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to deter corporate officers, such as the Film Recovery executives, with criminal sanctions. Imprisonment is one penalty that cannot be passed on to others. (Tr. 87.)

The criminal provisions of the 18-year-old OSH statute are outdated and need to be strengthened so that the Federal Government can effectively and meaningfully prosecute cases of murder and serious injury that result from willful disregard for worker safety.

C. OSHA AND THE PREEMPTION QUESTION

While OSHA has failed to seek criminal penalties for workplace safety violations, State and local prosecutors in dozens of jurisdictions across the coun have used the States' historic police powers to prosecute employers for willful conduct that has caused workers to be killed or injured on the job.

In the past 2 years the Los Angeles district attorney's office has prosecuted 18 such cases. Los Angeles Assistant District Attorney Jan Chatten-Brown describes one such prosecution:

> Our first involuntary manslaughter prosecution was against the president of a small drilling company who sent a worker down a 33-foot hole—if you can envision this—that was only 16 to 18 inches in diameter.
>
> The worker was lowered into the hole that was being drilled for an elevator shaft with his foot through a sling. He had no safety harness. The air was not tested. And the sides of the well were not encased.
>
> When the worker went into seizures and the rescue personnel responded, they were told that they could not pump oxygen into the hole because the sides of the wall might collapse. Therefore, by the time they were able to remove the victim, he was dead. (Tr. 41.)

Many of the resulting State court convictions have been challenged or appealed on the ground that the Federal OSH Act preempts State prosecution for workplace injuries and fatalities. The preemption claim has been raised in State courts by defendant employers who seek to use the Federal OSHA law as a shield against criminal prosecution. While an enormous amount of time and money is being spent on appeals on the preemption issue, OSHA and the Department of Labor have not taken an official position on the preemption question.

By its inaction and silence in some cases, and mixed signals in others, OSHA is only adding to the confusion. This confusion and uncertainty have had the effect of thwarting criminal prosecutions in some jurisdictions.

In the *Film Recovery* case, OSHA investigators backed off and deferred to the State of Illinois. As Jerry Thorn, Deputy Solicitor of Labor for National Operations, explained to the subcommittee:

> [T]he investigation that went on in *Film Recovery*, as I understand it, we were there—OSHA's inspectors were there either simultaneously with Mr. Daley's people, but when our OSHA inspectors found out that there was clear interest on the part of the State of Illinois and the county prosecutor's office with respect to the death, they some-

> what backed off their investigation and simply let them, as I understand it, take over. (Tr. 89.)

By "backing off" in *Film Recovery* because the State of Illinois was involved in the case, OSHA tacitly acknowledged the State's right to act in terms of criminal prosecutions.

OSHA is not a disinterested bystander in this matter. OSHA should take an official position on the preemption question and should issue a policy statement. In addition, OSHA should not wait for a particular case to work its way up to the U.S. Supreme Court, but rather should file *amicus* briefs in various cases pending on appeal in State courts, including the *Chicago Magnet Wire Corp* case, which is pending before the Illinois Supreme Court.

OSHA should take the position that the States have clear authority under the Federal OSH Act, as it is written, to prosecute employers for acts against their employees which constitute crimes under State law.

Nothing in the OSH Act or its legislative history suggests that Congress intended to shield employers from criminal liability in the workplace or to preempt enforcement of State criminal laws of general application, such as murder, manslaugher, and assault.

Generally speaking, preemption is not read into a statute, and must be unmistakable. It would be most unusual for Congress to displace ordinary criminal laws. Further, the OSH Act is basically an antipreemption statute. Section 8(b)(4) provides:

> Nothing in this act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, disease, or death of employees arising out of, or in the course of employment.

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

Section 18 of the OSH Act, however, provides that "[n]othing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6" and that "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards . . . with respect to which a Federal standard has been promulgated . . . shall submit a State plan. . . ." In this provision forbidding States without an approved plan from setting or enforcing occupational safety and health standards, Congress' focus was on administrative regulation of standards and was not meant to apply to or to deprive employees of the longstanding protection provided by State criminal laws.

As Cook County State's Attorney Richard Daley stated:

> We are not enforcing Government standards, as OSHA does. Rather, we are enforcing our criminal code to protect the people of Cook County from gross misconduct. I submit to you that there is no conflict of jurisdiction on the issue. On the contrary, the responsibilities and objectives of OSHA and local prosecutors can complement each other quite effectively. (Tr. 32)

Daley cited an example of how absurd and detrimental to public safety it would be if Congress had intended to preempt State criminal prosecutions of employers acts against their employees:

> For example, if there was an explosion in a factory stemming from hazardous conditions and dozens of workers died, local prosecutors would be preempted from prosecution.
>
> Yet if the explosion resulted in the deaths of residents in the surrounding area, or a passerby, or a delivery person, we would not be preempted from prosecution.
>
> All these deaths would occur due to the same reckless or negligent conduct. But we could prosecute only for the deaths of those who were not employed by the factory. (Tr. 32.)

Further, the imbalance of criminal penalties would mean that in the above example, the employer, under State law, could face up to 25 years in prison for the death of a nonemployee, but under the OSH Act, could receive only 6 months in prison for a worker's death. We cannot imagine that Congress intended such a result.

The States have an interest in controlling conduct that endangers the lives of their citizens whether it be at home, at work, or on the road. State and local prosecutors should be commended and encouraged to continue their efforts to protect people in their workplaces by utilizing the historic police power of the State to prosecute workplace injuries and fatalities as criminal acts.

