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## What Can We Do?

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## WHAT CAN WE DO?†

*Jonathan D. Karmel\**

As a country we face a great challenge; the challenge to do everything possible to make Americans safe at their workplaces. But, what is the measure of that challenge? How can we know when we have done everything possible? While there is no doubt that reported deaths and injuries have declined over the years, is there a number that is acceptable as the cost of doing business? At what point can we say that we have done enough? Is one preventable death acceptable? Are more rules and regulations going to move the statistical needle? Or, without meaningful deterrence and enforcement, are more rules and regulations just thousands of words on the pages of the *Federal Register*? Does protecting American workers extend beyond their physical safety at a work site, to caring for the workers, and their families, when they become injured, disabled, or die?

Before addressing these questions, it is important to consider the arguments of those who oppose robust and effective health and safety laws, and a larger role for government oversight and leadership. To begin with, there is a popular, if not prevailing, view in America that throws up its hands and reduces the complexity of worker safety to the simple notion that life is inherently and randomly dangerous, and we cannot be expected to protect every worker, nor should we. Accidents happen. Trains derail. Cars crash. Workers get injured, and die at their jobs.

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† “What Can We Do?” is excerpted from the author’s recently finished book, *Dying to Work*, a collection of short stories from and about workers who were injured or killed on the job. The stories are portraits of the worker, their life, dreams, and, of course, about their accident that tragically changed their life and the lives of everyone around them. The stories are bookended first by a brief history of safety laws that still today leave millions of workers without effective compensation and employers without any meaningful incentive to keep their workers safe. In the last part of the book, and from interviews with leaders in politics, government, business and labor, *Dying to Work* attempts to provide some answers to questions about worker safety, and to offer policy suggestions that may make American workers safer and employers more accountable.

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This fatalism has been widely appropriated by politicians and policy makers as the go-to rebuttal to practically any social problem that could be fixed or ameliorated by the hand of government. This do-nothing attitude is most often expressed in the gun debate; any type of gun control regulation will not stop all killings, so why increase regulation at all? It is the marching beat of the big government that destroys our freedoms. Workers, and worker safety, have not escaped the broad brush of this public policy nihilism. But it is an inherently unsound and immoral argument, especially when it comes to worker health and safety.

Two prominent conservative think tanks, the Cato Institute (“Cato”) and the Mercatus Center at George Mason University (“Mercatus”), are archetypical of those who espouse and promote this “anti-government organizing” philosophy and, in turn lobby politicians to codify its principles.<sup>1</sup> Cato was founded by the Charles Koch Foundation.<sup>2</sup> David Koch is a member of Cato’s Board of Directors.<sup>3</sup> When it comes to worker safety, Cato has argued that free markets “have done much better than governments at providing safety” for workers.<sup>4</sup> Founded in 1980, Mercatus labels itself as a university-based research center for “market-oriented ideas.”<sup>5</sup> Mercatus’ Board of Director, Richard Fink, is also an Executive Vice President of Koch Industries, Inc., and a member of its Board of Directors.<sup>6</sup> He founded Mercatus in 1978, which was briefly housed at Rutgers University before relocating to George Mason in 1980.<sup>7</sup> Charles Koch sits on Mercatus’ Board of Directors.<sup>8</sup> Since 1985, Mercatus and George Mason have received more than \$30 million from Koch foundations.<sup>9</sup>

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<sup>1</sup> *Koch and George Mason University*, DESMOGBLOG, <http://www.desmogblog.com/koch-and-george-mason-university> (last visited Feb. 2016).

<sup>2</sup> Eric Lichtblau, *Cato Institute and Koch Brothers Reach Agreement*, N.Y. TIMES (June 25, 2012, 6:40 PM), [http://thecaucus.blogs.nytimes.com/2012/06/25/cato-institute-and-koch-brothers-reach-agreement/?\\_r=0](http://thecaucus.blogs.nytimes.com/2012/06/25/cato-institute-and-koch-brothers-reach-agreement/?_r=0).

<sup>3</sup> *Board of Directors*, CATO INST., <http://www.cato.org/board-of-directors> (last visited Feb. 2016).

<sup>4</sup> David R. Henderson, *Are We Ailing from Too Much Deregulation*, CATO INST. (Dec. 2008), <http://www.cato.org/policy-report/novemberdecember-2008/are-we-ailing-too-much-deregulation>.

<sup>5</sup> *About*, MERCATUS CTR., <http://mercatus.org/content/about> (last visited Feb. 2016).

<sup>6</sup> *All-Board of Directors*, MERCATUS CTR., <http://mercatus.org/all-people/1285> (last visited Feb. 2016).

<sup>7</sup> *History and Timeline*, MERCATUS CTR., <http://mercatus.org/content/history-and-timeline> (last visited Feb. 2016).

<sup>8</sup> *All-Board of Directors*, MERCATUS CTR., <http://mercatus.org/all-people/1285> (last visited Feb. 2016).

<sup>9</sup> Tess VandenDolder, *It’s Not Just Politics: The Koch Brothers Give Big Bucks to Influence Higher Education Too*, DCINNO (Sept. 12, 2014, 1:56 PM), <http://dcinno.streetwise.co/2014/09/12/its-not-just-politics-the-koch-brothers-give-big-bucks-to-influence-higher-education-too/>.

Cato publishes a quarterly journal, *Regulation*, which boasts that it examines nearly every market, “and nearly every government regulation.”<sup>10</sup> Its contributors and editorial board include the most prominent conservative thinkers and academicians in America, including the late Supreme Court Justice Antonin Scalia.<sup>11</sup> In 1995, *Regulation* published an article with the make-no-mistake-about- it title “*Abolishing OSHA*”.<sup>12</sup> The authors, Thomas J. Kniesner and John D. Leeth, argue that “OSHA can never be expected to be effective in promoting worker safety; that an expanded OSHA will cost jobs as well as taxpayer dollars; and that other means currently keep workplace deaths and injuries low and can reduce them even more.”<sup>13</sup> This conclusion neatly fits into Cato’s anti-government and anti-regulatory construct, but it is a badly flawed.

One of the most inconvenient truths standing in the way of this argument is the indisputable fact that since OSHA’s inception in 1970, workplace deaths have decreased more than 66% as of 2013.<sup>14</sup> During this same period, occupational injuries and illnesses declined by 67%.<sup>15</sup> All of this occurred at a time when the United States workforce nearly doubled in size.<sup>16</sup> Fatalities went from 38 workers per day in 1970 to 12 per day in 2013.<sup>17</sup> As of 2014, injuries and illness are down to 3.3 per 100 workers from 11 per 100 in 1970.<sup>18</sup> How does Leeth address these facts? He argues that the decline in workplace injuries has more to do with temporal coincidence than anything attributable to OSHA.<sup>19</sup> Faced with more than 40 years of data, Leeth asserts in a 2013 Mercatus article that OSHA is “not the major cause” of the decline. However, he did begrudgingly admit that OSHA has had a “modest” role in improving worker safety.<sup>20</sup>

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<sup>10</sup> *About Regulation Magazine*, CATO INST., <http://www.cato.org/regulation/about> (last visited Feb. 2016).

<sup>11</sup> *Id.*

<sup>12</sup> Thomas J. Kniesner & John D. Leeth, *Abolishing OSHA*, 4 REGULATION. 46 (1995).

<sup>13</sup> *Id.*

<sup>14</sup> Occupational Safety & Health Admin., *Commonly Used Statistics*, U.S. DEP’T OF LABOR (2016), <https://www.osha.gov/oshstats/commonstats.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Occupational Safety & Health Admin., *supra* note 14.

<sup>18</sup> *Id.*

<sup>19</sup> John Leeth & Nathan Hale, *Evaluating OSHA’s Effectiveness and Suggestions for Reform*, MERCATUS CTR. (Apr. 23, 2013), <http://mercatus.org/publication/evaluating-oshas-effectiveness-and-suggestions-reform>.

