²⁷ Thus, as China's economic situation changed, the workers began to find themselves jobless and subject to new challenges in a more competitive market environment.²⁸

Oriental and African Studies in London, recently devoted an entire issue to this problem. *See generally* 170 CHINA Q. 1 (2002).

24. NAUGHTON, *supra* note 23, at 54-55. A more current analysis of China's economic situation can be found in NICHOLAS LARDY, CHINA'S UNFINISHED ECONOMIC REVOLUTION (2001). The book points out the situation in China is much different from the views put forth by perhaps overly optimistic foreign investors and the Chinese Government. *Id.* at 10. Others in fact paint the situation as even more bleak. They argue that the Chinese State is now on the verge of collapse due to the problems that the reforms and the persistent unwillingness of the Communist party to institute any sort of real political reform. *See* GORDON CHANG, THE COMING COLLAPSE OF CHINA 1-10 (2001).

25. The situation for the State banking system is drastic. Estimates for the amount of unrecoverable loans made by state banks to State Enterprises fall somewhere between twenty and seventy percent. Carsten A. Holtz, *Economic Reforms and State Sector Bankruptcy in China*, 166 CHINA Q. 340, 360 (2001). Mr. Holtz comments: "the Chinese State then has more than relinquished its claim to assets of governments on all tiers, the State banking system and the SOE's. It is Bankrupt. Even if only twenty-five percent of the SOE loans are non-performing, following the most conservative estimates, State net worth is zero." *Id.* at 349. While estimates of this sort may be alarmist, they do explain why the State Enterprises have come under such pressure to lay off workers. For statistics on the amount of laborers laid off each year from 1993-1999, see CHINA HUMAN DEVELOPMENT REPORT, *supra* note 3, at 44-47.

26. During the Mao-era jobs were assigned to everyone and labor was allocated, sometimes, without concern for need. In addition to the jobs every worker was assigned housing and healthcare benefits. *See* JOSEPHS, *supra* note 7. For an excellent description of how the political events played out in such a way that market economics took over leaving the workers to face a much more desperate situation, see BAUM, *supra* note 21, at 1-10.

27. KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 75-79 (1995). Lieberthal points to a generally destructive trend in China of an increase in corruption among the cadres and a loss of legitimacy of the Chinese government. *Id.* Moreover, Lieberthal ties the loss of legitimacy to the fact that the Chinese Government has tied its popular legitimacy to fast economic growth. Because no government can guarantee constant economic growth and perpetual prosperity, the Chinese Government has no other means to garner support among the population other than repressive means. *Id.* If the growth stops, slows, or goes too far in one direction, then the Chinese Government could be facing a legitimacy crisis. However, a more balanced approach might be more appropriate considering that the Communist party has managed to maintain control through worse times than this and there exists no credible, organized threat to its power at present. *See generally* IS CHINA UNSTABLE: ASSESSING THE FACTORS (David Shambaugh ed. 2000).

28. *See infra* Part I.A notes and accompanying text.

B. Domestic Labor Reform

Deng's market reforms also brought about a great deal of legal reform. The 1980s saw a considerable amount of lawmaking, which has only increased in the 1990s.²⁹ With this proliferation of legislation, governmental organs have found themselves with more of a role to play in the policy process.³⁰ In terms of labor legislation, there has been participation from all levels. The National People's Congress (NPC)³¹ enacted the Labor Law in 1994,³² and since then, the Ministry of the Labor and Social Security and the local People's Congresses have all become involved in supplementing the Labor Law by drafting administrative and procedural regulations.³³ The result of all of this legislation is a seemingly complete system of labor law and enforcement. However, there has been less success in terms of how effective the national and local governments, and administrative agencies have been at implementing this growing body of law and regulations.³⁴

29. Since 1979 there have been two Criminal Codes enacted, one in 1979 and a new one in 1996, a Criminal Procedure Code, a Civil Procedure Code, an Arbitration Law, a Trust Law, and a considerable amount of other specialized legislation like the Education Law, the Product Quality Law, and the Income Tax Law. Indeed there has been legal growth on all fronts: basic or constitutional law, civil and commercial law, administrative law, economic law, social law, criminal law, litigation and non-litigation procedural law. *See, e.g.,* XINBIAN, *supra* note 8, at 1-12. For a statistical analysis of the increase in legislation by the National People's Congress and the Standing Committee of the National People's Congress from the 5th Congress in 1979 through the 8th Congress into 1999, see CHINA HUMAN DEVELOPMENT REPORT, *supra* note 3, at 45. The number of laws promulgated per year by the NPC has more than doubled and the number of resolutions passed by the NPC has increased tenfold. *Id.* at 45.

30. Several sources have noted the rise in prominence of the people's congresses at the national and local levels. Before the reform era these bodies were a mere rubber stamp, secondary to the Chinese Communist Party, but the reforms and the increase in legislation have created an environment where national and local legislative organs can play much more of a role in the research and drafting of legislation. *See* Young Nam Cho, *From "Rubber Stamps" to "Iron Stamps" The Emergence of Local People's Congresses as Supervisory Power Houses*, 171 CHINA Q. 725, 725-40 (2001). *See also* UNITED NATIONS, CHINA HUMAN DEVELOPMENT REPORT: MAKING GREEN DEVELOPMENT A CHOICE 15 (2002) (noting the importance of the National People's Congress in drafting environmental legislation).

31. ZHONGHUA RENMIN GONGHE GUO XIANFA [THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA], arts. 57-78 (2000).

32. *See* PRC Labor Law, *supra* note 8.

33. There has been labor legislation at all levels. At the top, the NPC enacted the Labor Code, but then there have also been Implementation provisions issued by other branches of government. For example, there have been regulations issued by the Supreme People's Procuracy. *Zuigao renmin jianchayuan guanyu renzhen zhixing "laodongfa" de tongzhi* [Notice on the Serious Implementation of the Labor Law], available at <http://www.lawbook.com.cn>. Finally, the local People's Congresses and Governments have issued regulations as well. *See, e.g., Qingdao shi laodong zhengyi chuli tiaoli* [Qingdao Municipality, Regulations for the Resolution of Labor Disputes]. The Qingdao regulations were enacted by the People's Congress of Qingdao. *Id.* prmb1.

34. JOSEPHS, *supra* note 7, at 60-100; LAODONG FA SHILI SHUO [SPEAKING ABOUT THE LABOR

C. China Joins the World: International Influence on China's Labor Law Reforms

Coupled with domestic support for legal reform is the influence of many of the international organizations that China has joined or will join. Indeed, China has become a much more proactive member of the international community since the beginning of the Deng-era in the late 1980s.³⁵ Certainly, China's impending entry into the WTO has had an extraordinary influence over the legislation promulgated in the last ten years.³⁶ With regard to labor, the influence of the international community,³⁷ particularly the International Labor Organization (ILO), is quite apparent in the 1994 Labor Law.³⁸ However, as previously mentioned, the problem is not the amount of legislation, or, for the most part, its substantive content, but rather the effective enforcement of these new laws and regulations.

LAW AND ITS PRACTICAL USE] 100 (Qi Wei Ping ed. 1999).