D. COOPERATION WITH THE STATES

OSHA's record with respect to cooperation with State and local prosecutors has been spotty. Cook County State's Attorney Richard Daley told the subcommittee:

> Unfortunately, cooperation is not the current norm. OSHA has been reluctant, at best, to cooperate in our State prosecution of these cases. (Tr. 32.)

It is absurd that local OSHA offices do not routinely fully cooperate with local law enforcement officials who seek to prosecute crimes that occur at the workplace. There is a need for a real partnership between the Federal Government and State and local prosecutors in the area of worker safety, similar to the partnership that exists in prosecuting drug dealers and environmental polluters.

At the urging of subcommittee members, on June 15, 1988, OSHA belatedly issued a memorandum to its field offices concerning cooperation with State and local prosecutors in cases where employees have been killed or injured on the job. While the memoran-

dum encourages cooperation in State or local prosecutions "to the fullest extent appropriate" and is a step in the right direction, more coordination is needed to achieve a real partnership.

VI. Summary

OSHA's record in referring cases for criminal action is dismal. Part of the problem is that OSHA "cannot" and part is it "will not." Deficiencies in the Federal OSH statute preclude OSHA from seeking criminal sanctions in cases such as *Pymm Thermometer*, where there was no fatality. In cases such as *Film Recovery*, where there was a fatality, OSHA has regularly and consistently chosen not to seek criminal penalties. There is an institutional reluctance by OSHA, the Justice Department, and the U.S. Attorney's Office to pursue criminal prosecutions in workplace safety cases.

There is a need for OSHA to be more aggressive and timely in using available criminal sanctions. Unless the OSH statute is beefed up and vigorously enforced by OSHA to punish criminally those who show willful disregard for worker safety, some employers will continue "to get away with murder."

O

Attachment B

List of State Prosecution Contacts
and
various articles relating to state prosecution for
OSHA violations

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THE LAW

THIS SAFETY RULING COULD BE HAZARDOUS TO EMPLOYERS' HEALTH

Illinois' OSHA decision opens business up to more criminal charges

Mercury is certainly lethal enough. To Brooklyn District Attorney Elizabeth Holtzman, it looked like a deadly weapon. In 1987 her prosecutors convinced a New York jury that two Pymm Thermometer Co. executives were guilty of assault and reckless endangerment for exposing their workers to the poisonous metal. One employee suffered permanent brain damage. But the judge had a last-minute change of heart. He set aside the verdict, ruling that job safety could be regulated only by the federal Occupational Safety & Health Act.

Holtzman is hardly the only D.A. to be rebuffed on this issue. But as she pursues her appeal of the decision, she and other prosecutors who want to crack down on unsafe work conditions have some new ammunition. On Feb. 2 the Illinois Supreme Court ruled that OSHA does not bar states from prosecuting corporate officials for work-related injuries and deaths. The decision gives the state the go-ahead to prosecute five executives of Chicago Magnet Wire Co. While the Illinois decision doesn't apply outside that state, other state courts where appeals of such cases are pending could be influenced by the ruling and by a December Justice Dept. opinion that reached the same conclusion (table).

FILLING A GAP. The Illinois ruling buoyed prosecutors who have had little success in appeals of overturned convictions for workplace offenses. In Chicago, State's Attorney Richard M. Daley says he will use the decision to seek extradition from Utah of a defendant in a murder case the state has brought against Film Recovery Systems Inc. Utah had balked at extraditing company President Michael MacKay until the state supreme court ruling clarified that Illinois had the right to prosecute him. Daley has already won convictions and 25-year prison sentences against three other FRS executives who exposed their employees to cyanide fumes, resulting in one death.

In Milwaukee, County District Attorney E. Michael McCann is weighing criminal charges against a contractor and others in the deaths of three workers who died in a methane explosion on Nov. 10. "My message to business," he warns, "is you better care about safety or be prepared to go to jail."

Business is worried. Employer groups contend that it's unfair for companies that comply with OSHA regulations to be prosecuted for criminal conduct. They assert that the whole point of OSHA was to codify an explicit set of regulations to guide employers. "The issue here is whether we have a clear standard for employers to follow or whether we are going to be at the mercy of the whims and caprices of every county state attorney in the U.S.," says Thomas L. Reid, vice-president of the Illinois Manufacturers Assn. The IMA filed a brief in the Illinois case supporting Chicago Magnet, a unit of North American Philips Inc.

MORE CLOUT. Local prosecutors, for their part, claim they're filling a void. Since 1970 the Occupational Safety & Health Administration has referred 44 cases to Justice for criminal prosecution, and charges have been filed in only a few of them. Prosecutors complain that criminal penalties of up to six months in jail are so weak that Justice is reluctant to go to court. And OSHA rarely gets prosecutions because it can pursue criminal cases only when a worker has died. "I have to face families of victims and tell them I have a legal problem—that an OSHA fine of several hundred dollars may stand in the way of holding these people truly accountable," says Austin (Tex.) D.A. Kenneth Oden.

Local prosecutors dismiss OSHA's civil penalties as a toothless deterrent. They "are just passed on to the consumer as a cost of business," says Jan E. Chatten-Brown, a D.A. in Los Angeles County's occupational safety and health unit.

