Death by Oversight

Because OSHA fails to protect workers, local D.A.'s are hauling employers into criminal court

For years corporations and their top executives were invulnerable to criminal prosecution for workplace injuries and death. American workers once looked to the Occupational Safety and Health Administration (OSHA) to protect them from foreseeable harm.

But times have changed. Legal obstacles to charging corporate liability have eroded, and OSHA has been gutted by the Reagan administration. Now America's state and local prosecutors are hauling corporations and executives into court for workplace injuries and deaths, and getting convictions based on state law. Alarmed by those successes, the business community has mounted the defense that state criminal laws, as applied to cases involving occupational injury and fatality, are preempted by federal OSHA rules.

Prosecutors reply that it is precisely because OSHA has failed to police the workplace that state criminal sanctions have had to be invoked. Convictions in cases like *Film Recovery* and *Pymm Thermometer* have had "a symbolic impact," proving that "OSHA was failing and still is failing," notes William Maakestad, associate professor of business law at Western Illinois University. His book on business responsibility, *Corporate Crime Under Attack: The Ford Pinto Case and Beyond*, addresses the safety and federal-state jurisdictional issues that dominate much of the corporate criminal liability debate. Successful criminal prosecutions against corporations and their executives for industrial injuries and fatalities have been helped by two decades of changing public attitudes toward environmental issues, including workplace health and safety.

Concern over corporate negligence in safeguarding the natural and constructed environment has dovetailed with generally "changing notions of criminal law," Maakestad says.

Safety-related criminal prosecutions by district attorneys, whose elected status makes them sensitive to public concerns, have been viewed as part of a burgeoning societal mandate on health and safety issues. Community and labor leaders' work for state right-to-know laws on toxic chemicals—which passed in 29 states and provoked the setting of a federal standard in 1983—is one manifestation of the public's current attitude.

Now, a company's officers and managers may be indicted for assault, aggravated battery—even murder—if their reckless disregard for their employees' job-site health and safety results in a fatality or serious injury.

OSHA's shortcomings have not been lost on Congress: In February 1988, the House of Representatives Subcommittee on Employment and Housing held hearings on the agency's failure to use criminal sanctions. The subcommittee's report has not yet been issued,

Holly Metz is a free-lance writer in Hoboken, New Jersey.

By Holly Metz

Illustration by Tom Herzberg

function by slashing the number of firms that were to receive routine safety inspections. In changing OSHA enforcement policy "by fiat" through uncontestable administrative directives, the administration effectively blocked organized labor's ability to challenge such changes, complained United Steelworkers of America President Lynn Williams in testimony before the Senate's 1988 OSHA oversight committee. The agency's standard-setting, for example, "requires notice and comment rulemaking and is subject to court review," Williams said, which lets labor petition OSHA. Court orders alone had moved OSHA to set new health standards on dangerous materials such as benzene and asbestos. Without this kind of challenge, the administration was able to exempt from inspection 86 percent of all manufacturing employers. Joseph Kinney, executive director of the National Safe Workplace Institute, a Chicago-based nonprofit research organization, explains that OSHA's reduced workforce had actually been conducting "less health and safety inspections, and more records inspections anyway. Until recently, OSHA's policy was to check [a firm's] records, and if there wasn't an apparent problem—that showed up on the books—they wouldn't do what they call a 'wall-to-wall'." Therefore, it often only was a firm's own records that would trigger an inspection and possible citations.

Critics have always complained about the puny civil sanctions that may be levied by OSHA against violators. "Many of the fines are in such paltry amounts that businesses consider them as part of their operating costs," charge Kinney and senior research associate Rosalie R. Day, in the Institute's 1987 report *The Rising Wave: Death and Injury Among High Risk Workers in the 1980s*. Despite inflation, employers still face a maximum fine of only $1,000 for "serious" violations—where a "substantial probability that death or serious physical harm could result . . . unless the employer did not and could not with the exercise of reasonable diligence, know of the presence of the violation." For "willful" or repeated violations, the maximum fine is $10,000. Although such sanctions have never been heavily imposed in the past—fines never exceeded $25 million in any one year—they have hardly been used during the Reagan years, dropping to an average of $6 million annually.

But it is the inadequacy of the criminal sanction deterence in the OSH Act, and the apparent unwillingness of the Justice Department to actively prosecute serious offenders that sparks incredulity, then anger, in critics.