35. See generally CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS (Elizabeth Economy & Michael Oksenberg eds., 1999).

36. ZHONGGUO FALU NIANJIAN [LEGAL YEARBOOK OF CHINA] 17-20 (2001).

37. China has ratified "pizhun" twenty-two international treaties regarding labor, including: the Chemical Products Treaty, the Employment Policy Treaty, the Minimum Employment Age Treaty, The Labor Administration and Management Treaty, and The Treaty on Safety Protection in the Construction Industry. A more comprehensive list of the treaties ratified and acknowledged by the PRC is available at the website of the Ministry of Labor and Social Security at <http://www.molss.com.cn>. See also LIU WEN HUA, WTO YU ZHONGGUO LAODONG FALU ZHIDU DE CHONGTU YU GUIBIAN [THE CONFLICTS AND SIMILARITIES OF CHINA'S LABOR LAW SYSTEM AND THE WTO'S] 108-14 (2001) [hereinafter WTO AND CHINA LABOR].

38. Scholars studying China's entry into the WTO have done much work on the challenges that face things like Labor Law in the future. WTO AND CHINA LABOR *supra* note 37, at 118. One author claims that while China's Labor Law and the policies of the ILO are "unified," there still need to be further research done on harmonizing the two in order to bring China totally into compliance. *Id.* at 146. A comparison of ILO policy expressed through recommendations and treaties and the general principles and rights afforded to the work under PRC law reveals that Chinese legislators did take the ILO and international policy on labor into account when drafting the Labor Code. *Id.* One author commented with regard to the long and sometimes tenuous relationship between China and the ILO: "Only in the mid-1990s did [China] begin to take its obligations more seriously and to invoke ILO standards as protection against labor unrest and foreign exploitation as it had in its pre-1949 history." ANN KENT, CHINA, UNITED NATIONS AND HUMAN RIGHTS 123-24 (1999). In addition to China's somewhat tense history with the United Nations, some might also argue that perhaps the itself has a rather uneasy relationship with the ILO. Hillary K. Josephs, *Upstairs Trade Law Downstairs Labor Law*, 33 GEO. WASH. L. REV. 849 (2001). Professor Josephs argues that labor standards as set forth by the International Labor Organization have become almost incompatible with the evolving WTO framework and in the context of current international trade and business practices. *Id.* It is this divorce between economics and labor standards that has caused much of the problems in China. China is a source of cheap labor for foreign manufacturers. Much of this foreign investment drives China's economic reforms and the new wealth that has taken hold, but in order for labor to remain cheap labor law enforcement has fallen from the agenda. See generally Hillary K. Josephs, *Labor Law in a Socialist Market Economy: The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559 (1995).

II. LEGAL MECHANISMS FOR RESOLVING DISPUTES AND ENFORCING LABOR LAW

A. *The Civil Law and Dispute Resolution*

The PRC Labor Law provides for the settlement of disputes through one of three ways: mediation, arbitration (*zhongcai*),³⁹ and litigation (*susong*).⁴⁰ The last option of litigation, however, is only available after the parties to the labor dispute have gone through the arbitration process.⁴¹ These methods of dispute resolution constitute a mechanism for the worker to seek redress for her grievances, such as contract disputes, through the civil law. One scholar comments that China's 1994 Labor Law seems to reflect warmer feelings on the part of the Chinese government with regard to civil liability in the context of labor and employment law.⁴² The Labor Law does include quite a few civil remedies for workers seeking relief for various problems relating to wages and breach of contract.⁴³ In actuality, however, little relief has been afforded to workers, who decide to use the civil law to solve their problems.⁴⁴ Instead, a worker who sues may not only lose the suit, but may also lose her job or face retribution from her employer.⁴⁵

B. *Administrative Penalties*

For the most part, the administrative penalties that may be imposed on the employing unit for Labor Law violations are fines exacted by the local branch of MOLSS.⁴⁶ The Labor Law empowers the local people's governments and the local branches of the MOLSS to inspect and prosecute all violations of the Labor Law.⁴⁷ However, the fines may be

39. Article 79 of the Labor Law specifically states: "If a party is not satisfied with the decision of the arbitration then it may litigate the dispute before the people's courts PRC Labor Law, art. 81. The most likely reason for the non-binding nature of the arbitration decision is that the arbitration commission consists of members of the employing unit as well as members from the All China Labor Union at the corresponding level. Interview, July 18, 2002. The option to go to the courts is most likely available to get an impartial judge for the dispute.

40. PRC Labor Law, ch. 10

41. *Id.* art. 79.

42. Josephs, *Upstairs Trade Law*, *supra* note 38, at 568.

43. PRC Labor Law, ch. 12.

44. 2002 CECC REPORT, *supra* note 11, at 84-120.

45. *Id.*

46. PRC Labor Law, ch. 12.

47. *Id.* ch. 11. The Labor Law allows for inspection of facilities for safety regulations. *Id.* The Labor Department is responsible for conducting these inspections and obstruction of the Labor Department in this charge can result in criminal penalties for the inspectee. *Id.* Article 88 of the Labor

little more than a slap on the wrist for already ambivalent employers, although technically more severe administrative penalties such as halting of operations (*tingye*) may be possible under certain circumstances.⁴⁸ These administrative penalties may be in addition to a civil suit brought by the worker.⁴⁹ Thus, for some violations of the Labor Law, except for general safety violations, the party injured may seek compensation under the civil law, and MOLSS may also institute administrative penalties on the employing unit.⁵⁰

C. Criminal Penalties

There are also remedies available under the criminal law for certain more serious violations of the Labor Law and relevant regulations.⁵¹ Regardless of the provisions of the Labor Law that mention criminal liability, any criminal liability relating to the workplace or the worker is liability completely under the PRC Criminal Law and its provisions.⁵² In other words, the Labor Law does not itself criminalize behavior, the criminal law does.⁵³

Law allows for any individual or organization to report or expose labor violations to the Department of Labor in the area. *Id.* art. 88. Of course, a worker, fearing termination, may be hesitant to report such a violation to the authorities.

48. PCR Labor Law, ch. 12.

49. *Id.* ch. 12.

50. The Labor Law specifies the situations in which compensation may be sought. *Id.* ch. 12. This includes violation of contracts causing loss to the employees and infringements of the Labor Law which result in harm to minors or female staff workers. *Id.* arts. 95, 97. However, the Labor Law does not exclude the possibility of workers seeking compensation under other laws. *Id.* art. 105. For an example of how a case can result in civil and administrative penalties for the employing unit, see *The Administrative Case of a Certain Brick Maker Using Child Labor*, in LAODONGFA LIJIE SHIYONG YU AANLI PINGXI [A PRACTICAL UNDERSTANDING OF THE LABOR LAW AND CASE ANALYSIS] 200 (Gao Yan & Li Jun eds., 1996) [hereinafter LABOR LAW AND UNDERSTANDING CASES] (describing how a mine which had employed a 16 year old boy was subject to administrative penalties, but avoided potential civil penalties on behalf of the boy by his mother by agreeing to compensate the boy for his medical expenses). The distinction between administrative and civil law in labor cases reflects the hybrid nature of labor law common to many civil law nations. THE CIVIL LAW TRADITION: EUROPE, EAST ASIA & LATIN AMERICA CASES AND MATERIALS 1144 (John Merryman et al. eds., 1994).