Congress may give OSHA more clout. Representative Tom Lantos (D-Calif.) plans to introduce legislation that would strengthen criminal penalties for worker safety violations. And at some point, the U.S. Supreme Court is likely to rule on the state-federal dispute. In the meantime, prosecutors say that managers should be able to figure out when they are committing potentially criminal acts in the workplace. "If mercury can put holes in someone's brain," says Holtzman, "that's not much different from a gun putting a hole in someone's brain."

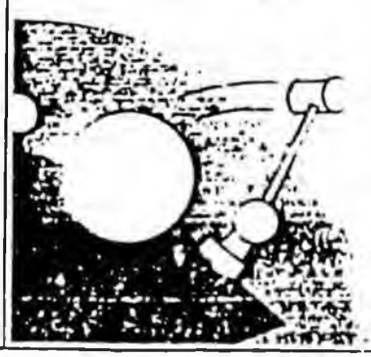
By Susan B. Garland in Washington

COURTROOM CONFLICT OVER WORKER SAFETY

CHICAGO MAGNET WIRE CO. Elk Grove Village, Ill. On Feb. 2 the Illinois Supreme Court upheld Cook County's criminal prosecution of five senior executives for allegedly allowing workers to become ill from exposure to hazardous chemicals. A lower appeals court, ruling that OSHA preempted the state criminal code, supported a trial judge's dismissal of the case.

FILM RECOVERY SYSTEMS INC. Elk Grove Village, Ill. The Cook County state's attorney successfully prosecuted three senior officials on murder and reckless conduct charges in 1985 after a worker died from inhaling cyanide fumes. The officials have appealed, arguing in part that OSHA preempted state law.

PYMM THERMOMETER Brooklyn, N.Y. In 1987 the Kings County district attorney won convictions against the company's two owners on charges of assault and reckless endangerment by exposing workers to mercury. The trial judge overturned the verdict on the ground that OSHA preempted state prosecution. The decision is on appeal.

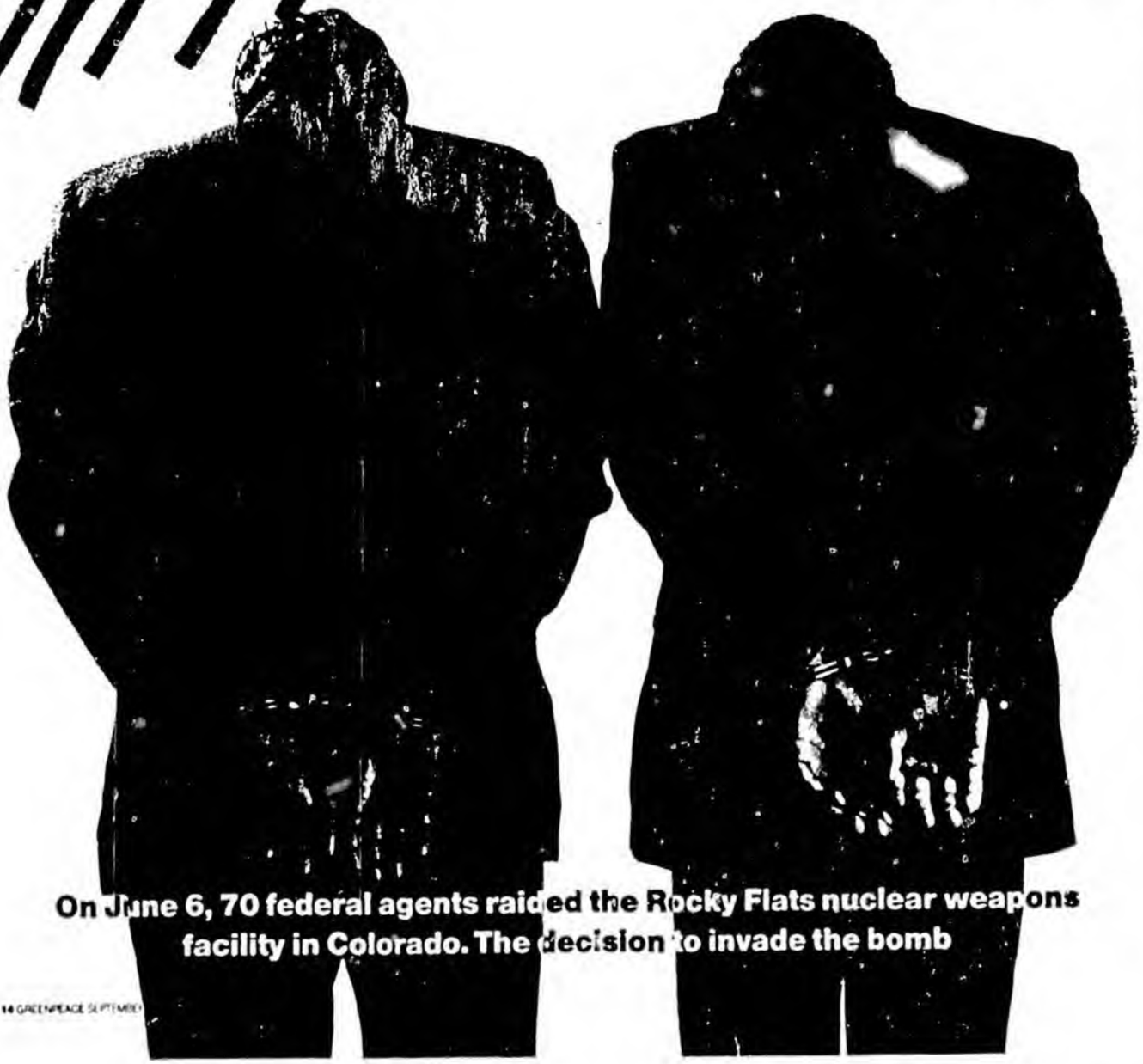


SABINE CONSOLIDATED INC. Austin, Tex. The state prosecutor won a conviction of criminally negligent homicide against the company president in connection with the death of two employees in a trench collapse. An appeals court said the state had no jurisdiction. The state has taken its case to the Texas Court of Criminal Appeals.