<sup>20</sup> *Id.*

This would be a major concession, albeit belated, from the author of *Abolishing OSHA*, except that the “modest” role might have been even greater if OSHA had been given more resources to protect workers, and not less. In a revealing moment of tone deafness, typical of those that spin facts to fit their belief systems without considering an alternative reality, Leeth writes that OSHA’s inspection efforts have only reduced injuries by 4%.<sup>21</sup> Stop and take a moment to think about that statement made in support of the ineffectiveness of OSHA. Then, consider the fact that OSHA is armed with very few inspectors; there are only about “2,200 inspectors responsible for the health and safety of 130 million workers, employed at more than 8 million worksites around the nation—which translates to around one compliance officer for every 59,000 workers.”<sup>22</sup> Given this miniscule enforcement resource, it is a wonder that inspections have reduced injuries by even as little as 4%.<sup>23</sup> Rather than argue for more inspections, the do-nothing “anti-governmenters” want fewer inspections, even as the data indisputably shows that employers who have been inspected have fewer safety problems later on. A study of more than 500,000 OSHA inspections found that total violations decreased by 28-48% from the initial OSHA inspection to the second.<sup>24</sup>

Even for Cato and Mercatus acolytes, it is tough to continue to insist that OSHA “can never be expected to be effective in promoting worker safety” when faced with hard facts that assert otherwise.<sup>25</sup> Thus, the updated view offered by Cato, Mercatus and others, is that “OSHA can best complement the other pillars of the U.S. policy system by providing information to workers about possible hazards, particularly health-related hazards, and by gearing inspections toward worksites where dangers are hard to monitor and firms employing less mobile and less knowledgeable workers.”<sup>26</sup> This hard won acknowledgement is long overdue, but is tempered by the persistent denigration of OSHA’s funding and rule making authority. Instead, it is argued that OSHA is merely a complement to the other pillars of worker safety policy.<sup>27</sup> It is important to note, at this point no worker safety advocates have

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<sup>21</sup> *Id.*

<sup>22</sup> Occupational Safety & Health Admin., *supra* note 14.

<sup>23</sup> Leeth & Hale, *supra* note 19.

<sup>24</sup> David Michaels, *OSHA Does Not Kill Jobs; It Helps Prevent Jobs From Killing Workers*, 55 AM. J. INDUS. MED. 961 (2012).

<sup>25</sup> Kniesner & Leeth, *supra* note 12.

<sup>26</sup> John Leeth, *OSHA’s Role in Promoting Occupational Safety and Health*, MERCATUS CTR. (Nov. 13, 2012), <http://mercatus.org/publication/oshas-role-promoting-occupational-safety-and-health>.

<sup>27</sup> *Id.*

ever argued that OSHA is the only pillar in worker safety policy. Rather, they assert that OSHA is part of a comprehensive occupational health and safety regime.<sup>28</sup> Nonetheless, let us examine a policy system that the other pillars of the market-oriented proponents claim will protect American workers.

A 2008 Cato policy report argues that “[f]ree markets have done much better than government at providing [worker] safety, fairness, economic security, and environmental sustainability.”<sup>29</sup> Simply stated, there is nothing that this single source solution could not fix if the government would just get out of its way. But in regard to workplace safety, Henderson writes, “[i]n short, there is and has been a ‘market for safety.’”<sup>30</sup> Leeth similarly argues that the labor market is one of the four pillars in the U.S. worker safety policy system.<sup>31</sup> “The positive relationship between wages and risk means firms with better safety records are rewarded in the market by being able to pay less to attract equally qualified workers than firms with worse safety records.”<sup>32</sup> Let us see if this statement holds true.

The argument is that workers demand job safety “by the wage premium we insist on to take a given risk.” As this so-called risk-wage premium rose, employers found it cheaper to avoid the risk premium by increasing safety in the workplace.<sup>33</sup> One of the many fallacies of this argument is the assumption that workers are aware of the risks in their workplace, and armed with this information, can make an informed, rational decision about whether to work there and at what price. This is an enormous assumption that, in the real world, simply does not exist. We know that employers and employees underreport in substantial numbers.<sup>34</sup> Accordingly, true and accurate information is simply unavailable.<sup>35</sup> Moreover, in almost all instances, workers simply do not possess the information to demand a wage premium based on an assessed risk, accurate

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<sup>28</sup> Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 (2016).

<sup>29</sup> David R. Henderson, *Are We Ailing from Too Much Deregulation*, CATO INST. (Dec. 2008), <http://www.cato.org/policy-report/novemberdecember-2008/are-we-ailing-too-much-deregulation>.

<sup>30</sup> *Id.*

<sup>31</sup> John Leeth, *OSHA's Role In Promoting Occupational Safety and Health*, MERCATUS CTR. (Nov. 13, 2012), <http://mercatus.org/publication/oshas-role-promoting-occupational-safety-and-health>.

<sup>32</sup> *Id.*

<sup>33</sup> David R. Henderson, *Are We Ailing from Too Much Deregulation*, CATO INST. (Dec. 2008), <http://www.cato.org/policy-report/novemberdecember-2008/are-we-ailing-too-much-deregulation>.

<sup>34</sup> Thomas A. Robinson, *New Study Points to Significant Underreporting of Injuries to Bureau of Labor Statistics*, LEXISNEXIS (Aug. 29, 2014, 7:27 PM), <http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2014/08/29/new-study-points-to-significant-underreporting-of-injuries-to-bureau-of-labor-statistics.aspx>.

<sup>35</sup> *Id.*

or otherwise.<sup>36</sup> Even if an employer's real safety record is known to a worker when completing a job application while sitting in the human resource office, workers are not insurance companies—they are unable to underwrite their expected wage rate based on the safety risk of their prospective employer. They simply are not armed with the ability to handicap their job risk, nor do they possess the bargaining power to use the information as leverage against a prospective employer.<sup>37</sup> As will be discussed, this inequality of bargaining power is even greater in the context of non-union workers.

Regardless, by the very nature of a particular job or industry some risks are patently obvious. Working in an underground coal mine, one thousand feet inside a mountain, poses an obvious risk for which a worker could demand a higher wage. But even then, the most important information is often unknown. For example, miners working at the Upper Big Branch mine were unaware that their employer was violating mine safety laws, including those designed to prevent mine explosions, when the mine exploded from coal dust combustion.<sup>38</sup> Had they known the real risks involved with their jobs, there is certainly no wage premium large enough that a reasonable worker would have accepted.

That is, of course, unless there are no other jobs tucked into the hollers of West Virginia or eastern Kentucky, which raises yet another fallacy in the market-oriented argument. In a scenario where supply outstrips demand, particularly in time periods or industry sectors with high unemployment, basic economics dictate that workers can demand nothing in the way of a wage-risk premium.<sup>39</sup> They take the jobs that are there offered at the wage offered. Thus, notwithstanding the inherent dangers in the dangerous underground mining, for these workers there is mining or the military.

Moreover, the ability of workers to demand higher wages has historically depended in large part on their power to bargain. In 2012, the Wall Street Journal acknowledged the existence of a union-wage premium of around 23%

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<sup>36</sup> Gabriel Brunswick et al., *Comments on the Forthcoming Injury and Illness Prevention Program Rule (RIN 1218-AC48)*, N.Y.U. (Aug. 7, 2013), [http://policyintegrity.org/documents/Policy\\_Integrity\\_Letter\\_on\\_I2P2.pdf](http://policyintegrity.org/documents/Policy_Integrity_Letter_on_I2P2.pdf).

<sup>37</sup> *Id.*

<sup>38</sup> Samira J. Simone, *Mining Disaster Raises Questions About Effectiveness of Safety Laws*, CNN (Aug. 9, 2010, 6:19 AM), <http://www.cnn.com/2010/US/04/09/west.virginia.mine.safety/>.

<sup>39</sup> *Supply, Demand, and the Invisible Hand*, INFOPLEASE (2003), <http://www.infoplease.com/cig/economics/change-supply.html>.

between workers in right-to-work states versus non-right-to-work states.<sup>40</sup> In union settings, workers can demand a higher wage through their ability to bargain collectively.<sup>41</sup> Not so much for non-union workers, including those working in the largely union-free underground coal mining industry.<sup>42</sup>

Furthermore, the benefits of unionization and collective bargaining also extend to safety. Union work sites are safer than non-union work sites.<sup>43</sup> However, this is not attributable to the union-wage premium, but rather to the negotiated mechanisms and legal protections in place at a union work site. For example, unions often negotiate safety rules and have robust safety committees.<sup>44</sup> Moreover, workers at a union plant are less fearful to complain about unsafe working conditions than at a non-union plant.<sup>45</sup> Nowhere is this more evident than in the coal industry where miners fear for their jobs if they raise health or safety concerns. The Upper Big Branch was a non-union mine.<sup>46</sup> According to the United Mine Workers of America, between 2002 and 2010 “[only around] 11 percent of U.S. coal mining fatalities—or 30 fatalities—have occurred at unionized mines.”<sup>47</sup>

Finally, the *laissez faire* risk-wage premium that is supposed to invisibly protect workers is of little protection to the millions of low wage workers, many of whom are women of color and undocumented.<sup>48</sup> The risk-wage premium for these workers is virtually non-existent, particularly for undocumented workers in dangerous industries like construction and landscaping.<sup>49</sup> The threat of deportation and other penalties for immigration

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<sup>40</sup> Ben Casselman, *Closer Look at Union vs. Nonunion Workers’ Wages*, WALL ST. J. (Dec. 17, 2012, 3:40 PM), <http://blogs.wsj.com/economics/2012/12/17/closer-look-at-union-vs-nonunion-workers-wages/>.

<sup>41</sup> Daniel Disalvo, *The Trouble with Public Sector Unions*, NAT’L AFFAIRS (2010), <http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>.