51. See PRC Labor Law, ch. 12.

52. LABOR LAW UNDERSTANDING AND CASES, *supra* note 50, at 305.

53. One author comments with regard to criminal liability for labor practices: "What we must pay attention to is that criminal matters within the scope of the Labor Law can not be used independently, rather it is necessary to unite the labor code with the provisions in the Criminal Code." *Id.* at 305. Indeed, there is a strong separation between civil, criminal, and administrative law as there is in most legal systems. For a better explanation of this separation See Merryman, *supra* note 50, at 1144. The major difference between civil and criminal liability is that it is the state which is imposing it through the relevant criminal law personnel on the party responsible for the act. *Id.* This is an important point to remember in talking about enforcement of the law, that is that there are different mechanisms available for enforcing criminal law than administrative and civil law.

There are several provisions in the Criminal Law, which correspond or match directly with similar provisions in the chapter entitled “Legal Liability” in the Labor Law.⁵⁴ Indeed, criminal liability may be imposed in the following areas: safety protection, prohibition of child labor, protection of the personal and democratic rights of the laborers (forced labor), and maintaining an adequate inspection system.⁵⁵ There is one final requirement for intersections between the Labor Law and the Criminal Law to arise: the circumstances must be especially severe (*qingjie yanzhong*).⁵⁶

The tools that one needs to analyze how the criminal law can be used to punish labor safety violations are simply to understand the general provisions of the criminal law on *dolus specialis* (*mens rea*), the concept of criminal liability for a corporation or other legal entity, and the *actus reus* for the specific crimes.⁵⁷ Beginning with the *actus reus* of labor-related crimes, Articles 134-137 cover labor related accidents under the heading of “Crimes that Infringe on the Public Safety.”⁵⁸ The *mens rea* for most of

54. See, e.g., PRC Criminal Law, arts 134-37, 244.

55. LABOR LAW UNDERSTANDING AND CASES, *supra* note 50, at 305.

56. *Id.* Indeed the severity requirement is one common to the distinction between criminal and civil liability in the United States as well. The negligence required for criminal liability in the United States must be gross negligence or for recklessness, very gross or very severe. WAYNE R. LAFAVE, CRIMINAL LAW 224-28 (3d ed. 2000). The criminal code of China also requires the accidents must be severe. PRC Criminal Law, arts. 134-37, 244.

57. The Chinese Criminal Law is based on the German model with a general part and a specific part. Donald C. Clarke & James V. Feinerman, *Criminal Law and Human Rights in China*, in CHINA’S LEGAL REFORMS 135, 137 (Stanley Lubman ed. 1996).

58. Article 134 of the Criminal Law relates to the liability for staff members of a factory, mine, forestry center, construction enterprise or other enterprise or institution who causes an accident when he acts contrary to regulations. PRC Criminal Law, art. 134 (Wei Luo trans. 1998). Article 135 relates to the a factory, mine, forestry center, construction enterprise or other enterprise which fails to meet safety standards and thereby causes a serious accident. *Id.* art. 135. Article 136 relates to a person who “violates the regulations for controlling explosive, combustible, radioactive, poisonous or corrosive materials” and causes a serious accident. *Id.* art. 136. Article 137 relates to a “builder, designer, contractor or . . . engineer” who violates safety standards and causes an accident. *Id.* art. 137. Particular attention should be paid to Article 135 and its text, which is as follows:

Where a factory, mine, forestry center, construction enterprise, or other enterprise or institution which has work safety facilities failing to meet standards set by the state and does not take measures to remove hidden perils *that were pointed out* by relevant departments or its employees, thereby causing a serious accident involving injury or death and serious consequences, *personnel who are directly responsible* shall be sentences to fixed-term imprisonment . . .

Id. (Wei Luo trans.) [emphasis added].

Attention should also be paid to Article 244, which deals with forced labor that violates a laborer’s rights. PRC Criminal Law, art. 244. This Article is referenced in Article 96 of the Labor Law which states in relevant portion “Where the employing unit commits one of the following acts . . . persons who are held directly responsible shall be investigated for criminal responsibility according to

these crimes is assumedly negligence, and the accident caused must be “severe” (*zhongda*).⁵⁹ While the personnel directly responsible for the actus reus may be punished with either imprisonment or a fine.⁶⁰

What emerges from these provisions as cited above is that when a safety accident (1) occurs, (2) results in death, injury, or severe consequences, (3) is due to violations that had already been pointed out by the authorities or the employees of the corporation, and (4) is severe, then criminal liability shall attach for those personnel who are directly (*zhijie*) responsible for its occurrence.⁶¹ The provisions do not specifically mention punishing the enterprise itself through a fine or by halting its operations.⁶² The punishment for personnel under the circumstances in Articles 134-37 is up to three years in prison, and under particularly severe

law: . . . Compelling laborers to work by means of violence, intimidation or illegal restriction of personal freedom.” PRC Labor Law art. 96.

59. PRC Criminal Law, arts. 14-15. The Criminal Law sets out two types of mens rea: intentional and negligent. *Id.* Article 15 states:

A negligent crime refers to a crime committed by a person who should have foreseen that his act would possibly produce socially dangerous consequences but who fails to do so because of carelessness or, having foreseen the consequences, readily believes that they can be avoided, the result being that these consequences do occur.

PRC Criminal Law, art. 15 (Wei Luo trans. 1998). Article 16 of the Criminal Code states that if the consequences were “unforeseeable or unavoidable” there is no criminal responsibility. *Id.* The provisions above clearly mean, to translate this into American law terms, that a mental state of actual or imputed knowledge is necessary for the crime of negligence.

60. *Id.* arts. 30-31. Article 31 states:

A unit shall be fined in the case of committing a crime, and the responsible persons in charge or those directly at fault shall be punished. Where there are other stipulations in the Special Provisions of this Law or other laws, those stipulations shall prevail.

Id. art. 31. The corporate fiction is covered by Zhonghua renmin gonghe guo minfa tongze [General Principles of Civil Law in the People’s Republic of China] in XINBIAN, at 227. Under these principles there are no provisions that make it difficult for prosecutors to pierce the corporate veil and hold managers liable for the sins of the corporation. *See id.* In addition the Supreme People’s Court has ruled on this issue as well, holding that those entities which may be held liable for criminal liability are State-Owned Enterprises, Communal Enterprises, Enterprises, Commercial Enterprises, Joint Ventures, Cooperative Ventures, Wholly Owned Foreign Enterprises, and Domestic Privately Owned Enterprises. Zui gao renmin fa yuan: guanyu shenli danwei fanzui anjian juti yingyong de falu [The Supreme People’s Court on Related Questions on to the Appropriate Law for Adjudicating Cases in Which a Corporation Has Committed a Crime]. This leaves us with the idea that Chinese courts have indeed had no problem with holding corporate entities (*fa ren*) liable criminally for violations of labor safety standards, but another question emerges as to whether holding those directly responsible is indeed an appropriate way of holding the corporation responsible. Does holding a manager or someone who merely oversees the operation of the plant really mean that we are holding the corporation responsible? Perhaps the manager is an easy scapegoat. There may be some distinct problems with following liability for the corporation and those who actually control it in the Chinese case, especially when we are referring to the paradigm set forth by state enterprises.