A willful violation of a specific OSH Act standard that results in a worker's death brings a maximum of only six months imprisonment and up to $10,000 for a single violation. (Responding to the Institute's 1987 report, then-Assistant Attorney General William F. Weld told Kinney that the Justice Department would begin seeking increased penalties: $250,000 against individuals and $500,000 against corporations. The new sanctions have not been tested in court yet.)

Working from field reports, OSHA refers cases to the Department of Labor's lawyers who in turn refer them to the Department of Justice for consideration. Yet prosecutor Jay Magnuson notes that "in the first seventeen years of OSHA, only forty-one cases nationwide were referred for criminal prosecution, and only fourteen cases were accepted. Ten led to any kind of conviction, and *none* led to any kind of incarceration." More than 128,000 people have died on the job since the act became law.

□

By the mid-1980s, unionists and others were expressing outrage over the increase in job-related deaths since the beginning of the decade—especially because the numbers had been decreasing for several years before that.

From 1983 to 1985, employee deaths jumped 21 percent to 3,750, according to the U.S. Bureau of Labor Statistics (BLS). (Critics of the federal agency charge that the figures are undoubtably much higher, since BLS bases its figures on the number of incidents reported to the agency by employers, who may underreport in order to avoid OSHA inspections and higher insurance premiums. In Milwaukee's *Shoreline* case, for example, OSHA inspectors learned about the fatality from the D.A.'s office.)

The National Safe Workplace Institute estimates in its 1987 report that 7,500 people died in 1985 from work-related causes (excluding motor vehicle deaths). "Based on a 2,000-hour work year. . . 3.5 people die each hour, or 150 each week." The report also revealed that "high risk workers"—those employed in agriculture, manufacturing, mining, construction, and steelmaking—make up 82 percent of the nation's work-related deaths, even though they comprise a minority of the total U.S. workforce.

The figures indicate national losses in income and societal contributions, but each workplace death also tells a story about individuals — those who are lost to their families and communities, and those "managers, supervisors, [and] company owners who do not care enough to take simple steps to preserve life," says Kinney.

He includes in the report an account of his 27-year-old brother's death in Denver from head injuries when a scaffold collapsed because it was erected by unqualified personnel. After the death—for which no criminal charges were brought—Kinney founded the institute in 1986. The construction company eventually paid an $800 fine in response to several citations. The institute's report notes that the "policing of safety violators" has been sorely lacking in Colorado. "Federal budget cuts through the 1980s have prevented federal officials from fully fielding a complete OSHA staff in Colorado, which is believed to be, currently, 50 percent under desired strength level."

Similar complaints have been made by state and local prosecutors. "[W]hile millions each year are harmed by safety and health hazards on the job, the Reagan administration, in its zeal to deregulate, has turned its back on effective enforcement of safety laws," charged Brooklyn, New York District Attorney Elizabeth Holtzman in a June 12, 1987 editorial for *New York Newsday*. Just three months earlier, she had established the state's first Environmental Crimes-Worksite Safety Bureau, responding, along with other prosecutors, to "the void left by OSHA."

"No one ever went to jail under OSHA," says Milwaukee's McCann. "Then there was *Film Recovery Systems*, this landmark case, nationally, for prosecutors who are concerned about these sorts of situations. Three guys got twenty-five years. You can see the *stick* that criminal prosecution can be," he adds. Moved by the outcome of the Illinois case, and by the requests of labor health and safety professionals, McCann began investigating workplace fatalities in Milwaukee, winnowing out the most egregious cases for prosecution. "With *Film Recovery*, you just shake your head over what happened there," he said.

What happened in the Elk Grove, Illinois company reads like a modern Dickens tale. Film Recovery Systems

regularly hired undocumented Mexican and Polish workers to operate the unventilated plant, which extracted silver from exposed X-ray films by soaking them in more than 100 open, frothing vats of toxic hydrogen cyanide. Rashes, nosebleeds, nausea, and dizziness were common among the 30 or so people who worked eight-hour shifts over the vats.

On February 10, 1983, Stefan Golab, a 59-year-old illegal immigrant from Poland, became nauseated while working, staggered outside the plant, and collapsed. He was dead on arrival at the hospital. The medical examiner's autopsy established death by "acute cyanide toxicity."