<sup>42</sup> *Id.*

<sup>43</sup> Scott Schneider, *Yes, Union Construction Really is Safer*, LABORERS’ HEALTH & SAFETY FUND N AM. (Oct. 2015), <http://www.lhsfna.org/index.cfm/lifelines/october-2015/yes-union-construction-really-is-safer/>.

<sup>44</sup> *Id.*

<sup>45</sup> James Sherk, *What Unions Do: How Labor Unions Affect Jobs and the Economy*, THE HERITAGE FOUND. (May 21, 2009), <http://www.heritage.org/research/reports/2009/05/what-unions-do-how-labor-unions-affect-jobs-and-the-economy>.

<sup>46</sup> David Moberg, *Fatalities Higher at Non-Union Mines—Like Massey’s Upper Big Branch*, IN THESE TIMES (Apr. 9, 2010, 12:51 PM), [http://inthesetimes.com/working/entry/5813/fatalities\\_higher\\_at-non-union\\_mineslike\\_masseys\\_upper\\_big\\_branch](http://inthesetimes.com/working/entry/5813/fatalities_higher_at-non-union_mineslike_masseys_upper_big_branch).

<sup>47</sup> Daniel Malloy, *Are Union Mines Safer?*, PITT. POST-GAZETTE (Apr. 18, 2010, 12:00 AM), <http://www.post-gazette.com/local/region/2010/04/18/Are-union-mines-safer/stories/201004180265>.

<sup>48</sup> *Injustice On Our Plates*, S. POVERTY L. CTR. (Nov. 7, 2010), <https://www.splcenter.org/20101108/injustice-our-plates>.

<sup>49</sup> *Id.*

violations naturally reins in a worker's demand for a higher wage in exchange for a safety risk. Additionally, the risk-wage premium offers no protection for the millions of temporary workers who have many "new" jobs each year in different industries and are given little or no safety training at their temporary job.<sup>50</sup> These workers, typically without a union, can be "returned" to the employment agency for a less difficult worker.

In the end, today there is no risk that wage premium can adequately protect, if at all, American workers. Instead, in the United States, the workforce is more part-time than ever before;<sup>51</sup> and the new temporary worker is waiting to take their place. Unionization is at 11% of the workforce, a historical low water mark.<sup>52</sup> Against this backdrop of a fractured and vulnerable workforce, the politics and philosophy of *lassiez faire* fatalism promoted by the ascended plutocracy, championed and funded by the Koch brothers,<sup>53</sup> has continued to put American workers at great risk, but with no risk-wage premium.

The other two pillars protecting workers, according to Leeth, are the legal and workers compensation systems.<sup>54</sup> But, for the free marketers, these systems work as intended, a true statement, but not necessarily for the good of worker safety.

The legal system, which the free marketers argue incentivizes employers to provide safe working conditions for fear of financial liability, actually does nothing of the sort. The workers' compensation system was precisely designed to insulate employers from liability imposed in a court by a jury for the death and injuries to its workers.<sup>55</sup> Injured workers, and surviving family members, have no legal recourse against their employers outside of workers' compensation benefits.<sup>56</sup> As such, legal claims can only be brought against

<sup>50</sup> *Id.*

<sup>51</sup> Jill Mislinski, *Ratio of Part-Time Employed Remains Higher Than the Pre-Recession Levels*, ADVISOR PERSPECTIVES (Feb. 8, 2016), <http://www.advisorperspectives.com/dshort/updates/Full-Time-vs-Part-Time-Employment>.

<sup>52</sup> *Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 28, 2016, 10:00am), <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>53</sup> Dave Levinthal, *How the Koch Brothers Are Influencing U.S. Colleges*, TIME (Dec. 15, 2015), <http://time.com/4148838/koch-brothers-colleges-universities/>.

<sup>54</sup> John D. Leeth, *OSHA's Role in Promoting Occupational Safety and Health*, MERCATUS CTR, Nov. 2012, at 4.

<sup>55</sup> *What Employer's Need to Know About Workers' Compensation Insurance*, 360 DEGREES OF FINANCIAL LITERACY, <http://www.360financialliteracy.org/Topics/Insurance/General-Insurance-Topics/What-Employers-Need-to-Know-about-Workers-Compensation-Insurance>.

<sup>56</sup> *Id.*

third-parties, for example the manufacture of a machine that injured an employee.<sup>57</sup> But, these claims are exceedingly difficult and expensive to prove, and are often subject to liability caps that were enacted by politicians hostile to worker safety, and beholden to the likes of the Kochs and their allies.<sup>58</sup>

The final pillar, workers' compensation, is a varied system of state laws that depends on the same hostile politicians for their continued existence and benefit levels. Too many workers live and work in states with workers' compensation systems that make it difficult for them to obtain adequate benefits. In a bit of a spoiler alert, the dominance of corporate money in politics has resulted in the significant reduction of workers' compensation benefits and the creation of more legal hurdles for workers to clear before they receive these parsimonious benefits.<sup>59</sup> These same politicians tout their failed - for workers—workers' compensation systems as a reason for businesses to relocate to their employer friendly states.<sup>60</sup> For example, the Indiana Economic Development Corporation, the State's economic development agency, proudly brags on its website the usual list of pro-business incentives for businesses considering whether to move to Indiana.<sup>61</sup> These include its low corporate tax rate, right-to-work law, and that Indiana has the nation's second lowest workers' compensation rates.<sup>62</sup> These rates, and lower workers' compensation costs, are attributable in large part to Indiana's low average weekly wages, 35th in the Nation.<sup>63</sup> Yet, despite the low wages, and low workers' compensation rates, Indiana had the tenth highest worker fatality rate in 2013, only surpassed by states with much larger workforces.<sup>64</sup> In the end, this race to the bottom exposes more and more workers to the vagaries of a deeply flawed

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<sup>57</sup> *Third-Party Liability*, JUSTIA, <https://www.justia.com/injury/negligence-theory/third-party-liability/>.

<sup>58</sup> Environmental Working Group, *Koch Brothers Exposed for Campaign Contributions to 19 Members of Congress Who Voted to Deny Fair Compensation to Asbestos Victims*, ECO WATCH (July 16, 2015, 10:42 AM), <http://ecowatch.com/2015/07/16/koch-brothers-exposed-asbestos/>.

<sup>59</sup> Howard Berkes, *Injured Workers Suffer As 'Reforms' Limit Workers' Compensation Benefits*, NPR (Mar. 23, 2015), <http://www.npr.org/2015/03/04/390441655/injured-workers-suffer-as-reforms-limit-workers-compensation-benefits>.

<sup>60</sup> Matthew DeFour, *Republicans Pushing Possible Changes to Workers' Comp System*, WISC. STATE JOURNAL (Sep. 15, 2013), [http://host.madison.com/ws/news/local/govt-and-politics/republicans-pushing-possible-changes-to-workers-comp-system/article\\_1d1d6f1f-d210-5282-ba90-fc7c461d0143.html](http://host.madison.com/ws/news/local/govt-and-politics/republicans-pushing-possible-changes-to-workers-comp-system/article_1d1d6f1f-d210-5282-ba90-fc7c461d0143.html).

<sup>61</sup> *Incentives*, INDIANA.GOV, <http://iedc.in.gov/incentives> (last visited Feb. 2016).

<sup>62</sup> *Id.*

<sup>63</sup> *Quarterly Census of Employment and Wages*, BUREAU OF LABOR STATISTICS (2015), [http://www.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=0&year=2015&qtr=2&own=5&ind=10&supp=0](http://www.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=0&year=2015&qtr=2&own=5&ind=10&supp=0).

<sup>64</sup> *2013 Census of Fatal Occupational Injuries*, BUREAU OF LABOR STATISTICS (2013), <http://www.bls.gov/iif/oshwc/cfoi/rate2013in.pdf>.

workers' compensation system in need of a national overhaul, an unlikely outcome in this era of corporate money poisoning our political processes. As such, rather than creating an economic incentive for employers to provide a safe workplace, the workers' compensation system, with its legions of insurance adjusters and their chosen doctors, serve instead to protect and insulate employers from any legal liability and meaningful financial exposure.

Grim as this all sounds, are there any solutions? Can we do better? Yes, and yes. And, it is important to keep in mind that there are no bad ideas to any of the health and safety problems facing workers in America. If we stop putting forth ideas, no matter how dispiriting it is to be constantly pushing the boulder up the hill, especially against such a well-funded and resourced opposition, then the workers will have lost. That means us, our families and our friends will suffer. This excerpt will analyze the need for enhanced civil penalties and criminal prosecutions as a means to keep American workers safer.