61. PRC Criminal Law, arts. 134-37.

62. *Id.*

circumstances, three to seven years in prison.⁶³ In order to fully analyze this situation under the Criminal Law and make a proposal as to how it should be amended or reinterpreted, it will be necessary to consider each one of these elements separately and then in combination with one another. This methodology will parse out the strengths and weaknesses in the law.

III. THE SPECIFICS OF CRIMINAL SANCTIONS FOR LABOR SAFETY VIOLATIONS

A. *The Accident Must Have Already Occurred*

The effect of requiring that the accident must occur and must involve some sort of death, injury, or other severe result is that it precludes liability for reckless endangerment of workers or pre-accident circumstances that create a very high degree of risk.⁶⁴ Also, if the accident only involves a small or unserious consequence, then, absent some sort of minor criminal sanction (such as a fine), the law may proffer no incentive for a corporation to fix the problem and thereby avoid a larger or more serious accident in the future.

B. *The Accident Must be Due to Violations Already Pointed Out*

This element clearly shows that there must be actual knowledge of the safety violation on the part of those in charge and therefore rules out imputed knowledge. Without the possibility of prosecution for imputed knowledge, managers and personnel will have little incentive to inspect facilities and unearth latent hazards, except in the case where there are direct orders from the local MOLSS branch. The employees themselves may not have the technical skills necessary to spot a problem and avoid accidents. In addition, MOLSS inspection teams may be short handed and real inspections may not be conducted with regularity.⁶⁵ Thus, this requirement that the violation already be pointed out inhibits prosecution

63. *Id.*

64. This kind of a legal provision is not unheard of in the United States. The California Penal Code § 387 covers "Corporate Liability for nondisclosure of serious concealed danger subject to regulatory authority." CAL. PEN. CODE § 387 (Deering 2002). The provision makes punishable failure to disclose such violations before an accident actually occurs. This is a way of *avoiding* a serious problem and providing an incentive for managers to seek out and fix problems. *Id.*

65. Interview, July 8, 2002 (text on file with author).

and provides no incentive for managers to conduct regular inspections and refrain from negligent behavior.

C. The Personnel Directly Responsible Will Assume Criminal Liability

The largest problem with this phrase is that it is vague and undefined. The primary issue is whether the law holds the corporation, and *thus* the personnel responsible, or merely holds the personnel actually directly responsible liable for the damages caused. This debate is prominent in Chinese legal circles, and some scholars have argued vigorously that it should be the corporation and *thus* the personnel that are held responsible.⁶⁶ If it is the corporation that is primarily responsible, then this distinction may open the door for liability higher up the management chain.⁶⁷ The major question then becomes: how high up in the chain does the procurator need to go in order to ensure that the personnel with real power correct safety violations. Obviously, there is no one right answer, however there must be a balance between the power to correct the violation and the opportunity and duty of oversight of the workspace. This issue will become more salient when discussing possible amendments to the law.

D. Prosecuting Under a Theory of Murder

If there is an accident that causes the deaths of employees, then why can it not be prosecuted under a theory of negligent homicide? It should be noted here that negligent and intentional murder are certainly theories that *could* be used under the Chinese Criminal Law.⁶⁸ If the purpose of connecting criminal law and the labor law is to protect against death or

66. LONG BEI HAU & XIAO ZHONG HUA, XINGFA YINAN ZHENGYI WENTI YU SIFA DUICE [PROBLEMS AND DISPUTES OVER THE CRIMINAL LAW AND JUDICIAL POLICY] 264-67 (2001), [hereinafter CRIMINAL LAW & PROBLEMS]. The question here is what is the “subject” or “zhuti” of the crime. The authors of CRIMINAL LAW & PROBLEMS point out that because what we are talking about with regard to provision 135 of the PRC Criminal Law is essentially a negligent crime that we should hold the corporation and thus the personnel responsible for it. However, were it to be an intentional crime, then the corporation, clearly a legal fiction, would be an entity incapable of perpetrating such an offense. *Id.* at 264. With regard to the personnel directly responsible, the authors also point out that, based on other legal provisions, there are two possibilities of who should be held responsible: the managers and the workers, or just the workers. *Id.* at 265. The Authors believe that it should be just the workers. *Id.* at 265-66. This Note will take a different position arguing that both the managers and the workers should be held responsible. Indeed under some conditions it should be just the managers, and the high-up managers at that, who should be held responsible for such accidents.

67. *Id.*

68. PRC Criminal Law, ch. 4 (“Crimes Against the Person”).

injury then should there not be a reference in the Labor Law that points the procurator towards the provisions in the Criminal Law that deal with murder? This important question is one which will be addressed in the following sections.

IV. ENFORCEMENT ISSUES

It is quite obvious that despite the legal regime in place for enforcing the safety provisions in the Labor Law and in the newly enacted Safe Production Law, there are still a great deal of safety violations.⁶⁹ This Note shall begin to answer the question of how a more streamlined mechanism of criminal enforcement might just solve the problem.

A. *The Enforcement Apparatus*

Any evaluation of how to create an effective deterrent to the problem of enforcing labor safety standards will necessarily involve some comparison between the administrative and criminal law provisions for the enforcement of the law and the punishment of offenders. First, it is clear to some extent that administrative sanctions have not solved the problem because significant safety violations and large accidents continue in large numbers. Although administrative penalties have become much more severe, this part will show why the criminal justice is arguably better suited for the task of bringing down the number of labor safety violations.⁷⁰

As previously mentioned, the Ministry of Labor and Social Security is the administrative or bureaucratic agency responsible for inspecting facilities investigation whether the operation is in compliance with

69. A tragic fire killed 87 people at the Zhili Toy Factory in Southern China. Robert Sencer, *Toying with Lives*, AMERICAN EDUCATOR, Jan. 1, 2002, at 36. The factory was not in compliance with Shenzhen's fire safety regulations and managers had ignored the repeated warnings of a city inspection team. *Id.* A year later a dormitory collapsed at another toy factory killing eleven people. *Id.*

70. Two laws illustrate this nicely: The Law on the Promotion of Small and Medium Sized Enterprises and the Safety Protection Law. The SMSE law is quite obviously aimed at pushing Small and Medium Sized Enterprises, which constitute ninety-nine percent of China's total number of enterprises towards structural reform. Interview, July 27, 2002 (text on file with author). Still despite the fact that these laws represent concrete steps on the part of the Chinese government to get at the real problems facing the workers in the cities and suburban areas, the problem of enforcement is still the biggest issue. As was pointed out before, the Chinese Communist Party no longer maintains the same kind of tight reins on its cadres that it did during the Mao era. Lieberthal, *supra* note 27. Recently there has been much of scholarly attention given to the problem of corruption in China. The Deng reforms have given the local cadres even more room to move and thus, to break with central policies in favor of their own interests. See generally LU XIAO BO, CADRES & CORRUPTION (2000).