The OSHA inspector who visited Film Recovery Systems just four months before Golab's death could have seen the impending tragedy. Instead, the inspector, following the favored agency policy, examined only the corporation's records—in an adjacent office. Those records showed a low injury rate and no hint that the poorly-engineered plant "amounted to an industrial gas chamber" (as one reporter later described it). And even if the inspector had observed the dangerous conditions, the OSH Act did not authorize him to close Film Recovery down; he would have had to seek an injunction in federal district court.

The routine investigation by Cook County prosecutors quickly expanded when they discovered more about the company's day-to-day operations.

"There was a pattern of deception that the employers embarked upon, an attempt to conceal from the workers the nature of the chemical that they were working with," says Jay Magnuson. Prosecutors would later argue that this "knowledge that they were creating a strong probability of death or great bodily harm" made the Film Recovery managers liable for murder under a section of the Illinois homicide statute.

Magnuson says, "None of the workers that we had testify knew they were dealing with cyanide. They were told it was 'the chemical' and they called it *El Chemical*." In fact, one worker testified that he was instructed to remove the skull-and-crossbones symbol that warned of the lethal nature of *El Chem-*

Los Angeles Gets Results With Roll-Out Unit

The activism and achievements of the Los Angeles County D.A.'s OSHA unit are instructive, because more resources have been pumped into that operation (jointly created with an environmental protection division) than in any other jurisdiction nationwide. Jan Chatten-Brown and her colleagues, unlike criminal prosecutors in most other places, work only on safety-related cases, which includes participating in the unit's innovative "roll-out" program instituted by Los Angeles County District Attorney Ira Reiner in 1985.

The roll-out, "where an attorney and investigator respond twenty-four hours a day, seven days a week to the scene of traumatic occupational fatalities in Los Angeles County," is "the lynchpin of our prosecution effort," Chatten-Brown says. The unit begins the investigation as soon as it is notified by the coroner's office or a police department; it does not wait for referrals from the region's occupational safety agency.

The D.A.'s office had a reciprocating notification policy with the regional office of California's federally-approved, state-run plan (CAL/OSHA) until July 1987, when Governor George Deukmejian totally eliminated the plan from the budget. The legislature did not reinstate it. Litigation followed, and the state court of appeals held that the governor had exceeded his authority. He has appealed to the state's supreme court, which, at this writing, had not ruled.

Chatten-Brown reports that CAL/OSHA's current work in the public sector—while waiting for the court's holding—is limited to inspecting elevators, high-pressure vessels like steam boilers, and amusement rides; federal OSHA has jurisdiction elsewhere.

In the past three years, the D.A.'s OSHA unit's three attorneys and eight investigators (who are shared with the environmental crimes bureau) have investigated more than 80 workplace sites—often in response to calls by county police chiefs, who have been requested by the district attorney to treat all occupational fatalities as potential homicides. The unit may make referrals to local city attorneys, and about twelve cases have been filed as a result. Although four of the bureau's cases "were charged as involuntary manslaughters, based on the gross negligence of the employer, or another individual," Chatten-Brown says most have been filed under sections of the California Labor Code that make it a misdemeanor "to knowingly or negligently violate an OSHA regulation when that violation is serious" or "to willfully violate an OSHA standard when that violation results in death, permanent, or prolonged impairment."

Prosecuting egregious health and safety violators under the state labor code gets results. "We've found a willingness of juries to convict," she observes. "Not in the involuntary manslaughter area, where you have to show gross negligence, but under the labor code, [where] it's just simple negligence. The failure to take action is usually a question of an omission." Almost without exception, individuals in the corporation, and the corporation itself, have been charged.

"It's something that can be emulated in other states, and I always encourage people to consider that," advises Chatten-Brown. "And it's something that we've recommended to Congress—that they strengthen the federal OSHA law, to include some comparable provisions."

Prosecutors and occupational health and safety advocates believe Congress must make such changes. They cite the number of workplace deaths, maimings, and poisonings that have occurred in the eighteen years since the OSH Act became law. The act has never been amended, although, as Joseph Kinney notes, "public attitudes have changed." The National Safe Workplace Institute founder says that the country has had a lot of experience with the idea of voluntary compliance. "Employers need a different kind of motivation. I'd like to see them well-motivated, so that we can have people going to work with some confidence that they will return home."