*Enhanced Civil Penalties and Criminal Prosecutions:*

There is no single silver bullet for making workers safer. But, criminal prosecutions and enhanced penalties may be the closest thing to one. At a Health, Education, Labor & Pensions ("HELP") Senate hearing on April 29, 2008, then Chairman Kennedy began by noting that the median civil penalty for a workplace fatality in 2007 was \$3,675, a number which had largely remained unchanged.<sup>65</sup> He then stated, "[w]orkers' lives are obviously worth more than that."<sup>66</sup> Employers who ignore their employees' safety should pay a penalty that will force them to change their negligent ways. It is the only realistic way to save lives. A mild slap on the wrist is not enough.<sup>67</sup> Senator Kennedy went on to compare the civil penalty provisions in other regulatory laws. Violating the South Pacific Tuna Act of 1988 can net a fine of \$325,000.<sup>68</sup> A Clean Air Act violation can result in a fine of \$270,000, while a violation of the Fluid Milk Promotion Act can cost \$130,000.<sup>69</sup> Senator Kennedy added, "[p]rotecting tuna fisheries is important, but so is safeguarding workers' lives and we need to raise OSHA's penalties if we hope

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<sup>65</sup> *When A Worker Is Killed: Do Osha Penalties Enhance Workplace Safety?*, Hearing on S. 110-895, Hearing Before The S. Comm. On Health, Educ., Labor, and Pensions, 110<sup>th</sup> Cong. 3 (Apr. 29, 2008).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 5.

to deter unsafe working conditions.”<sup>70</sup> In March 2010, Dr. David Michaels, the Assistant Secretary of Labor for Occupational Safety and Health, testified before Congress on the need for enhanced civil penalties.<sup>71</sup> He noted that when a tank full of sulphuric acid exploded at a refinery in 2001, literally dissolving a worker there, the employer was only fined \$175,000 by OSHA.<sup>72</sup> But, in the same incident, the Environmental Protection Agency fined the employer \$10 million for violating the Clean Water Act, when thousands of fish and crabs were discovered dead from the explosion run-off.<sup>73</sup> It is abundantly clear, that by applying a free market analysis to the issue of penalties, there is simply no financial incentive for employers to provide a safe workplace.

There is no genuine dispute that the civil penalty regime in the OSHAct is woefully inadequate as a meaningful deterrent to prevent safety violations. For a “willful violation,” Section 17 (a) of OSHAct provides that the maximum civil penalty is \$70,000, and not less than \$5,000.<sup>74</sup> Keep in mind that willful is the most demanding civil standard, and requires a violation that the employer knowingly commits, or commits with plain indifference to the law.<sup>75</sup> The employer either knows that what he or she is doing constitutes a violation, or is aware that a hazardous condition existed, and still made no reasonable effort to eliminate it.<sup>76</sup> According to the United States Attorneys’ Manual, willful is the failure to comply with a safety standard under the OSHAct if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard, or is plainly indifferent to its requirement.<sup>77</sup> An omission or failure to act is willfully done if done voluntarily and intentionally.<sup>78</sup> Some courts have even permitted an employer to argue ignorance of the law in considering an employer’s intent.<sup>79</sup>

For a “serious violation,” a lesser penalty than willful, an employer can be fined up to \$7,000, which is for a violation where there is substantial

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<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Subcomm. On Workforce Protections, Comm. On Educ. and Labor*, H.R. 1 (Mar. 16, 2010) (statement of David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Dept. of Labor).

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.*

<sup>74</sup> 29 U.S.C. § 666 (1970).

<sup>75</sup> U.S. Dept. of Labor, CPL 02-00-159, OCCUPATIONAL SAFETY AND HEALTH ADMIN. INSTRUCTION 2 (Oct. 1, 2015).

<sup>76</sup> *Id.*

<sup>77</sup> OFFICES OF THE U.S. ATTORNEYS, *Criminal Resource Manual 2001–2009, OSHA—Willful Violation of a Safety Standard Which Causes Death to an Employee 2* (1997).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

probability that death or serious physical harm could result, and that the employer knew, or should have known, of the hazard.<sup>80</sup>

Section 17(e) provides that for a willful violation resulting in the death of an employee, an employer “shall, upon conviction” be punished by no more than \$10,000, or not more than six months in prison.<sup>81</sup> For a recidivist employer, who is convicted for a violation “after a first conviction” of causing the death of an employee, the OSHAct merely doubles the maximum penalties to \$20,000, or one year in jail.<sup>82</sup> Arguably, general criminal penalties in 18 U.S.C. Sec. 3571 (c) (4) of the United States Code can apply, with maximum penalties of \$250,000 for individual, or \$500,000 for corporations, who willfully cause the death of an individual.<sup>83</sup> However, as discussed momentarily, most U.S. Attorneys have been reluctant to prosecute worker death cases, preferring instead to invest their resources in bigger headlines, such as drugs, political corruption and terrorism cases.

Section 17 has other penalties, not directly related to the death or injury of a worker. If anyone “gives advance notice of any inspection,” and tips off an employer so it can cover up a possible workplace hazard, the maximum penalties, for what amounts to an obstruction of justice, are \$2,000, or six months in jail.<sup>84</sup> Finally, making false statements, or perjury, in documents that need to be reported under the Act, such as injury reports, are punishable by a maximum penalty of \$10,000, or six months in jail.<sup>85</sup>

Historically, the maximum fines described above have rarely been applied. In 2007, the average penalty for a serious violation, where there is a substantial probability that death or serious physical harm could occur, was \$906.<sup>86</sup> For violations that are “other than serious,” the average OSHA fine was only \$40.<sup>87</sup> In death cases, the average OSHA penalty assessed in 2007 was just \$2,343.<sup>88</sup> The already low maximum penalties, particularly for the most common serious violations, are routinely adjusted downward based on an employer’s size and history, often resulting in a reduction of 30–70%.<sup>89</sup> Thereafter, when

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<sup>80</sup> U.S. Dept. of Labor, CPL 02-00-159, *supra* note 75 at 6-1 (2015).

<sup>81</sup> *Id.* at 4-20.

<sup>82</sup> *Id.*

<sup>83</sup> 18 U.S.C. § 3571 (c)(4) (2001).

<sup>84</sup> U.S. Dept. of Labor, CPL 02-00-159, *supra* note 75 at 3-3, 6-16 (2015).

<sup>85</sup> *Id.* at 11-6 (2015).

<sup>86</sup> *When A Worker Is Killed: Do Osha Penalties Enhance Workplace Safety?*, *supra* note 65 at 16–17.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *When A Worker Is Killed: Do Osha Penalties Enhance Workplace Safety?*, *supra* note 65 at 18.

challenged, these reduced penalties have been abated further by another 30-50%.<sup>90</sup>

With a change in administration at OSHA after the 2008 election, the enforcement emphasis began to change, as well. In June 2010, OSHA adopted the Severe Violator Enforcement Program (“SVEP”), intended to focus enforcement efforts on significant hazards and violations, such as fall dangers, amputations dangers, combustible dust, silica exposure, excavation/trenching dangers, and shipbuilding hazards.<sup>91</sup> In addition, OSHA revised its penalty policies, and the factors used to adjust penalties. However, for employers with between one and 25 employees, the reduction factor is as high as 60%, even though small businesses have high injury rates.<sup>92</sup> Even with a new emphasis, total OSHA work site inspections have remained flat over a five-year period from 2009 to 2013, at around 39,000.<sup>93</sup> During the same time period, total violations actually fell almost by 10,000, including in all categories, except repeat violations.<sup>94</sup> OSHA claims that the number of violations has declined due to its enhanced and proactive enforcement activity, although the minimum proposed penalty for a serious violation increased only to \$500 before abatements, hardly a financial incentive for an employer to provide a safe workplace.<sup>95</sup>

The Section 17 statutory penalties, meager as they are, have only been adjusted upward one time—in 1990—since the OSHAct was passed.<sup>96</sup> Moreover, unlike other federal enforcement agencies, the penalties in the OSHAct have been exempt from the Federal Civil Penalties Inflation Adjustment Act.<sup>97</sup> Not adjusting the penalties for inflation reduces their real dollar value by around 39%.<sup>98</sup> The Protecting America’s Workers Act (“PAWA”) seeks to correct this by increasing the penalties for serious and willful violations.<sup>99</sup> This increase would only recalibrate the real dollar value

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<sup>90</sup> *Id.*

<sup>91</sup> U.S. Dept. of Labor, CPL 02-00-149, SEVERE VIOLATOR ENFORCEMENT PROGRAM (June 18, 2010).

<sup>92</sup> J. Paul Leigh, *Economic Burden of Occupational Injury and Illness in the United States*, MILBANK QUARTERLY (Dec. 2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3250639/>.

<sup>93</sup> Michael Best, *2013 OSHA Developments and Review—What’s New?*, FRIEDRICH LLP 23 (June 12, 2012), <http://www.ppsa.org/assets/2013Conference/Presentations/use-2013%20osha%20developments%20%20review%20whats%20new%20-%20eric%20hobbs.pdf>.