relevant safety standards.⁷¹ It is generally considered to be a small and ineffective ministry. Criminal enforcement, however, is carried out by the Public Security Agency (*Gonganju*), and criminal prosecutions are carried out by the local procuratorate.⁷² The chain of command then for prosecuting labor safety violations or accidents, which warrant criminal penalties under the current system, is that violators are detained by the public security apparatus and investigated by the procuratorates in a specific locality.⁷³ Once the procurators's investigation uncovers a violation, the prosecution is mandatory according to China's Criminal Law.⁷⁴

B. The Advantages to Using the Criminal Justice System

The most obvious difference between criminal and administrative enforcement is the severity of the penalty that is involved.⁷⁵ Under

71. PRC Labor Law, *supra* note 8, at Chapter 12.

72. The responsibilities of the various law enforcement agencies can be found in the following laws: *Zhonghua renmin gonghe guo jingcha fa* [The Police Law of the People's Republic of China], *in* XINBIAN; *Zhang gonghua renmin gonghe guo zhian fa* [The Public Security Law of the People's Republic of China], *in* XINBIAN. The organization and function of the People's Procuracy is laid out in *Zhonghua renmin gonghe guo jiancha fa* [The Procuracy Law of the People's Republic of China], *in* XINBIAN; *Zhonghua renmin gonghe guo jiancha yuan zuzhi fa* [The Organization Law of the People's Procuracy], *in* XINBIAN. For further discussion of these organs of the Chinese State, see WANG CHENGUANG & ZHANG XIANCHU, *supra* note 18, at 62-64. Some of the more relevant responsibilities include: investigating criminal cases, reviewing cases that other public security organs of the state have investigated, and "to initiate public prosecutions of criminal cases and support such prosecutions." *Id.* at 62.

73. See PRC Labor Law, *supra* note 8, at Chapter 5.

74. Article Three of the PRC Criminal Law states "Any act deemed by explicit stipulations of law as a crime shall be convicted and given punishment by law and any act that no explicit stipulations of law deem a crime shall not be convicted or given punishment." PRC Criminal Law, art. 3 (Wei Luo trans. 1998). Thus if the procurator finds after her investigation that the conduct in question is criminal then, according to the Criminal Law, the procurator *must* prosecute that act. This provision is further defined by the following passage from a commentator on the criminal law:

Article 3 of the criminal code states that "what the law formally deems criminal behavior shall be tried and punished according to the law. But, what the law does not formally deem criminal behavior must not be tried and punished." But what does this so-called "principle of the criminal law" deem as crimes, and what are the different criteria for each crime? Whatever they may be, we must follow the law, and what the law does not deem a crime we cannot punish someone for What is wrong does not necessarily violate the law, what is a violation of the law is not necessarily a crime, but what is a criminal wrong must be dealt with according to the law. Nevertheless, we must be careful not to talk about all of these situations as if they are the same.

Song Bo, *Lawyers Defending Each Other*, *in* ZHONGGUO LUSHI [CHINA LAWYER], Apr. 9, 1999, at 33.

75. The penalties for some labor-related crimes in the PRC can range anywhere from three to seven years. PRC Criminal Law, arts. 134-37. Once there has been a criminal investigation there must be a prosecution and if the defendant is found guilty then the punishment must be prison. *Id.* art. 134. It should also be noted, however, that China's Criminal Procedure Law does have the principle of

administrative law, the possibility of prison is not ruled out, but the length of the incarceration and the size of the fine will most certainly be less. The Criminal Law has more teeth one might say because threatening someone's freedom or life (if the accused is sentenced to death) surely has a greater deterrent effect on their conduct than does threatening their money.⁷⁶ Criminal sanctions also have other serious advantages to deterring enterprises. First, a criminal indictment may have a shaming function and is bad publicity, especially in the case of a foreign enterprise, for which the foreign media can play a very important role.⁷⁷ Second, criminal prosecutions involve the State and the individual. This will allow the Chinese State to play an active role in the punishment through a centralized system of procuratorates.⁷⁸ With criminal prosecutions there is not the same threat to the State's power that there would be from the individual pursuing a civil action on his or her own.⁷⁹ Finally, China's criminal law system is generally feared by the citizenry.⁸⁰

innocent until proven guilty or ("bu de fui ding wuzui"). Zhonghua renmin gonghe guo xingshi susong fa [Criminal Procedure Law of the People's Republic of China], art. 4, in XINBIAN.

76. See *supra* note 56.

77. Indeed, there is no liability for a foreign corporation that participates in a type of processing arrangement (*san lai yi bu*). In each of the three types of processing arrangements the firm provides something to a Chinese manufacturer and the manufacturer returns a finished product. In these arrangements the foreign firm remains relatively disconnected from the labor. Although the arrangement is not often used, it is still one avenue for foreign firms to escape liability. See Guanyu jiaqiang sanlai yibu guanli de ruogan guiding [Several Regulations on Improving the Management of Processing Arrangements], <http://www.law-lib.com.cn>. If these manufacturers were subject to criminal indictments there is a good chance that the response from the media would be even more potent. Perhaps then foreign manufacturers would be more careful about choosing their partners in a processing arrangement.

78. PRC CONSTITUTION, ch. 3, § 4.

79. In traditional Chinese Law there was not such a concept of due process. Criminal liability was imposed as a means of punishment and the presumption was one of guilt. See SOURCES OF CHINESE TRADITION, VOL. 1 90-100 (William Theodore DeBarry et al. eds., 1958) (stating that one of the major modes of thought behind early Chinese criminal law was exclusively to punish because it was assumed that anyone accused was a bad person whose character needed correction). See also HUANG REN YU, WANLI SHIWU NIAN [FIFTEEN YEARS OF THE EMPEROR WAN LI] 23-28 (1999) (painting a picture of typical Ming Dynasty justice in which the accused was brought before the emperor and simply sentenced without any chance to plead his or her case). See also HSUN TZU [WRITINGS OF HSUN TZU (XUN ZI)] 44-55 (2d ed. 1996) (laying out the dominant theories behind the legalist school of thought, which focused on punishment without much thought to a process of determining the guilt or innocence of the accused).