Holly Metz

ical. No basic safety equipment was given the employees. And, Magnuson notes, "it was common knowledge at the plant" that undocumented workers were hired "not so much to save money," but because "you can't run from the federal government if you're illegal, and then report to the federal government on safety violations."

Prosecutors could have charged Film Recovery with murder, Magnuson says, but the sentencing provisions in the code allow only jail for murder—not for the fines or probation that could be applied to a corporation. "We also had the argument that the individuals were guilty of murder, but the corporations"—Film Recovery and one of its parent companies—"had been negligently reckless in *allowing* the individuals to commit these acts. That brings it into an involuntary, and that's how we argued it." Magnuson says that in the applicable section of the Illinois murder statute—which would be classified as second-degree murder in most jurisdictions—"the penalties are pretty much the same as first degree, [but] it acknowledges that you can commit murder even if you don't intend any *specific* person to die."

But, Magnuson explains, the traditional common law basically says that in a second-degree murder situation the conduct could be so outrageous that the court could infer both malice and intent from the result.

After a two-month bench trial, Cook County Circuit Court Judge Ronald Banks found Film Recovery's president, plant manager, and foreman guilty of murder and reckless conduct. Each was fined $10,000, and sentenced to 25 years in prison for murder, with 364 additional days for reckless conduct. The two corporations—both no longer operating at the time of sentencing—were found guilty of reckless conduct and involuntary manslaughter, and fined $11,000 each.

"The judge basically said that this [crime] was tantamount to leaving a bomb in an airport—a time bomb. Just because it goes off days later, it doesn't exonerate the defendants from their own knowledge that they're creating this strong probability of death or great bodily harm," says Magnuson.

While acknowledging the particular circumstances that created *Film Recovery*, prosecutors and workplace health and safety advocates note that the case also focused on a situation which plagues many jurisdictions: dangerous worksites staffed by undocumented and other economically vulnerable workers. "High risk workers," report *Rising Wave*'s authors, are "disproportionately ethnic, black, Hispanic, and young"; they are "455 percent more likely to die than low risk workers." They are also more susceptible to serious injury, including poisoning through exposure to toxic materials.

Film Recovery has been appealed on jurisdictional grounds—a matter not raised at trial. Defendants are attempting to remove themselves from the reach of the state law by saying that the issue is a federal matter because federal OSHA preempts state law. It is a defense being forwarded in other cases, too.

□

According to William Maakestad, who was a special deputy prosecutor in the 1979 reckless homicide trial of Ford Motor Company, cases like *Film Recovery* were made possible through a series of twentieth-century court decisions that gradually eroded corporate and executive immunity to criminal prosecution.

Until the early part of this century, corporations were never even charged with crime, because they lacked a physical being that could be jailed. They were also viewed as having no mind, making intent to commit crime impossible. Then, in 1909, the U.S. Supreme Court set precedent in *New York Central Railroad v. the United States*, holding that in limited circumstances corporations may be charged with crimes. Several decades later, in the 1974 *People of New York v. Ebasco Services* case, which involved the death of a construction worker, a New York Supreme Court ruled that homicide charges could be filed against a corporation. The following year the U.S. Supreme Court ruled in *United States v. Park* that a corporation's chief executive may be held guilty of violating a law, even if an assistant had been instructed to correct the violation, but didn't. And in 1977, a New York appellate court upheld manslaughter indictments against Warner-Lambert Co. and four of its executives after six workers died in a plant explosion; although the charges were dismissed because the explosion was ruled a previously-unimaginable accident, the corporate shield had been pierced.

In 1985, *Film Recovery* became the first known successful application of a murder statute to a job-site fatality. The startling outcome of the case was scrutinized in business publications and law journals, with many writers concluding that the case represented the exceptional confluence of sustained and dramatic negligence and the close involvement of a small company's management with daily plant operations.

Jan Chatten-Brown agrees that in filing charges against individuals within a corporation, "it becomes more difficult, the larger the company, to get up to the top." But she notes that the three-year-old Los Angeles County D.A.'s OSHA unit has occasionally managed to try vice-president and general managers of large firms "on the basis of documents that we either obtain through discovery or as part of the execution of a search warrant." She adds that deterence for a major company is not the prospect of paying a trivial fine, but rather having to tell the SEC about a criminal action against them. "It drives them crazy," she says. "That's why so many of them fight it as hard as they do."