<sup>94</sup> *Id.* at 23, 29.

<sup>95</sup> *Id.* at 46.

<sup>96</sup> *When A Worker Is Killed: Do Osha Penalties Enhance Workplace Safety?*, *supra* note 65 at 23.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Subcomm. On Workforce Protections*, *supra* note 71.

to 1990 values.<sup>100</sup> Nonetheless, there must be a price point for workplace hazards that will incentivize employers to create and operate safe workplaces.

In a sliver of good news, in the Bipartisan Budget Act of 2015, Congress approved an increase in fines that OSHA and other agencies could levy pegged to the Consumer Price Index, and automatically adjusted for inflation going forward.<sup>101</sup> What this means is that civil penalties for serious OSHA violations could increase to around \$12,700, from the current maximum amount of \$7,000.<sup>102</sup> Willful violations could increase to \$127,000 from the current limit of \$70,000.<sup>103</sup> The increases must still await regulatory guidance before they can be implemented, a process that may delay the increases for months.<sup>104</sup> Finally, the legislation provides that an agency head can reduce the penalty from the maximum amount based on certain factors, including the all-consuming loophole that the penalty would have a negative economic impact.<sup>105</sup> What penalty doesn't have a negative impact? By definition, any penalty naturally has some negative economic impact. However, the real question is whether these, or any penalties, will help reduce workplace injuries? While it is too soon to know the effects these long overdue increases will have on protecting workers, a study in 2015 by the Institute for Work and Health concluded that there is a strong correlation between penalties and citations and a reduced rate of workplace injuries.<sup>106</sup> But, at the very least, the increases may represent a small recognition by Congress that the penalty regime in federal regulatory statutes, particularly the OSHA Act, is woefully inadequate as a deterrence to violators.

How about a criminal prosecution? It would be difficult to argue that the threat of meaningful jail time is not a deterrent, except to the sociopath. Yet, as already discussed, under the OSHA Act, the maximum jail time for the death of a worker as a result of an employer's willful violation of workplace safety laws, is only six months.<sup>107</sup> Criminal deterrence should be measured in years,

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<sup>100</sup> *Comm. On Health, Education, Labor and Pensions*, S. 1 (Apr. 27, 2010) (statement of David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Dept. of Labor).

<sup>101</sup> Avi Meyerstein, *OSHA Gets Authorization to Boost Penalty Amounts*, NAT. L. REV., (Dec. 13, 2015), <http://www.natlawreview.com/article/osha-gets-authorization-to-boost-penalty-amounts>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Meyerstein, *supra* note 101.

<sup>106</sup> *Research Finds That OSHA Citations, Penalties Reduce Workplace Injuries*, CLAIMS J., (Nov. 23, 2015), <http://www.claimsjournal.com/news/national/2015/11/23/267189.htm>.

<sup>107</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. § 666 Sec. 17(e) (2011).

not months. As stated by Senator Kennedy, “[i]f you improperly import an exotic bird, you can go to jail for two years. If you deal in counterfeit money, you are looking at 20 years.”<sup>108</sup> His point was obvious. Without a credible threat of jail, “many companies treat safety violations as another cost of doing business.”<sup>109</sup> The criminal provisions of the OSHAct must be strengthened to protect American workers.

Currently, Section 17 (e), 29 U.S.C. Sec. 666(e), provides that a Class B misdemeanor prosecution for an OSHAct violation will occur only (1) for willful violations of worker safety regulations, and (2) that result in the death of a worker. The closest comparison to Section 17 (e) in state and federal criminal codes is involuntary manslaughter, a felony that has a wide range of sentencing alternatives, but none as low as six months for causing the death of a worker.<sup>110</sup>

Beyond the insignificant civil penalties and jail time, the statute as presently written is a failure on many levels. First, using a willful standard allows an employer to use their ignorance of the law as a defense to the element of intent, which is contrary to well established American jurisprudence that ignorance of the law is no defense. Second, changing the standard to “knowing” violations is more in line with other regulatory crimes, such as violations of environmental laws. Under this standard, a defendant need only know of facts or circumstances that are unsafe, and need not know that the unsafe conditions are a violation of a particular safety regulation or law. This also eliminates the ignorance of the law defense. Third, permitting prosecutions only where a worker has died ignores the seriousness of most other safety violations, which can result in horrific injuries and lifetime pain and suffering. Moreover, violations that endanger workers, even if no injury or death has occurred, should be criminalized in appropriate circumstances. This is a common sense and proactive approach that does not wait until a worker gets injured or dies. A criminal worker endangerment provision would also have a strong deterrent effect in incidents where an employer is aware of unsafe work conditions, which have not yet injured or killed a worker. Fourth, classifying worker safety crimes involving the death of a worker as only a misdemeanor, all but guarantees that a prosecutor will not waste their limited resources for crimes that Congress has reserved for the most egregious

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<sup>108</sup> *When a Worker Is Killed: Do OSHA Penalties Enhance Workplace Safety?*, *supra* note 65 at 42-210 (statement of Sen. Edward Kennedy, Chairman, S. Comm. on Health, Educ., Labor and Pensions).

<sup>109</sup> *Id.*

<sup>110</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. § 666 Sec. 17(e) (2011).

felonies. Finally, criminal prosecutions have to be expanded to include supervisors, and not just the “employer.” Supervisors have the authority to direct the employees, and can place them in harm’s way. Importantly, putting supervisors at risk for criminal prosecutions might also have the added benefit of creating an important layer of whistleblowers with direct knowledge of an employer’s internal policies and decisions that create the unsafe workplace in the first place.

Given this list of inherent structural flaws in the OSHA’s criminal regime, it is clear that OSHA has been severely constrained in its ability to keep workers safe through the threat of criminal prosecutions. According to the Department of Labor, between 1970 and 2008, there were 341,000 workplace fatalities.<sup>111</sup> Yet, during this same time period, there were only 68 prosecutions, resulting in a total of 42 months in jail.<sup>112</sup> From 2010 through 2013, despite a more robust OSHA, there were only 40 referrals for criminal prosecution, and only three referrals in 2013.<sup>113</sup> And, most referrals are declined for prosecution.<sup>114</sup> During this same time period, nearly 20,000 workers were killed on the job.<sup>115</sup>

In the end, prosecuting regulatory crimes that result in death, has not been a priority for any Department of Justice or U.S. Attorney’s office. Worker death cases are simply not headline grabbers that can help catapult an ambitious U.S. Attorney to political fame and glory, or to riches in private practice as a defender of prominent white-collar criminals. Nonetheless, in December 2015, the U.S. Departments of Labor and Justice entered into a Memorandum of Understanding (“MOU”) “to provide for coordination of matters pertaining to worker safety that could lead to criminal prosecutions by DOJ.”<sup>116</sup> On its face, the MOU looks like a meaningful change in prosecutorial emphasis. However, it did not change any statutory enforcement provisions, commit to prosecute any cases, or add any new resources. Instead, it merely promised to share information, cooperate and coordinate between the Departments. Indeed, it

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<sup>111</sup> 18 U.S.C. § 1112 (2008).

<sup>112</sup> Frontline, *Criminal Prosecutions of Workplace Fatalities*, PUB. BROAD. SERV., <http://www.pbs.org/wgbh/pages/frontline/shows/workplace/osha/referrals.html> (last visited Mar. 1, 2016).

<sup>113</sup> *Id.*

<sup>114</sup> Occupational Safety & Health Admin., *Occupational Safety and Health Administration (OSHA) Enforcement*, U.S. DEP’T OF LABOR (2013), [https://www.osha.gov/dep/2013\\_enforcement\\_summary.html](https://www.osha.gov/dep/2013_enforcement_summary.html).

<sup>115</sup> Frontline, *supra* note 112.