80. During the beginning of the Deng years and even into the 1980s China's government conducted movement-style crack downs on crime called the Stern-blows movement or rather the *yanda yundong*. These campaigns have left many of China's citizens with a bad taste in their mouths, because cadres were under pressure to arrest people which forced unsound convictions. One author writes: "Local police frequently brought in crime suspects with little or no evidence, insisting that local procurators prosecute and the courts convict. Years later, official court histories were deeply self-critical about the ease with which they had surrendered to this pressure during the campaign's first four months." Murray Scot Tanner, *State Coercion and the Balance of Awe: The 1983-86 Stern Blows*

The conclusion that one might arrive at is that China's criminal justice system is more capable of affectively dealing with the problem of labor safety violations. Of course, any proposed amendments to the Criminal Law or the Labor Law must comport with the kind of due process considerations that China is seeking to promote within its system.⁸¹ Indeed it is clear that many in the PRC are committed to establishing a solid criminal justice system.⁸² With this kind of a system in place and with the adequate protections and consideration for due process for those accused of crimes, the criminal law may very well go a long way towards correcting some of the problems that exist with labor safety violations. In fact, other countries⁸³ have also examined the possibility of using the criminal law to punish severe labor safety violations that lead to death or serious injuries of workers.⁸⁴

The remainder of this Note is devoted to a proposal that China deal with labor safety violations using a theory of murder and institute (1) a

Anti-Crime Campaign CHINA J., July 2000, 93, 125. Although such horrific campaigns have ceased, they are definitely an indication that the Chinese Government has shown that their criminal law system is to be taken seriously. *Id.*

81. The Chinese legislature revised its Criminal Procedure Law in 1996 calling for a drastic overhaul of the system. *See* PRC Criminal Procedure Law. Since the revisions the government has even conducted investigations into the progress of local cadres in enforcing some of the provisions. A report on the investigation and its progress states:

At the 9th session of the standing committee of the 19th National People's Congress, the head of the internal judicial committee Hou Zong Bin reported on the National People's Congress standing committee's examination of the enforcement of the Criminal Procedure Law of the People's Republic of China. This examination of the enforcement of the law was arranged through the work of the 2000 standing committee, which in September of 2000 created six small groups which proceeded to six places, including Tianjin municipality, the autonomous region of Inner Mongolia, Heilongjiang province, Zhejiang province, Hubei province and Xiaxi province to evaluate how the 1996 amended criminal procedure law had taken effect. At the same time the standing committee of the N.P.C. entrusted the task of investigating the effects of the new law to the local governments of six other places, including Hebei province, Jilin province, Shandong province, Guangxi province, Yunnan province, and Qinghai province.

Song Bo, *Evaluating the Execution of the Law*, CHINA LAWYER Apr. 1, 2000. One author even commented on the proposals coming out of the think-tank for the public security apparatus in the PRC: "recommendations [of the Number Four Institute of the Public Security Sector] . . . are actually more reformist than the content of China's recently revised Criminal Procedure Law." Murray Scot Tanner, *Changing Windows on a Changing China: The Evolving "Think Tank" System and the Public Security Sector*, 171 CHINA Q. 560, 570 (2002).

82. *Id.* at 570.

83. For an excellent analysis of the legal reforms which were greatly accelerated throughout the Deng-era and into the late 1980s, see SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA 19 (1995). The reforms culminated with the new criminal procedure code in 1996. *Supra* note 81.

84. Other scholars have determined that prosecution of executives for serious labor accidents is an appropriate use of the criminal law. Kathleen F. Brickey, *Death in the Workplace*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 4, 753 (1987).

more specific mens rea requirement for the offenses in question, (2) a defined set of criteria and theory that allows for ease of prosecution and investigation, and (3) reckless endangerment liability for serious violations of safety standards set out in both the Labor Law and the Labor Safety Law.

V. PROPOSAL FOR A NEW MODEL OF ENFORCING LABOR SAFETY LAWS AND REGULATIONS

A. *Negligent Homicide*

1. *Mens rea*

According to the PRC Criminal Law, there are only two mental states that may apply to crimes therein: negligent and intentional.⁸⁵ However, scholars have argued in favor of limiting the scope of negligent crimes within the Criminal Law, which may create a problem for this analysis because the provisions on safety accidents within the code do not make specific mention of negligence.⁸⁶ Thus, in order to apply the provisions in the Criminal Law dealing *specifically* with safety accidents there might need to be amendments that allow for such crimes to be prosecuted under a theory of negligence.⁸⁷ If, however, prosecution were to proceed under a

85. PRC Criminal Law, arts. 14-16.

86. PRC Criminal Law, arts. 15, 134-37. This becomes a problem when talking about the liability for managers for allowing a safety violation which eventually caused an accident to go on without remedy. Brickey, *supra* note 84, at 754-55 (stating that because there are not often incidents in which a corporate officer intentionally hurts those working for her, corporate criminal liability is predicated on neglect and the duty owed to the workers). Professor Brickey also notes, however, that it is not always clear whether the liability is premised on an affirmative act of the corporate officer (placing a harmful chemical in the way of workers without proper protection) or an omission (failing to provide protections or failure to remove the harmful chemical). *Id.* at 755 n.5. For the purposes of this discussion it would seem that under the requirements for mens rea for negligence of the Chinese Criminal Law, the liability can be premised on acting in a reckless manner or failing to act and therefore negligently breaching a duty. PRC Criminal Law, arts. 14-16. All that Chinese criminal law requires is that the actor in question disregard foreseeable consequences, and the provisions do not even make mention of a high degree of risk. PRC Criminal Law, art. 15. Admittedly, Chinese Criminal Law does not seem to be as sensitive to the act/omission distinction as does American criminal law. LAFAVE, *supra* note 56, at 250.

87. This analysis excludes two possibilities. First, although the Criminal Law makes no mention of what western criminal law terms strict liability or malum in prohibitum crimes, a judge might determine that the introductory language of provisions 134-137 does not call for any finding of a culpable mental state. PRC Criminal Law Articles 134-37 (stating that "any person" ("*you ren*") who commits the acts set forth shall be guilty of a crime). *Id.* Criminal law provisions that call for strict liability often begin with this kind of "any person who does X" language and they omit an adverb or adverbial phrase describing a mental state (i.e. willfully, intentionally, negligently, recklessly). LAFAVE, *supra* note 56, at 400. Second, because the Criminal Law arts. 134-37 makes mention of an

theory of murder, a negligent mental state would be expressly permitted in the provisions of the Criminal Law.⁸⁸ In the end, success may depend on the theory chosen, and the willingness of the procurator and judge to allow a negligence theory in a labor safety violation case.

Furthermore, in dealing with criminal prosecution for labor safety violations the most appropriate option for mens rea is criminal negligence. Although intentional violations of the standards themselves might be possible, the harm was most likely caused by the negligence of the manager or corporate officer.⁸⁹ Proceeding under a theory of negligent homicide, it will be necessary to determine the duty, the breach of that duty, and the causal connection between the act or the omission of the manager or corporate officer and the death or harm to the worker.⁹⁰

2. Duty

In western criminal law, negligent homicide will be predicated on some type of duty whether it be statutory, contractual, or familial.⁹¹ The Chinese Criminal Law makes no mention in the negligence provisions of any sort of duty owed to the person harmed or injured.⁹² Although negligence itself is not predicated on a breach of duty within the Chinese Criminal Law, this does not mean that there is no duty to workers upon which a theory of negligent homicide might be advanced.⁹³ The Labor Law expressly states that every worker has a right to a safe workplace.⁹⁴ The duty of the employer to provide the employee with a safe work place is further

“accident” (“*shigu*”), a judge might interpret the provision to *imply* that a theory of negligence might be appropriate.