DATA: LW

CRIME in the

BY RUSSELL MOKHIBER



On June 6, 70 federal agents raided the Rocky Flats nuclear weapons facility in Colorado. The decision to invade the bomb

plant came on the heels of a lengthy investigation described in FBI agent Jon S. Lipsky's 116-page affidavit, which convinced a federal judge to unleash the agents. In his report, Lipsky accused Rockwell International and the U.S. Department of Energy (DOE) of "knowingly and falsely" stating that the plutonium-processing plant complied with this country's environmental laws. In doing so, the contractor and its government client concealed "serious contamination" at the site. Lipsky charged that Rockwell and DOE secretly dumped hazardous waste into public drinking water and surreptitiously operated an incinerator they said had been shut down.

While scandal at nuclear weapons plants seems almost a regular news feature of late, the capacity demonstrated by the Justice Department in Colorado to deploy an environmental police force—replete with FBI agents, investigators, prosecutors, wiretaps and aerial surveillance—is in fact an unusual thing. The government rarely flexes its legal muscle to prosecute major environmental crimes or, for that matter, corporate crimes generally. For every Rocky Flats, there are dozens of corporate environmental crimes that go undetected, unprosecuted and unpunished.

"CRIME IS A SOCIOPOLITICAL ARTIFACT, NOT a natural phenomenon," writes legal scholar Herbert Packer in *The Limits of the Criminal Law*. "We can have as much or as little crime as we please, depending on what we choose to count as criminal." In this country, we have chosen to have very little corporate crime. Most corporate wrongs against humans and the environment are not considered criminal in the traditional sense—that is, activity that is prohibited by the state and prosecuted to conviction. While corporations like Rockwell International can be criminally prosecuted for serious violations of environmental laws, they usually face less demanding and less visible civil procedures.

On the face of it, this leniency is grossly out of proportion to the effects of the corporate crime wave. Every year, roughly 28,000 deaths and 130,000 serious injuries are caused by dangerous products. At least 100,000 workers die from exposure to deadly chemicals and other safety hazards. Workplace carcinogens are estimated to cause between 23 and 38 percent of all cancer deaths. More than 45,000 Americans die in automobile crashes every year. Many of those deaths either are caused by defects or are easily preventable by a simple redesign.

The financial cost to society is staggering. The National Association of Attorneys General reports that fraud costs the nation's businesses and individuals upwards of $100 billion each year. The Senate Judiciary Committee has estimated that faulty goods, monopolistic practices and other such violations annually cost consumers $174 to $231 billion. Added to this is the $10 to $20 billion a year the Justice Department says taxpayers lose when corporations violate federal regulations. As a rule of thumb, the Bureau of National Affairs estimates that the dollar cost of corporate crime in the United States is more than 10 times greater than the combined total from larcenies, robberies, burglaries and auto thefts committed by individuals.

The full extent of the corporate crime wave is hidden. Although the federal government tracks street crime month by month, city by city through the FBI's Uniform Crime Reports, it does not track corporate crime. So the government can tell the public whether burglary is up or down in Los Angeles for any given month, but it cannot say the same about insider trading, midnight dumping, consumer defrauding or illegal polluting.

Still, we do know that corporate crime is pervasive. A 1979 Justice Department study, "Illegal Corporate Behavior," found that 582 corporations surveyed racked up a total of 1,554 law violations in just two years. A 1980 *Fortune* magazine survey revealed that 11 percent of 1,043 large companies had been convicted on criminal charges or consent decrees for five offenses: bribery, criminal fraud, illegal political contributions, tax evasion and criminal antitrust. A *U.S. News & World Report* study of the 500 largest corporations found that "115 have been convicted in the last decade of at least one major crime or have paid civil penalties for serious misbehavior" in excess of $50,000. And in 1985, George Washington University Professor Amitai Etzioni found that roughly two-thirds of America's 500 largest companies were involved to some extent in illegal behavior over the preceding 10 years.

BY THE MID-1930s, EVIDENCE WAS MOUNTING that exposure to asbestos was a threat to human health. In 1982, the Manville Corporation (previously Johns Manville), the nation's largest manufacturer of asbestos, filed for bankruptcy to shelter its assets from 16,500 personal injury lawsuits. In the intervening 50 years, the corporation actively suppressed asbestos studies and hid information from its employees on the dangers of working with asbestos. They even cut workers off from their own health records. "As long as [the employee] is not disabled," rationalized the company's medical director in 1963, "it is felt that he should not be told of his condition so that he can live and work in peace, and the company can benefit from his many years of experience."

Over the next 30 years, 240,000 people—8,000 per year, almost one every hour on average—will die from asbestos-related cancer. The company will pay some $2.5 billion to its victims, a hefty civil penalty. But no asbestos executive has ever been prosecuted for reckless homicide.

Likewise, it was not a "crime," in the traditional sense of the word, for Union Carbide's Bhopal, India, subsidiary to operate a pesticide manufacturing plant so incompetently that in 1984, clouds of deadly methyl isocyanate gas escaped, killing 2,000 to 5,000 persons and injuring 200,000.