<sup>116</sup> *Fatal Occupational Injuries by Selected Characteristics, 2003–2014*, BUREAU OF LABOR STATISTICS (2015), [http://www.bls.gov/iif/oshwc/cfoi/all\\_worker.pdf](http://www.bls.gov/iif/oshwc/cfoi/all_worker.pdf).

clearly states that, “[n]othing in this MOU commits DOJ to investigate or prosecute any particular worker-safety incident.”<sup>117</sup>

Other regulatory statutes have stronger criminal provisions. Environmental laws, for example, have meaningful criminal penalties, and nearly every federal and state prosecutor’s office has an environmental specialist tasked with investigating and prosecuting environmental crimes.<sup>118</sup> The Clean Water Act (“CWA”) makes it a crime to negligently discharge a pollutant into a water system of the United States without a permit, or in violation of a permit, punishable by one year in prison.<sup>119</sup> Knowing violations are punishable by three years in jail, and fines up to \$100,000 per day.<sup>120</sup> The CWA has many other provisions that criminalize conduct, including a “knowing endangerment” crime, which has been used to protect workers from their employer’s crimes to the environment.<sup>121</sup> Knowing endangerment makes it a crime if an individual or a corporation “knew at the time that such acts put another in imminent danger of death or serious bodily injury.”<sup>122</sup> Conviction of this crime under the CWA carries with it a 15 year prison sentence, and a \$1,000,000 fine for a corporation.<sup>123</sup> While not intended exclusively as a worker safety law, some federal prosecutors have used these “knowing endangerment” crimes under environmental laws, such as the CWA and the Resource Conservation and Recovery Act of 1976, to protect workers from life threatening environmental conditions created by their employers, and that the OSHA is unable to do.<sup>124</sup>

There is a legitimate debate that these criminal laws are not being utilized enough as a deterrent against environmental crimes, and that DOJ resources focus more on fighting terrorism and drugs. In a battle of numbers, the Environmental Protection Agency reported that in Fiscal Year 2013 it assessed more than \$1.5 billion in criminal fines and restitution, and charged 281

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<sup>117</sup> U.S. Dep’t of Labor and U.S. Dep’t of Justice, *Memorandum Of Understanding on Criminal Prosecutions of Worker Safety Laws* (2015), <https://www.justice.gov/enrd/file/800526/download>.

<sup>118</sup> *Id.*

<sup>119</sup> *Clean Water Act (CWA) and Federal Facilities*, ENVTL. PROT. AGENCY, <https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities>.

<sup>120</sup> *Criminal Provisions of the Clean Water Act (2015)*, ENVTL PROT. AGENCY, <http://www.epa.gov/enforcement/criminal-provisions-clean-water-act#directdischarge>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

defendants, resulting in 161 years of incarceration.<sup>125</sup> Critics claimed these victories came from a relatively few big name prosecutions.<sup>126</sup> Nonetheless, the obvious point is that the OSHAct does not even have meaningful criminal laws on the books in the event that enforcement priorities begin to recalibrate. More galling, is that there is not even a “knowing endangerment” crime in America’s worker safety statute. Protection for workers in that area must come from environmental laws, and increasingly from state prosecutions.<sup>127</sup> Prosecuting worker safety crimes under other statutes, rare as they are, merely underscore the toothlessness of the OSHAct’s enforcement provisions. Nonetheless, there is one notable prosecution that may send a strong message of deterrence.

On April 5, 2010, at 3:02 p.m., an explosion erupted at the Upper Big Branch Mine (“UBB”) near Montcoal in Raleigh County West Virginia.<sup>128</sup> Fueled by high levels of coal dust, methane gas exploded in a fireball deep inside the UBB mine, and roared through more than two miles of underground tunnels.<sup>129</sup> Twenty-nine miners were killed.<sup>130</sup> The UBB mine was owned by the Massey Energy Company, which was the fourth largest coal producer in the United States.<sup>131</sup> At the time of the explosion, Massey’s CEO was Don Blankenship, a tall and physically imposing figure, with dark brooding features.<sup>132</sup> Blankenship rose from poverty in West Virginia to become a powerful and feared coal baron.<sup>133</sup> He used the courts and politicians to shield Massey, and himself, from accountability, while becoming the largest coal producer in Central Appalachia.<sup>134</sup> As an example of Blankenship’s influence, he contributed \$3 million to defeat an incumbent justice on West Virginia’s Supreme Court, at a time that Massey was appealing a \$50 million civil

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<sup>125</sup> Carey L. Biron, *Criminal Prosecution Rates For Corporate Environmental Crimes Near Zero*, MINTPRESSNEWS (July 25, 2014), <http://www.mintpressnews.com/criminal-prosecution-rates-for-corporate-environmental-crimes-near-zero/194479/>.

<sup>126</sup> *Enforcement Annual Results for Fiscal Year (FY) 2013 (2014)*, ENVTL. PROT. AGENCY <http://archive.epa.gov/enforcement/annual-results/web/pdf/eoy2013.pdf>.

<sup>127</sup> Carey L. Biron, *Criminal Prosecution Rates for Environmental Crimes Near Zero*, PORTSIDE (July 25, 2014), <http://portside.org/2014-08-02/criminal-prosecution-rates-environmental-crimes-near-zero>.

<sup>128</sup> Governor’s Indep. Investigation. Panel, *Upper Big Branch: The April 5, 2010, Explosion: a Failure of Basic Coal Mine Safety Practices*, NPR (May 2011), <http://www.npr.org/documents/2011/may/giip-massey-report.pdf>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

judgment.<sup>135</sup> Predictably, the court overturned the judgment. The deciding votes were provided by the newly elected Justice Brent Benjamin, who Blankenship helped elect, as well as the Chief Justice.<sup>136</sup> Four months earlier, Blankenship and the Chief Justice were reportedly seen vacationing together in the French Riviera.<sup>137</sup> In June 2009, the United States Supreme Court reversed the decision based on the undue influence that Blankenship had on Justice Benjamin's campaign for the West Virginia Supreme Court, at a time when Massey had a pending case before it.<sup>138</sup> The U.S. Supreme Court concluded, "that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case."<sup>139</sup>

Because of Blankenship's outsized influence, no one believed that he or Massey would be held accountable for the deaths of the 29 miners. Only two years before the explosion at UBB, federal prosecutors refused to bring charges against Blankenship for an explosion at another Massey owned mine, which killed two miners there.<sup>140</sup> But, shortly after the UBB explosion, President Obama appointed Booth Goodwin to become the new U.S. Attorney for the Southern District of West Virginia.<sup>141</sup> While other investigations into the UBB disaster continued, including Congressional hearings where mine safety reforms were blocked by House Republicans, Goodwin's office methodically began to build its case against Massey and Blankenship.<sup>142</sup> The investigation went forward despite a public relations campaign mounted by Massey in the immediate aftermath of the explosion, which warned against a "rush to judgment," and a statement by Blankenship around the time of the funerals that, "any suspicion that the mine was improperly operated or illegally operated or anything like that would be unfounded."<sup>143</sup> During the investigation, Blankenship, and other Massey officials, asserted their Fifth Amendment rights in December 2010, and refused to answer government

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<sup>135</sup> Governor's Indep. Investigation Panel, *supra* note 128.

<sup>136</sup> *Id.*

<sup>137</sup> *Don Blankenship*, SOURCEWATCH (2015), [http://www.sourcewatch.org/index.php/Don\\_Blankenship](http://www.sourcewatch.org/index.php/Don_Blankenship).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868, 884 (2009).

<sup>141</sup> Carey L. Biron, *supra* note 125.

<sup>142</sup> Jef Feeley & George Hohmann, *Massey's Donald Blankenship Tagged as Conspiracy 'Kingpin'*, BLOOMBERG (Nov. 17, 2015), <http://www.bloomberg.com/news/articles/2015-11-17/massey-s-blankenship-tagged-as-mine-safety-conspiracy-kingpin>.

<sup>143</sup> Feeley & Hohmann *supra* note 142.

investigators' questions.<sup>144</sup> Two months later, Massey's security chief was charged with lying to investigators, and trying to destroy evidence.<sup>145</sup> He was convicted and sentenced to prison.<sup>146</sup> The following year, in February 2012, the UBB mine superintendent was charged by Goodwin's office with conspiracy to violate mine safety laws.<sup>147</sup> The superintendent pled guilty and spent 21 months in jail.<sup>148</sup> In the meantime, West Virginia legislators passed a mine safety reform bill, which was greatly watered down by industry lobbyists and prominently included a drug testing provision of miners—even though there was no connection between drug use and the UBB explosion.<sup>149</sup> Still, the investigation continued. The big break came when Goodwin's office announced that a longtime Massey official, David Hughart, would plead guilty to a conspiracy to violate mine safety laws and cooperate with the criminal investigation.<sup>150</sup> In entering his plea, Hughart alleged that Blankenship was part of the conspiracy.<sup>151</sup> Hughart was sentenced to 42 months in prison.<sup>152</sup> The noose around Blankenship was getting tighter.

Finally, on November 13, 2014, Goodwin announced the indictment of Blankenship.<sup>153</sup> In a 43 page criminal indictment styled, *United States of America v. Donald L. Blankenship, Criminal No. 5:14-cr-00244*, Goodwin's office charged Blankenship with four counts of conspiring to violate mine safety laws related to the ventilation and control of coal dust rules, a conspiracy to cover up the violations, and to interfering with the government's enforcement efforts by providing advance warnings of mine inspections.<sup>154</sup> Reading like a novel of abuse of power, threats and intimidation, the indictment charged Blankenship, "with the routine violation of its [Massey] ventilation plan," and that beginning in April 2009, Blankenship requested and received daily reports detailing Massey's violations of mandatory federal mine

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<sup>144</sup> *Timeline of Upper Big Branch Mine Disaster Events*, CHARLESTON GAZETTE-MAIL (Nov. 13, 2014), <http://www.wvgazette.com/article/20141113/GZ01/141119618/>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Jonathan Mattise, *Former Coal Executive Begins Testifying Against Ex-CEO Boss*, ASSOCIATED PRESS (Oct. 15, 2015, 7:24 PM), <http://bigstory.ap.org/article/654aa27aa6f043caa69df35986fe637f/former-coal-executive-begins-testifying-against-ex-ceo-boss>.