88. Article 233 of the Criminal Law expressly permits prosecution on the grounds of negligent homicide. The punishment for negligently causing the death of another is 3 to 7 years unless otherwise dictated by provisions in the law. PRC Criminal Law, at art. 233. Article 235 of the Criminal Law allows for prosecution for negligently harming another person. *Id.* Articles 232 and 234 allow for prosecution for intentionally killing or harming another person respectively. *Id.*

89. Brickey, *supra* note 84, at 759.

90. See Clarke & Feinerman, *supra* note 57, at 137. The definition of negligence under the 1997 Criminal Law in China represents a vast change from the 1979 code. XIN XINGFA XIUGAI DUAN SHIYONG TUJIE [EXPLANATIONS AND USEFUL ANSWERS FOR THE AMENDED CRIMINAL LAW] 7 (Liu Jia Shen ed. 1997). Article 15 of the Criminal Law makes no explicit mention of an omission, but it does state that when a person *behaves* in such a way that they are disregarding foreseeable consequences then they should be guilty of a negligent crime. PRC Criminal Law, art. 15. This mention of “behavior” might be taken to mean that the person did not or do not affirmatively act. Thus, the omission might be part of or included in the definition of behavior; behavior is not defined in the Chinese Criminal Law. *Id.* ch. 1.

91. LAFAYE, *supra* note 56, at 292.

92. PRC Criminal Law, arts. 15, 233, 235.

93. *Id.*

94. PRC Labor Law, art. 3.

reinforced by the recently promulgated Safe Production Law.⁹⁵ Both the Labor Law and the Safe Production Law include provisions which state that if violations of the laws constitute a crime, then criminal liability will be imposed.⁹⁶ It seems possible then, if not entirely logical, that a procurator could premise a prosecution for negligent homicide under Article 233 of the Criminal Law on the duty that the employer or employing unit owes to the worker to provide a safe work place under the Labor Law⁹⁷ and the Safe Production Law. Because both of these laws are national laws they are controlling under all circumstances pertaining to laborers in the PRC.⁹⁸

3. *Breach*

In order for criminal prosecution to take place under most circumstances there needs to be harm caused, as the Criminal Code makes very little allowance for what American scholars would term inchoate crimes like attempt.⁹⁹ For a prosecution under a murder theory or injury to the person theory, a worker must be actually harmed through the negligent or intentional behavior of the employer.¹⁰⁰ Also, for prosecutions under provisions in the Crimes Against the Public Safety section of the Criminal Law there must be a large “zhongda” accident and the consequences must be severe or “yanzhong.”¹⁰¹ These provisions beg the question often asked about Chinese Law: to what extent exactly? Other laws are much more exact in the approach taken to what constitutes a large accident, but the criminal law makes nothing particularly quantifiable.¹⁰² In this analysis

95. *Id.* art. 92; Sener, *supra* note 68, at 37.

96. PRC Labor Law, art. 69.

97. *Id.* art. 9.

98. See PRC Legislation Law, ch. 2 (stating that national law (*fa*) decided by the National People's Congress or the Standing Committee of the National People's Congress is supreme to all regulations, or other provisions promulgated by lower organs or bodies within the Chinese government).

99. PRC Criminal Law, at art. 233.

100. *Id.* arts. 134-37, 233, 235.

101. *Id.* arts. 134-37.

102. In the case of medical accidents (*yiliao shigu*) where negligence is also used as a theory for liability, “severe” or “zhongda” is actually defined. Weishengbu guojiazhong yiyao guanli ju guanyu yinfa <<zhongda yiliao guoshi xingwei shigu baogao zhidu de guiding>> de tonzhi [The National Pharmaceutical Bureau: Notice on Regulations for the System of Reporting Severe Negligent Behavior and Medical Accidents], Aug. 20, 2002, <http://www.law-lib.com.cn>. The Notice states in relevant part “Severely negligent medical malpractice means that 3 or more patients have died or that 10 or more patients have suffered bodily harm.” *Id.* art. 4. Thus, the severity of the negligence is not determined by the amount of the harm done to the individual but by the amount of people harmed. This might be a situation analogous to the “severe” accidents called for under Articles 134-37 of the Criminal Law. PRC Criminal Law, arts. 134-37.

one must be satisfied with saying that it will be up to the procurator and ultimately the judge to determine what is severe or large enough to constitute a crime.

The next part of the breach that must be proven is the causal nexus between the harm inflicted and the behavior of the employing unit and those who manage it. Under the Chinese Criminal Code, employing units can be legal persons for the sake of the provisions in the code.¹⁰³ Jurisprudence has shown and scholars have argued that the actions of the employees may be imputable to the employing unit,¹⁰⁴ and that both may be held responsible for negligent and intentional crimes.¹⁰⁵ There is, therefore, some precedent in the Chinese system for holding the managers liable for breaching a duty to provide the workers with a safe workplace and thereby causing harm.

4. Punishment

The final question to resolve is: which one of the corporate actors should be held responsible for breaching a duty under the Labor Law and thereby causing an accident and injuries or deaths of workers. Ideally, such provisions would provide an incentive to whomever in that particular enterprise truly has the power to correct the problems that could potentially lead to accidents by directing funds to the manager overseeing the workers or an inspection team. Designing a catchall provision of that nature or manipulating provisions within the pre-existing law to that end is surely not an easy task.

103. *Id.* ch. 2, § 4. Note that a debate has emerged amongst legal scholars concerning whether or not the legal entity or enterprise may be held liable for a negligent crime as well as an intentional crime. CRIMINAL LAW & PROBLEMS, *supra* note 66, at 74. The consensus with regard to whether or not a legal entity may be held liable for a negligent crime is “intentional crimes first, and negligent crimes second.” *Id.* at 74. This general trend of the courts being tentative about charging a corporation with a negligent crime is also reflected in American law. See Brickey, *supra* note 84, at 759 (stating that Illinois criminal homicide statutes state that the crime must be committed by a person).

104. Corporate criminal liability in China was not originally included in the 1979 criminal code, but rather began with the promulgation of Customs Law in 1987. In those regulations a corporate entity including governmental organs and collectives may be charged with the crime of smuggling. *Zhonghua renmin gonghe guo hai guan fa* [The Customs Law of the People’s Republic of China], in XINBIAN. This kind of liability has become more important as the PRC develops a private sector within its socialist market economy and new corporate forms have developed. CRIMINAL LAW & PROBLEMS, *supra* note 66, at 66. Since the promulgation of the 1979 criminal code a host of joint ventures, cooperative ventures, wholly owned foreign enterprises, and partnership enterprises have emerged. See generally LARDY, CHINA’S UNFINISHED ECONOMIC REVOLUTION, *supra* note 24; NICHOLAS LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY (2002); HE QING LIAN, XIANDAIHUA DE XIANJING [THE TRAPS OF MODERNIZATION] (1988). In short, as more and more corporate actors have emerged the demand for corporate liability has become greater.