And it is not a "crime" for the tobacco companies knowingly to market a highly addictive drug that kills more than 365,000 Americans a year, 1,000 every day. This toll is higher than the number of Americans killed annually by AIDS, heroin, crack, alcohol, car accidents, fire and murder combined.

And it is not a "crime" to market known cancer-causing pesticides such as Alar. Nor

CORPORATE CRIME-BUSTING: SOME LEGAL AND SOCIAL REMEDIES

✗ Congress should pass an executive responsibility statute making it a criminal offense for a corporate supervisor willfully or recklessly to fail to oversee an assigned activity that results in criminal conduct. The globe-trotting chief executive, like Exxon's Lawrence G. Rawl, would have a new incentive to monitor the safe conduct of his corporation.

✗ Corporate managers should be required to report to federal authorities a product or process that may cause death or serious injury. This would ensure that R&D departments keep worker health and safety in mind. A bill to this effect, introduced by Representative George Miller (D-CA) in 1979, was defeated thanks in part to corporate lobbying.

✗ Congress should require publicly held corporations to report their litigation records—indictments, convictions, sentences, fines and product-liability lawsuits—to the FBI. This corporate crime database could then be used by communities and prosecutors to inform their fights against criminally inclined companies.

✗ At the local level, corporate crime-watch committees should be formed to keep an eye on the activities of neighboring corporations and to keep police and prosecutors on their toes. Victims of corporate crime, such as those who have been injured by the Dalkon Shield, Agent Orange and asbestos, have formed organizations to lobby for just compensation, strong laws and, where applicable, effective prosecution and strict sentences.

✗ Creative penalties should be devised, such as court-ordered adverse publicity. As a condition of probation, for example, a judge could order a company to take out network television advertisements telling viewers about its long criminal record.

✗ More than anything else, corporate criminals should do time. They should be jailed alongside the mugger and drug dealer, not in the posh "Club Feds" usually reserved for white-collar crooks.

is it a "crime" to dump toxins into the air and water. General Motors (GM), among others, has been campaigning actively against public health for decades. In 1949, the company was convicted of conspiracy to destroy the nation's mass transit systems by buying up and then dismantling electrical transit systems in urban areas around the country.

The environmental consequences of this crime are still felt today. Los Angeles, which in the 1930s boasted an efficient system of electrified public transit that served 56 cities, saw the system destroyed and replaced with diesel buses and a freeway network for GM's cars. The city now has one of the worst air pollution problems in the country, and the Bush administration has proposed exempting it from some provisions of the Clean Air Act.

"What is good for General Motors is not necessarily good for the country," former San Francisco Mayor Joe Alioto told senators in a hearing about the destruction of the electric transit system in the Bay Area. "In the field of transportation, what has been good for General Motors has, in fact, been very, very bad for the country."

With the enormous resources available to them, companies like General Motors can ensure that the laws protecting us from them remain weak. During the last decade, for example, General Motors has successfully opposed amendments that would strengthen federal clean air and federal fuel-efficiency standards. GM has spent more than $1.8 billion lobbying Congress against clean air amendments since 1981, the year the Clean Air Act came due for reauthorization. In addition, GM's political action committee made more than $750,000 in campaign contributions, much of it to legislators who sit on committees with jurisdiction over clean air issues.

LACK OF ACCOUNTABILITY IS DEEPLY EMBEDded in the concept of the corporation. Shareholders' liability is limited to the amount of money they invest. Managers' liability is limited to what they choose to know about the operations of the company. And the corporation's liability is limited by Congress (the Price-Anderson Act, for example, caps the liability of nuclear power companies in the aftermath of a nuclear disaster), by insurance and by laws allowing corporations to duck liability by altering their corporate structure (the Manville bankruptcy dodge, for example).

In addition, since the turn of the century, most laws governing corporate behavior give regulators the option of avoiding criminal charges and proceeding with less burdensome and less noticeable civil enforcement. In this way, corporations avoid either admitting or denying that they violated the law and are let off with slap-on-the wrist fines and consent decrees. For environmental, labor, securities, energy, and food and drug violations, the civil injunction is today the primary method of enforcing the law against big business.

Fines, dismissed by criminologists as "license fees to violate the law," are the customary civil penalty for corporate wrongdoing. "One jail sentence is worth 100 consent decrees," said one federal judge. "Fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by his company."

Under civil enforcement, the executives of criminal corporations are freed from the stigma of prosecution and possible jail sentences. "The violations of these laws are

crimes," wrote Edwin Sutherland in his 1949 classic, *White-Collar Crime*, "but they are treated as though they are not crimes, with the effect and probably the intention of eliminating the stigma of crime."

Sanctions for egregious corporate crimes rarely match the gravity of the offense, nor do they compare well with the punishment meted out for common street crimes. Not one corporate executive went to jail for marketing thalidomide, a drug that caused severe birth defects in 8,000 babies during the 1960s, but Wallace Richard Stewart of Kentucky was sentenced in July 1983 to 10 years in prison for stealing a pizza. Not one Hooker Chemical manager went to jail, nor was Hooker charged with a criminal offense after the company exposed its workers and Love Canal neighbors to toxics, but under a Texas habitual offenders statute, William Rummel was sentenced to life in prison for stealing a total of $229.11 over a period of nine years. And General Motors was fined a mere $5,000 for its mass transit conspiracy, which set back the country's environmental standards for decades.