<sup>152</sup> *Id.*

<sup>153</sup> Jared Hunt, *Ex-Massey CEO Don Blankenship indicted by federal grand jury*, CHARLESTON GAZETTE-MAIL (Nov. 13, 2014), <http://www.wvgazette.com/article/20141113/DM01/141119628>.

<sup>154</sup> Indictment at 34–43, *United States v. Blankenship*, 5:14-cr-00244 (S.D.W. Va. Nov. 13, 2014).

standards, and estimates of the fines for these violations.<sup>155</sup> In the first six months of 2009, the reports that Blankenship received showed that the UBB mines were cited for approximately 596 violations of mine safety laws, mostly related to the accumulation of combustible coal dust that eventually ignited in a fireball.<sup>156</sup> A major cause of the accumulated dust was that Blankenship deliberately understaffed UBB with too few miners dedicated to “non-coal production time,” which is necessary to make sure that the safety laws are being followed.<sup>157</sup> During this same time period, Blankenship demanded and received production reports that detailed an reasons for delays every thirty minutes, even when he was at his home on evenings and weekends.<sup>158</sup> The indictment revealed Blankenship’s micro management of the UBB mine, down to how many miners were hired.<sup>159</sup> Blankenship, the indictment charged, pressured managers to cut the number of miners assigned to critical safety-law compliance jobs, including those jobs required to properly ventilate and clean up accumulated coal dust.<sup>160</sup> He threatened the jobs of mine managers over safety compliance, and tied their compensation to the routine violation of safety laws.<sup>161</sup> Obsessed with coal production and profit over safety, the indictment charged Blankenship with instructing coal managers to “run some coal,” and that “we’ll worry about ventilation and other issues at an appropriate time. Now is not the time.”<sup>162</sup> In announcing the indictment, Goodwin took note to say that a conviction carried a maximum prison time of 31 years.<sup>163</sup>

In response, Blankenship attacked the indictment as “political,” while his lawyer asserted that Blankenship was “a tireless advocate for mine safety.”<sup>164</sup> Blankenship retired from Massey in December 2010, in a deal that provided him with \$12 million in cash.<sup>165</sup> The following month, Alpha Natural Resources, Inc. announced that it would purchase Massey for over \$7

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<sup>155</sup> *Id.* at 9.

<sup>156</sup> *Id.* at 16.

<sup>157</sup> Indictment at 18–19, *United States v. Blankenship*, 5:14-cr-00244 (S.D.W.Va. Nov. 13, 2014).

<sup>158</sup> *Id.* at 18.

<sup>159</sup> *Id.* at 19.

<sup>160</sup> *Id.* at 27.

<sup>161</sup> *Id.* at 30.

<sup>162</sup> *Id.* at 23–24.

<sup>163</sup> Hunt, *supra* note 153.

<sup>164</sup> *Id.*

<sup>165</sup> Kristen Korosec, *Massey CEO Don Blankenship’s Retirement Package: \$12 Million in Cash, Health Insurance, a Secretary and a Chevy*, CBS MONEY WATCH (Dec. 9, 2010, 10:00 AM), <http://www.cbsnews.com/news/massey-ceo-don-blankenships-retirement-package-12m-in-cash-health-insurance-a-secretary-and-a-chevy>.

billion.<sup>166</sup> In a prepared statement after the indictment, Alpha took pains to note that Blankenship left Massey before the acquisition, and that he “was never an employee of Alpha Natural Resources.”<sup>167</sup> A Superseding Indictment was filed on March 10, 2015, that consolidated some of the conspiracy allegations.<sup>168</sup> Blankenship’s lawyers filed numerous motions, including a Motion to Dismiss for Selective and Vindictive Prosecution. Blankenship claimed that he was being prosecuted in violation of his First Amendment rights only after he released a documentary film entitled, “Upper Big Branch—Never Again,” a piece of YouTube propaganda which blamed regulators for the explosion, and that the film inflamed the “West Virginia Democratic Establishment,” including Senator Joe Manchin, as well as union leaders.<sup>169</sup> U.S. District Judge Irene Berger denied Blankenship’s motion.<sup>170</sup> She also denied his motion to disqualify Judge Berger, “*and All the Judges of the United States District Court for the Southern District of West Virginia.*”<sup>171</sup> Blankenship’s lawyers claimed that Judge Berger and others could not be fair because Goodwin’s father is a Judge presiding in the same district.<sup>172</sup> This claim came from the same man who the United States Supreme Court held exerted an “exceptional case” of influence, and which created a “probability of bias” that required Justice Benjamin’s recusal.<sup>173</sup> Judge Berger denied this motion, as well, and set the case for trial in October 2015.<sup>174</sup>

In a not entirely coincidental matter, in April 2015, the Department of Labor reported that black lung disease has killed more than 70,000 miners between 1970 and 2013, while permanently disabling many thousands more.<sup>175</sup> Black lung was supposed to have been eradicated in 1969 with safety reforms,

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<sup>166</sup> Hunt, *supra* note 153.

<sup>167</sup> Mandi Cardosi, *Don Blankenship, Former Massey Energy CEO, was Indicted in Federal Grand Jury Nov. 13 on Four Criminal Offenses*, WOWKTU (Nov. 13, 2014, 4:14 PM), <http://www.wowktv.com/story/27379225/don-blankenship-former-massey-energy-ceo-indicted-in-federal-grand-jury>.

<sup>168</sup> Superseding Indictment at 1, *United States v. Blankenship*, 5:14-cr-00244 (S.D.W.Va. Mar. 10, 2015).

<sup>169</sup> Motion to Dismiss at 1, *United States v. Blankenship*, 5:14-cr-00244 (S.D.W.VA. Feb. 6, 2015).

<sup>170</sup> See Ken Ward Jr., *In Unsealed Filings, Blankenship Claims ‘Vindictive’ Prosecution*, CHARLESTON GAZETTE-MAIL (March 5, 2015), <http://www.wvgazette.com/article/20150305/GZ01/150309505>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Ken Ward Jr., *supra* note 170.

<sup>174</sup> See Associated Press, *Ex-Coal CEO Don Blankenship’s Trial Delayed to October*, WASH. TIMES (June 13, 2015), <http://www.washingtontimes.com/news/2015/jun/13/ex-coal-ceo-don-blankenships-trial-delayed-to-octo/>.

<sup>175</sup> *Black Lung Benefits Act Rule Proposal Protects Coal Miners’ Health*, U.S. DEPT. LABOR (Apr. 28, 2015), <http://www.dol.gov/newsroom/releases/owcp/owcp20150812>.

including by regulations on coal dust control and ventilation.<sup>176</sup> At the same time, the Mine Safety and Health Administration reported that miner deaths increased in 2014, totaling 44, while a record low of 16 deaths were reported in coal mines.<sup>177</sup> A couple of thoughts on these facts. Blankenship and Massey were certainly not responsible for all of the black lung deaths in this time period. But, it is just as certain, that at Massey plants, including where the indictment alleges among other things, a criminal disregard for coal dust and ventilations regulations, many miners there developed black lung. And, it is likely that many more miners died at UBB mines under Blankenship's reign from the disregard of safety laws, than only the 29 miners killed in the UBB explosion. And, finally, the decline in coal miner deaths in 2014 just may have had something to do with Booth Goodwin's four-year investigation, and prosecution of Massey officials, leading up to Blankenship's indictment.

In the end, Don Blankenship finally stood trial. At the Robert C. Byrd United States Courthouse in Charleston, West Virginia, jury selection began on October 1, 2015. According to court transcripts, 88 citizens living within the 20 counties that make up the Southern District of West Virginia were summoned for jury duty. After the first day of jury selection, 42 potential jurors were dismissed, whittled down through *voire dire* examination by Judge Berger, and from answers on questionnaires originally mailed to over 300 potential jurors in the district. Potential jurors were excused for cause, including one who worried that Blankenship might be a "scapegoat," while another said that Blankenship was "a horrible person with questionable morals and no work ethics."<sup>178</sup> Jury selection lasted four days before 12 jurors and alternates were finally seated. The evidentiary portion of the trial lasted 23 days.<sup>179</sup> The government called 28 witnesses, including miners and UBB officials who testified that safety violations were a known and accepted way of doing business.<sup>180</sup> There were more than 500 exhibits introduced into

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<sup>176</sup> Bill Estep & John Cheves, *After Decades of Decline, Black Lung on the Rise in Eastern Kentucky*, LEXINGTON HERALD LEADER (July 6, 2013, 11:00 PM), <http://www.kentucky.com/news/special-reports/fifty-years-of-night/article44432793.html>.