105. See CRIMINAL LAW & PROBLEMS, *supra* note 66, at 249.

It is helpful, therefore, to begin with the purpose of criminal sanctions for labor safety violations. Clearly there are three: punishment, deterrence, and education.¹⁰⁶ The Criminal Law states that when a corporate entity is the subject of a criminal prosecution that the personnel directly responsible and the personnel in charge for the incident will bear responsibility.¹⁰⁷ This kind of a vague provision leaves room for interpretation. Because current corporate law maintains the division of labor typical to corporate law in most other countries, it would seem that going after corporate officers would be the way to get the results desired.¹⁰⁸ This result is ideal, but getting that high up the food chain in a Chinese court will certainly be difficult. It would also seem, however, that punishing a manager who may or may not have any power to fix a violation that has been reported to her would be unfair, although possibly easier to sell to a judge. On the other hand, one might argue that both of these actors should most likely bear responsibility. If a corporate officer has the power to fix a problem and does not, then he must pay the price for causing the death of a worker or workers. If a manager has reported the violation and a corporate officer refuses to have the problem fixed, and the manager lets the workers continue to be exposed to a grave risk of injury, then that manager should also bear criminal responsibility. Even if the corporate officers refuse to correct the violation, the manager still has the option to report the violation to the labor authorities under the Labor Law, and, as a last resort, the manager might set an example by quitting. Perhaps unemployment is preferable to prison. In the end, not every case will be the same, and it will all also depend on what the actors knew. From a policy standpoint, such prosecutions should (1) deter future violations, (2) educate managers and corporate officers as to their responsibility under the law, and (3) punish guilty offenders.

B. Reckless Endangerment

The Chinese Criminal Code makes no allowances for prosecution under a theory of reckless endangerment.¹⁰⁹ However, this provision is not

106. These are generally considered some of the main purposes of criminal law in the United States. LAFAVE, *supra* note 56, at 7-12. Certainly these are some of the purposes set forth in the "General Principles" section of the 1997 Criminal Law. PRC Criminal Law ch. 1.

107. *Id.* ch. 1.

108. See Zhonghua renmin gongheguo gongsi fa [Company Law of the People's Republic of China] chs. 1-3, in XINBIAN.

109. For a description of theories of reckless endangerment, see LAFAVE, *supra* note 56, at 292.

unheard of under the criminal law in other countries.¹¹⁰ This kind of liability will most likely be un-welcomed by Chinese authorities, but criminal liability beyond administrative fines would certainly provide a stronger deterrent for corporate officers and managers to be stricter and more disciplined regarding inspections of the facilities. Any liability for managers or officers in this context would have to be sought under an amendment to the Chinese Criminal Law.¹¹¹

C. The Cultural Variable and the Politics of Enforcement

All the issues of enforcement of the law in the People's Republic of China is beyond the scope of this Note. Nevertheless, some of the questions left unanswered above will be answered more clearly in the context of the institutional and cultural situation in China. This is not to say what is right and wrong, or even what would be desirable to everyone involved, rather it is a question of what will work.¹¹²

Prevailing localism in the Deng-era has made local officials into entrepreneurs.¹¹³ Many of these officials may have connections to officials in the labor department or even in the procuracy.¹¹⁴ The above mentioned framework *depends* on the commitment of the government to correct the problem.¹¹⁵ Enforcement of the law must be voluntary, and can only be achieved through the zealous cooperation of a variety of actors within society.¹¹⁶ There are, however, several factors which make enforcement

110. See California Penal Code, § 387.

111. It is uncertain as to whether liability should consist of a criminal fine or actual jail time. The Chinese Criminal Law is very specific on the extent of punishment for each type of crime. See, e.g., PRC Criminal Law, arts. 134-37. Failure to comply with safety inspection rules will certainly result in a money penalty administered by the labor department. PRC Labor Law, ch. 12. Thus, it would seem that a suspended sentence or perhaps even a short jail term if the violations are extraordinarily serious would have more of an educational and deterrent effect for corporate officers and managers.

112. Given the dire straights of laborers in the PRC, others have suggested the use of law as a means for solving the more serious problems. Senser, *supra* note 69, at 39. If law, and not policy, is the answer then criminal law may be the most appropriate legal mechanism.

113. Local officials have become the heads of many of these factories that are the sites of these accidents. Senser, *supra* note 69, at 37-39. For trends of local corruption, see LU XIAO BO, *supra* note 70.

114. Senser, *supra* note 69.

115. Scholars in China hope for the independence of the judicial system. WANG PIN, SIFA GONGZHENG HE DULI [JUDICIAL INTEGRITY AND INDEPENDENCE] 88 (2001). For now the State, consisting of the party and the governmental institutions has total control and the judiciary remains just another arm of the bureaucracy. *Id.* DAVID SHAMBAUGH, THE CHINESE STATE ch. 3 (2000).

116. BASSIOUNI ET AL., INTERNATIONAL CRIMINAL LAW 471 (2000).

through the criminal law a more attractive option than either the administrative or civil law.

First, the procuracy is larger than most of the departments within the Chinese bureaucracy.¹¹⁷ This is true as well with regard to the Public Security Apparatus.¹¹⁸ More procurators and more public security officials means that there is better potential for enforcement of the criminal law. Second, the criminal law has a long and sound place in the Chinese legal tradition.¹¹⁹ Those who harm the good of the whole must be punished, or so the story goes. Third, and finally, the criminal law is the State versus the individual or legal person. Enforcement through the criminal law allows for the Chinese government to play the leading role, instead of individual lawyers and workers seeking redress under the civil law.¹²⁰ Lawyers challenging the State are generally seen as subversive and meddlesome.¹²¹ An increase in criminal sanctions for labor safety violations may very well have the desired deterrent and educational effects.

In summary, the strategy laid out above uses the law in existence in the People's Republic of China to prosecute both managers and corporate officers for severe violations of the Labor Law under a theory of negligent homicide. Alternatively, the Chinese government may choose to prosecute under provisions in the specific part of the Criminal Law which deal with labor accidents under the heading of Crimes Against the Public Safety.¹²² Reckless endangerment liability is not unheard of, but is only possible if the Criminal Law is amended to include such provisions. Regardless of the liability theory used, China's workers are in dire need of assistance at this junction in the reform process. Using the Criminal Law would not only instill more confidence in China's legal system for those domestic and foreign actors who see it as an unreliable institution,¹²³ but it may very

117. See Zhai, Jianxiong Judicial Information of the People's Republic of China: A Survey, available at <http://www.llrx.com/features/chinajudicial.htm#Court%20System> (last visited Dec. 19, 2003) (noting the size of the procuracy in comparison to other parts of the judicial system). There are around thirteen offices of procuracy per province. *Id.*

118. See Tanner, *supra* note 81, at 570.

119. ZHONGGUO FALU SHI, *supra* note 22, at 5-10.

120. Lawyers using the civil law to defend the rights of workers has led to disaster in the past as two lawyers have already been imprisoned by provincial authorities. See 2002 CECC REPORT, *supra* note 11, at 87.

121. *Id.* at 87. Charles Chao Liu, Note, *China's Lawyer System: Dawning Upon the World Through A Tortuous Process*, 23 WHITTIER L. REV. 1037, 1037 (2002).

122. PRC Criminal Law, arts. 134-37.

123. 2002 CECC REPORT, *supra* note 11, at 84-120.

well also strengthen the powers of the Chinese judiciary and procuracy in the eyes of other arms of the bureaucracy.

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