"No amount of money paid out of corporate assets can address the wrongful acts of the individuals responsible within the organization," says Kenneth Oden, a District Attorney in Austin who has prosecuted a number of occupational homicide cases. "Sometimes the boss needs to be placed in handcuffs and taken to jail." While incarceration of street criminals may have a limited deterrent effect, jail time for corporate executives has a markedly different impact. "I would starve before I would do it again," said one General Electric official, convicted and jailed in a price-fixing scandal.

IN FEBRUARY 1983, A WORKER AT FILM RECOVery Systems' silver extraction plant became nauseated while working in a room with open vats of hydrogen cyanide. He staggered outside the plant, collapsed and died. The medical examiner reported that he died of "acute cyanide toxicity." A month later the state attorney for Cook County, Chicago, charged three executives of Film Recovery Systems with homicide.

Prosecutors argued that plant employees were forced to work in the equivalent of a huge gas chamber, that the company hired mostly illegal aliens who spoke little English, that the company had scraped skull and cross bones warnings off the side of the cyanide drums, and that ventilation was so inadequate that a thick yellow haze hung inside the plant.

After a two-month trial, each of the three executives was found guilty of murder and reckless conduct, fined $10,000 and sentenced to 25 years in prison for murder and 364 days for reckless conduct. Two operating corporations were found guilty of reckless conduct and involuntary manslaughter and fined $11,000 each.

The Film Recovery Systems case represents the first time a corporate executive has been found guilty of murder in an occupational death case, and public sentiment seems to be calling for more such legal actions. Earlier this year in Torrance, California, the city attorney, citing the fear of a "disaster of Bhopal-like proportions," filed an unusual lawsuit against Mobil Oil. He sought to have Mobil's giant Torrance refinery declared a public nuisance, thus giving the city the authority to regulate it. The lawsuit cites the plant's appalling safety record—127 accidents at the refinery since December 1979, including the fiery deaths of three persons, among them a passing motorist, in an explosion and fire at the tank farm.

The district attorney (DA) for Los Angeles County requires prosecutors to investigate the circumstances of every occupational death or serious injury on the job. In the past four years, the DA has investigated more than 100 such cases and has brought criminal charges in more than two dozen cases. And in Austin, Milwaukee and New York City, activist prosecutors are hitting employers with homicide charges for death on the job.

In early 1989, the Commonwealth of Massachusetts announced the creation of a statewide Environmental Crimes Task Force that will use prosecutors, scientists, investigators and police officers to target high-priority threats to public health and natural resources. The 34-member strike force will specialize in major cases involving threats to drinking water supplies, harm to wetlands, illegal dumping and toxic discharges into sewage systems.

"This should send a clear message to everyone across the state: If you pollute, we're going to catch you and you'll pay the price," said Massachusetts Environmental Affairs Secretary John DeVillars. "Poisoning someone's water supply or illegally dumping material isn't a victimless crime. It's a costly crime that has a major impact on individuals whose health may suffer. It damages our quality of life."

At the federal level, the Justice Department's Environmental Crimes Section, which was created in 1983, has recorded 520 indictments and more than 400 convictions, bringing in $22 million in fines and more than 240 years of actual jail time. Earlier this year, Ashland Oil was found guilty of violating federal environmental laws in connection with the collapse of an Ashland storage tank that spilled more than 500,000 gallons of oil into the Monongahela River outside of Pittsburgh on January 2, 1988.

The developments described above point to a new willingness on the part of the public and the judicial system to see corporate crime punished fairly. Until now, the law has taught that if you are strong, rich and corporate, you can inflict the most egregious wrongs on society and continue business as usual. There is no reason why this cannot change. In a just society, the criminal law should also teach that those who poison the air, water and land, injure and kill others, or inflict cancer and birth defects are criminals and should be justly punished. □

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Deterring Death in the Workplace: The Prosecutor's Perspective

Ira Reiner and Jan Chatten-Brown

Introduction

In 1970, when Congress was debating the Occupational Safety and Health Act, it was argued that:

> The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today . . .

Congress cited some grim statistics necessitating vigorous action:

> . . . 14,500 persons are killed annually as a result of industrial accidents . . . more than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 21[illegible] million man days of work . . .

The human tragedy associated with the loss of lives, adverse health impacts, and serious injuries were the focus of legislative hearings, but Congess also addressed the economic impact of industrial deaths and disability.

> Over $1[illegible] billion is wasted in loss of wages, and the annual loss to the gross national product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. And this grim 'current scene' [illegible] represents a worsening trend . . .

These deaths and injuries were the catalyst for adoption of OSHA, despite strong opposition from industry. The Act was heralded as providing a legal and institutional framework for achieving greater safety in the workplace. Unfortunately, expectations have not been fulfilled.

Although the exact numbers are subject to debate, it is clear that enforcement of federal and state laws has failed to turn the tide, and workplace deaths, serious injuries, and occupational illnesses are on the rise. In response, there is a growing national trend to use criminal prosecutions as one weapon in the battle to achieve safe workplaces for all Americans. This article will explore the scope of the problem created by unsafe working conditions, contrast the federal and state responses, describe the specialized prosecution program within the Los Angeles District Attorney's Office, discuss some of the obstacles to effective local enforcement, and articulate the reasons we believe such prosecutions are an essential element of any plan to reduce the rash of untimely and unnecessary workplace deaths.