<sup>177</sup> *Mining Fatalities Increased in 2014*, INDUS. SAFETY & HYGIENE NEWS (Apr. 17, 2015), <http://www.ishn.com/articles/101185-mining-fatalities-increased-in-2014>.

<sup>178</sup> Joel Ebert & Ken Ward Jr., *Friday Update: What Blankenship Jurors Were Asked*, CHARLESTON GAZETTE-MAIL (Oct. 2, 2015), <http://www.wvgazette.com/blankenship-trial/20151002/friday-update-what-blankenship-jurors-were-asked>.

<sup>179</sup> Ken Ward Jr., *Blankenship trial examined WV's complex ties to coal*, CHARLESTON GAZETTE-MAIL (Dec. 5, 2015), <http://www.wvgazette.com/blankenship-trial/20151205/blankenship-trial-examined-wvs-complex-ties-to-coal>.

<sup>180</sup> *Id.*

evidence.<sup>181</sup> The defense rested without calling a single witness, including Don Blankenship.<sup>182</sup>

The jury deliberated for parts of ten days, despite defense motions for a mistrial.<sup>183</sup> On December 3, more than five years after the UBB explosion, the jury convicted Blankenship of criminal conspiracy to willfully violate federal mine safety standards, convinced beyond a reasonable doubt that he ruthlessly demanded that miners produce as much coal as possible and without regard to their safety.<sup>184</sup> He was acquitted on the lesser charges of securities fraud and making false statements to investigators.<sup>185</sup>

While Booth Goodwin and his team achieved a conviction on the most important count in the indictment in terms of the safety of miners at UBB and elsewhere, the crimes of securities fraud and lying to investigators involved more jail time—possibly 30 years in prison<sup>186</sup>—than knowingly violating thousands of safety rules at UBB which finally exploded in a fireball killing 29 miners. In a final insult to the families of the dead miners, the count of conspiracy to willfully violate federal mine safety standards is only a misdemeanor with a maximum one-year prison sentence, and a \$250,000 fine.<sup>187</sup> In the criminal justice system, jurors are not told by the court during deliberations what the penalty is for a conviction of any count.<sup>188</sup> Jurors decide guilt or innocence based on the evidence while Congress decides the penalty. According to the wisdom of Congress, known violations of mine safety laws that resulted in the deaths of one or 29 miners is punishable only up to one-year in prison.

Blankenship's lawyers immediately filed an appeal claiming that the trial was "full of errors," and the lead lawyer boldly declared that he was "as confident as I've ever been" that the verdict would be thrown out by the Court of Appeals.<sup>189</sup> In an interview after the trial, one of the jurors expressed

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Ken Ward Jr., *supra* note 179.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Ken Ward Jr., *Jury Didn't Know Safety Conspiracy Carried Just 1 Year in Prison*, CHARLESTON GAZETTE-MAIL (Dec. 12, 2015), <http://www.wvgazette.com/blankenship-trial/20151212/jury-didnt-know-mine-safety-conspiracy-carried-just-1-year-in-prison>.

<sup>188</sup> *Id.*

<sup>189</sup> Ken Ward, Jr., *Experts Predict Wide Targeting During Blankenship Appeal*, CHARLESTON GAZETTE-MAIL (Dec. 4, 2015), <http://www.wvgazette.com/article/20151204/GZ15/151209759/>.

frustration at learning that Blankenship was only facing a possible one-year sentence.<sup>190</sup> Bill Rose, who drove 118 miles each day to the courthouse said, “I wish we could have got more, you know—because I know—I assume since the other ones were felonies—he would ultimately get more fines or jail time, but that’s not how it went down.”<sup>191</sup>

In the immediate aftermath of the verdict, the fault lines cleaved along the issue of the need for more oversight and regulation, and stronger criminal penalties.<sup>192</sup> Leading the charge against the prosecution, *The Wall Street Journal* naturally trotted out its favorite bogeyman and wrote that turning an industrial accident into a crime was yet another example of an “Obama-era” prosecution.<sup>193</sup> The *WSJ* declared victory for the defense as Blankenship avoided the prospect of more serious jail time, and audaciously asserted that “Massey had paid dearly” in the millions of dollars that it paid in fines and settlements, while giving short shrift to the suffering of the 29 families and the Big Branch community.<sup>194</sup>

A day after the verdict, Virginia Rep. Bobby Scott, called for tougher penalties for mine violators who knowingly ignore mine safety standards that expose miners to significant risk of injury, illness or death.<sup>195</sup> The *Robert C. Byrd Mine Safety Protection Act*, introduced in April 2015 in the House by Scott and in the Senate by Bob Casey, D-PA., would make it a felony punishable for up to five years in prison for doing what Blankenship was convicted of by the Charleston jury.<sup>196</sup> There were no Republican co-sponsors of the legislation including any of West Virginia’s three Republican House members.<sup>197</sup> Govtrack.com gave the bill a 2% chance of passage.<sup>198</sup>

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<sup>190</sup> Ken Ward Jr., *supra* note 187.

<sup>191</sup> Joel Ebert, *Blankenship Juror: “We did the right thing,”* CHARLESTON GAZETTE-MAIL (Dec. 6, 2015), <http://www.wvgazette.com/blankenship-trial/20151206/blankenship-juror-we-did-the-right-thing-video>.

<sup>192</sup> The Editorial Board, *The Dirty Work of a Coal Baron Exposed*, N.Y. TIMES (Dec. 8, 2015), <http://www.nytimes.com/2015/12/08/opinion/the-dirty-work-of-a-coal-baron-exposed.html>.

<sup>193</sup> *The Blankenship Verdict: Justice turns a mine accident into a crime but loses on its biggest charges*, WALL ST. J. (Dec. 6, 2015, 7:07 PM), <http://www.wsj.com/articles/the-blankenship-verdict-1449446531>.

<sup>194</sup> *Id.*

<sup>195</sup> *Fitting Penalties for Mine Safety Violations*, CHARLESTON GAZETTE-MAIL (Dec. 22, 2015), <http://www.wvgazette.com/gazette-opinion/20151222/gazette-editorial-fitting-penalties-for-mine-safety-violations>.

<sup>196</sup> Jonathan Matisse, *Ex-Coal CEO Conviction Stirs Tougher Safety Penalty Talks*, ASSOCIATED PRESS (Dec. 24, 2015, 9:32 AM), <http://bigstory.ap.org/article/0ac6bd61cbf94089bc8c980b2592209a/ex-coal-ceo-conviction-stirs-tougher-safety-penalty-talks>.

<sup>197</sup> *Id.*

<sup>198</sup> Civic Impulse, *S. 1145: Robert C. Byrd Mine Safety Protection Act of 2015*, GOV. TRACK (Apr. 30, 2015), <https://www.govtrack.us/congress/bills/114/s1145>.

In the meantime, Blankenship sought and received permission from the court to leave the Charleston jurisdiction for the Christmas holidays in 2015 to travel back to his new home in Las Vegas.<sup>199</sup> For the families of the dead miners, and other miners hoping for an effective deterrent to safety violators, all they received was a lump of coal.

On April 6, 2016, six years and one day after the UBB explosion, Judge Berger sentenced Blankenship to serve the maximum sentence of one year in prison, and to pay a \$250,000 fine.<sup>200</sup> At the sentencing hearing, Judge Berger said, “By putting profits of the company ahead of the safety of your miners, you, Mr. Blankenship, created a culture of non-compliance at Upper Big Branch.” Earlier, Judge Berger had denied a defense motion to allow Blankenship to remain free on a \$1 million bond pending a full appeal of his conviction.<sup>201</sup>

As Don Blankenship will soon discover, meaningful prison time measured in years, and not months, is a deterrent. Is it the silver bullet? Certainly, not. But, it is, and must be, an integral part of comprehensive occupational safety and health reform. There must be a very high price to pay for key decision makers when worker safety rules are ignored and violated. So, to all the Don Blankenships who daily perform cost-benefit analyses on compliance with worker safety laws, versus corporate bottom line profits and shareholder return, it must unequivocally declared that crime against workers does not pay.

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<sup>199</sup> Kate White, *Federal Magistrate Lowers Blankenship Bond, Allows Travel with U.S.*, CHARLESTON GAZETTE-MAIL (Feb. 27, 2016), <http://www.wvgazette.com/blankenshiptrial/20151228/federalmagistratelowersblankenshipbondallowstravelwithinus>.

<sup>200</sup> Ken Ward Jr., *Blankenship Gets Maximum Sentence: One Year in Prison, \$250,000 Fine*, CHARLESTON GAZETTE-MAIL (April 6, 2016).

<sup>201</sup> *Id.*