□

In a first-of-its-kind assault case in New York state, prosecutors charged the president and vice-president of the Brooklyn-based Pymm Thermometer Company in 1987 with knowingly exposing a worker to a toxic chemical that caused injury (*People of the State of New York v. William Pymm*).

"The weapon here was a dangerous chemical"—mercury—"and it inflicted just as much damage as a gun or knife," explained District Attorney Elizabeth Holtzman about the assault charge when the indictment was jointly announced by her office and the office of the state's attorney general. A jury later found the two executives guilty of numerous charges, including reckless endangerment, for imperiling the health of several workers, and assault against one particular employee, Vidal Rodriquez.

Assistant District Attorney Marc Dubin, who, with a New York State assistant attorney general, prosecuted the Pymm case, argued for assault in the first degree, which in New York applies to persons who, in the course of a felony, cause serious physical injury to another person. In addition, New York State distinguishes between physical injury—the impairment of a person's physical condition, or substantial pain—and serious physical injury, defined as a physical injury that creates a substantial risk of death, or which causes death or

Prosecutors ask: Has OSHA perversely become a gift to management instead of a promise to labor?

serious and protracted disfigurement, impairment of health, or loss or impairment of any bodily organ.

In the course of a year-long investigation, prosecutors found that Rodriquez had worked for eleven months in an unventilated, secret cellar under Pymm's production floor, operating a machine that crushed broken thermometers to recover the mercury. Pymm's executives never told OSHA inspectors about the cellar operation. Their lies and consequent falsification of OSHA records created the underlying felony. In the course of the coverup, the executives caused serious physical injury to Rodriquez, who, because he was totally unprotected, suffered irreversible brain damage from mercury poisoning.

Conviction for assault in the first degree meant mandatory jail time. The executives faced up to fifteen years imprisonment, and either $5,000 in fines, or punative damages of double the profit Pymm made by not complying with the health and safety rules in the first place. A New York State Supreme Court judge set aside the verdict on procedural grounds, asserting that the case should have been tried in federal court, because OSHA, a federal agency, had jurisdiction over the workplace. Prosecutors have filed their brief, appealing the setting aside of the verdict to the New York Court of Appeals, and at this writing, they await the reply brief.

The judge's ruling—that the federal agency's health and safety rules preempt the state's general criminal laws in occupational injury and fatality cases—irked prosecutors.

Holtzman said her office's investigation of Pymm's health and safety record had "uncovered an appalling pattern of conduct by OSHA that was both cavalier toward enforcement of federal laws and callous to worker safety." As early as 1974, inspectors from the then-state-run OSHA reported that Pymm's younger employees "often...play with the 'quicksilver' globules that are spilled on their work benches" on the production floor. Mercury vaporizes when warmed, becoming a colorless, odorless gas that ravages the liver, kidneys, and brain. But no action was taken. Inspectors eventually cited Pymm in 1981 for serious health and safety violations, but then, without verifying compliance, repeatedly granted year-long extensions of the abatement deadline.

□

Pymm Thermometer still operates. The district attorney's office says that it can't prevent the company from doing business. The D.A.'s job is to prosecute crimes, not to clean up factories. That's OSHA's job, it says. And they note that the criminal provisions of OSHA do not cover cases where employees only are seriously injured and no fatalities occur. But—in a statement that shows how workers' safety falls through the cracks of the code and enforcement—Joseph Rufolo, OSHA's acting deputy regional administrator for Region II (which includes New York, New Jersey, Puerto Rico, and the Virgin Islands) told a reporter for *Occupational Hazards* in September 1987: "The problem [Holtzman] didn't realize is that we don't make the workplace safe. The employer does."

So, prosecutors are left asking: Has OSHA perversely become a gift to management instead of a promise to labor? Can the OSH Act, which was meant to insure worker health and safety, be used to protect employers?