The Widespread Failure to Provide Safe Workplaces

The purpose of the Occupational Safety and Health Act adopted in 1970[1] was to "assure so far as possible every working man and woman in the nation safe and healthful working conditions."[2] Despite this lofty objective, the tragic toll taken in the workplace in lives, safety and health continues.

There have been no comprehensive national surveys of occupational fatalities. As a result, figures range widely. For example, the Bureau of Labor Statistics estimated the number of occupational fatalities in 1984 at 3,750, while the National Safety Council calculated the figure at 11,500. In a report entitled *National Traumatic Occupational Fatalities, 1980–1984*, the National Institute for Occupational Safety and Health estimates that approximately 7,000 traumatic occupational fatalities occurred each year during 1980–1984. This figure,

which represents 8.8 persons per 100,000 workers, excludes deaths from asbestos exposure and other occupationally related diseases which do not result in traumatic or immediate death. The National Safe Workplace Institute, in a 1987 report entitled *Safety at Bay—The Failure of the Department of Justice to Enforce Federal Occupational Safety and Health Laws*, estimated that 120,000 men and women had died in American workplaces since July of 1971, when the Occupational Safety and Health Act was signed into law.

While a wide range of estimates of occupational fatalities exists at the national level, the Los Angeles County Coroner's Office tracks deaths with considerable care. Each year there have been over 100 such deaths in Los Angeles County.

For every one death, there are hundreds, and perhaps thousands, of serious injuries each year, including amputations, blindings, hearing losses, disfiguring burns, and disabling injuries such as back pain. The illnesses and deaths attributable to workplace exposures to carcinogens, and the birth defects, still-births, and cases of sterility resulting from exposure to chemicals that cause reproductive hazards remain unquantified.

While quantification is difficult, what is clear is that the regulatory structure and penalties provided in the Federal Occupational Safety and Health Act have not achieved an acceptable level of deterrence of unsafe working conditions. As a result, since the early 1980s, there has been a national trend toward imposing corporate and individual liability for deaths resulting from unsafe working conditions.

The National Trend toward Imposing Criminal Liability on Corporations and Individual Managers

Since three corporate officers were sentenced to twenty-five years in state prison in the Film Recovery Systems case, there has been a national trend toward local prosecutions for OSHA violations. This recent surge in the number of cases against corporations and their managers for occupational fatalities has not taken place in a vacuum. Prosecutions for occupational safety and health violations increase as society focuses more attention on white collar, business, and corporate crime.

The use of civil, and sometimes criminal sanctions to maintain minimal standards of business ethics was first accepted to protect the integrity of the stock market. Increasingly, violations of anti-trust laws and insider trading laws, among others, have been prosecuted. Health and Safety Code violations prosecuted as part of consumer protection efforts emerged in the 1970s. In 1975, the U.S. Supreme Court held that the president of a company could be liable for Health Code violations, even though he has no specific knowledge of such violations, if he exercised responsibility, management, and control over the company's operation.[4] Such health and safety violations were held punishable, even without criminal intent, because of society's need for protection. Persons with responsibility over such operations could be held "strictly liable" if the violation were in that class of crimes sometimes referred to as "*malum prohibitum*."

It was a significant development in the effort to achieve responsible corporate conduct when a local prosecutor attempted to hold Ford Motor Co. liable for deaths resulting from the explosion of the gas tanks of Pintos, but that prosecution proved unsuccessful.[5] In the 1980s, in the areas of environmental crimes, and particularly hazardous waste disposal, the public's demand for aggressive enforcement has led to an explosion in criminal prosecutions for violations of environmental laws. The Los Angeles District Attorney's Office, and the Los Angeles City Attorney's Office before it, have been the most active in the country in terms of the number and scope of such crimes prosecuted. Prosecutions for occupational safety and health violations should be viewed in the context of other efforts to deter irresponsible corporate conduct.

Criminal Enforcement under the Federal Occupational Safety and Health Act

When Congress passed the Federal Occupational Safety and Health Act in 1970, the primary enforcement mechanism was civil penalties. The Secretary of Labor may impose a civil penalty of up to $1,000 for each serious violation.[6] Willful or repeat violations of the general duty on employers to provide a place of employment free from hazards which are likely to cause death or serious physical harm, or for any specific safety standards, can result in imposition of a civil penalty of not more than $10,000.[7] Failure to abate a hazard for which the employer has been cited may result in a civil penalty of up to $1,000 for each day the hazard continues.[8] With the exception of criminal penalties for giving advance notice of a safety inspection, or for falsification of documents, criminal penalties were reserved for willful violations of a specific standard which results in death. A fine of up to $10,000, and or not more than 6 months imprisonment could be imposed after a first offense. A second offense could result in a fine of not more than $20,000, and or not more than one year's imprisonment.[9]

Since enactment of the criminal penalties in the Federal Occupational Safety and Health Act, many commentators have questioned the efficacy of utilizing criminal sanctions. In fact, the experience with such prosecutions has been disappointing. According to the Labor Department, between 1970 and 1988 there were only

41 referrals from the Department of Labor to the Department of Justice.[7] An additional 3 cases were requested of the Department of Labor by the U.S. Attorney. Of those 44 cases, not a single case resulted in the imposition of jail time. In at least two cases, individual defendants were dismissed. In 3 cases, the action was unsuccessful in that the Grand Jury did not return an indictment, there was an acquittal, or there was a hung jury. Seven cases were declined by the Department of Justice, and 15 by the U.S. Attorney. Seven cases resulted in fines, and in an additional 3 cases, the corporation was convicted, but the Department of Labor does not report that a fine was imposed. In one case, an indictment was returned, and as of February 1988, the action was still pending. In 8 cases, either the Department of Justice or the U.S. Attorney has not yet acted. Some of those cases go back to 1985. The likelihood of obtaining a successful prosecution, even if the U.S. Attorney decided to go forward, becomes more remote with the passage of time.