Even though the preemption issue has been raised in several courts, prosecutors involved in safety-related cases are most closely watching another injury case, *People of the State of Illinois v. Chicago Magnet Wire Corporation.* In 1985, the Cook County, Illinois, district attorney's office charged the wire-coating company and five of its officers with aggravated battery, reckless conduct, and conspiracy to commit aggravated battery. Prosecutors alleged that these common-law crimes were committed by knowingly and recklessly exposing 41 workers to "poisonous and stupifying substances," seriously injuring them. Ventilation, safety instruction, and protective gear, the prosecutors charged, were absent.

The circuit court judge dismissed the charges, finding that the OSH Act preempts the application of the state's criminal code because OSHA had set standards on the occupational use of such toxic chemicals, and Illinois had not undertaken to enforce these standards in a OSHA-approved state-run plan. The prosecutor appealed. The preemption issue in *Chicago Magnet Wire* now has been argued before the Illinois Supreme Court, and there has been no ruling yet.

To respond to preemption arguments and to continue to push new cases forward, prosecutors from around the country have developed "a kind of informal network," says Michael McCann. As a result, the district attorneys of Brooklyn, Milwaukee, Los Angeles, and Middlesex County, Massachusetts (where there has been much interest in such cases, but no indictments yet) filed an amicus brief with the Illinois Supreme Court on *Chicago Magnet Wire.*

Their brief joins the small mountain of paper gathering on the issue, as "the powerhouses in the manufacturing and labor aspects of our society" also focus in on the case, according to McCann. The AFL-CIO and the United Auto Workers are against preemption. The National Association of Manufacturers and the U.S. Chamber of Commerce are for it. Some observers might find the Chamber's reversal of opinion curious, especially since it "fought like hell against OSHA, and now they want to dance," says McCann.

Tremendous resources are being marshaled for this battle, which because "it deals with such a fundamental issue"—federalism—"has an awfully good chance of going before the U.S. Supreme Court," according to William Maakestad. The Court, he notes, only reluctantly permits federal acts to supersede the state's traditional police powers.

A large part of the battle revolves around congressional intent. According to the December 1987 *Harvard Law Review* note "Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents," even though the Constitution establishes the preemption doctrine in the supremacy clause,

"congressional intent is the 'ultimate touchstone' for deciding whether a specific state action is preempted by federal law."

The note's authors argue that the intent of Congress was clear. The OSH Act expressly addresses the development and enforcement of state standards—which are proactive—but not the enforcement of generally applicable state criminal laws— which are reactive. Prosecutor Magnuson agrees, adding that "in my conversations in Washington, D.C., with different committees in Congress, it is clear that the Congress did not intend in 1970 to preempt criminal law application. There wasn't any criminal law application going on at the time, anyway." Nor did Congress intend uniformity, for it did not exclusively occupy the field, argues Magnuson. "They were quite willing to say: All we want is a floor [on health and safety standards]. We don't need *uniform* standards. If California wants to be twice as restrictive as New Mexico, then they both can have their own state plans, as long as they meet the minimum federal standard."

State criminal prosecutions "effectively compliment" the OSH Act, concludes the Harvard note. But by definition, they are reserved for particularly egregious conduct.

Maakestad agrees. Criminal law "comes into play in those cases that go outside of acceptable moral boundaries," he says. Applying the criminal code is "necessary as an alternative, but it can never be seen as the preferred approach." In workplace-related cases, "the research on OSHA regulations, workers' compensation, and the options of private suits" need to be integrated with the use of criminal sanctions. "We need to look at all of these alternatives as a way to establish levels of workplace safety."

Prosecutors and defense attorneys, as well as business executives and their consultants, have heard the strong public support for criminal sanctions against violators of workplace safety.

Magnuson has attributed the Film Recovery defendants' request for a bench, rather than a jury, trial to an awareness of public support for sanctions. And Chatten-Brown recalls how she "had a juror say after [a] trial, in terms of a vice-president's liability: 'But ultimately, *all* of this comes from the top, doesn't it?' "

Chatten-Brown feels very strongly that such prosecutions help promote job safety and health. "First of all, as to the individual employer, I can refer you to some of the defendants—or defense counsel, anyway—and they would say this has made a drastic change, in terms of the kind of comprehensive accident prevention plans that they have accepted as conditions of probation." But she notes that focusing on the individual defendants does not tell the whole story. "Safety engineers and industrial hygienists tell me all the time that our presence in Los Angeles County has made their job a lot easier. Management pays attention to them in a way they never did in the past."