To some extent, the Department of Justice's reluctance to commit the necessary resources for successful criminal prosecutions may be explained by reviewing its early experiences with such actions. A summary of such prosecutions follows.

In 1974, the U.S. Attorney prosecuted the first criminal action under the OSHA Act.[8] The case involved a death resulting from failure to shore a trench. The corporation had been cited by state inspectors for lack of trench shoring 11 times, and had trench jobs closed down as imminent hazards six times in the nine months preceding the fatal incident. Immediately after the worker's death, the president of Dye Construction Co. informed an OSHA inspector that compliance with trenching requirements would be too expensive. The fact that he had knowledge of such requirements was never denied. In fact, he had signed several of the earlier state citations. Despite this terrible history, the U.S. District Court dismissed all counts against the president of Dye Construction Co. The court further dismissed two of the three counts against the corporation, and imposed a fine of only $3,500 on the remaining count.

An industrial cleaning company and its two operating officers were charged with two counts of having willfully failed to provide necessary air supplies and related safety equipment to employees who died after entering confined spaces containing poisonous gases in *United States v. Crosby and Overton*.[9] The officers of the corporation were personally aware of the assignment and the fact that the air compressor they provided was unreliable and inadequate because it tended to draw carbon monoxide from its own engine exhaust. The officers were aware of the death of employees of some of their competitors, and yet they decided not to provide standby rescue equipment. An attempt was made to cover up the violation after the deaths. When the violations were discovered, the individuals and the corporation pled *nolo contendere*. At sentencing, the U.S. Attorney argued for jail terms and fines as a "signal" to industry. The district court declined to impose either, but simply placed the individual defendants on four years parole on condition that they implement a safety program.

Early experiences with jury trials were as disappointing as those with the courts. In *United States v. Pinkston-Hollar*, employees under the direct supervision of the corporate vice president were installing roofing insulation 35 feet above a concrete floor. Winds were so high that one of the employees fell through an opening, catching himself moments before he would have dropped 35 feet. He then warned the vice president that continued work without protection from falling would be deadly. The vice president was aware that the company twice had been cited for failure to provide fall protection. Nevertheless, he ordered work to proceed. A short time later, a worker fell through an opening to his death. Despite all of this evidence, the jury acquitted both the individual and the corporation.[11]

United States v. Turcon Co. resulted in the acquittal of the president of a corporation for a death from a violation which had been cited before the fatal incident. Although the corporation was fined $5,000, the money was never collected since the corporation filed for bankruptcy.[14]

U.S. v. Jones was decided in 1978.[13] A large grain elevator in Galveston, Texas, exploded, killing eighteen and injuring twenty-two. Two on-site managers were indicted for willfully violating OSHA requirements to keep the grain elevators clean and safe. A 3½ week trial resulted in a hung jury.

Perhaps as a result of adverse experiences in litigating these cases, a number of less than satisfactory plea bargains were negotiated. For example, in *U.S. v. Hues Construction Corporation*, a plea bargain resulted in a guilty plea by the corporation for a death from a trenching collapse in exchange for dismissal of charges against two individuals.[15]

In 1980, a plea bargain resulted in the dismissal of charges against the president of *Port Allen Marine Services* in exchange for a plea from the corporation.[16] That prosecution was for improperly erected guardrails, and the president previously had been informed that such rails constituted a safety violation.

Of the cases which have been "successfully completed," only three resulted in imposition of the maximum fine of $10,000. In a number of cases, the fines imposed have been less than would, in all likelihood, be imposed through civil penalties.

More importantly, there appears to be a reluctance to prosecute fatality cases. Three of the cases considered

by the Department of Justice since 1985 have been for violations of record keeping requirements,[8] and one for interference with an OSHA inspection.[9]

As a result of the failure to use the criminal enforcement provisions of the Federal OSHA Act effectively, commentators question the efficacy of these criminal sanctions. Many attribute the lack of successful prosecution to the fact that jurors were unwilling to attach the moral stigma of a conviction to individuals who are often leaders in the community. A related concern, which Stephen Redin refers to as a "spillover problem," is the concern that a corporate fine would penalize shareholders, creditors, employees, and consumers.[10] As to whether the reliance the OSHA Act places upon criminal sanctions is appropriate, at least one commentator concludes the jury is still out.[11]

Recent prosecutions in state courts, however, support the conclusion that criminal prosecutions of corporations and managing officials and supervisors can play an important role in efforts to achieve safer work places.

The Focus Shifts to Local Prosecutions

An active field presence by the regulatory agencies, actions to abate, and civil penalties are all critical elements of an effective regulatory scheme. However, most prosecutors believe criminal prosecution is a substantially more effective deterrent than civil penalties for altering conduct that normally is dependent upon economic considerations. Far more than with street criminals, plant managers may radically change their behavior if they believe failure to do so may result in imposition of even a short period of jail time.

The generally accepted objectives of criminal prosecution are punishment, incapacitation, rehabilitation, and deterrence. Rehabilitation and incapacitation are objectives rarely applicable to criminal conduct by corporate managers. Punishment in some cases is clearly appropriate. Normally, however, the most important objective is to deter unsafe conduct by other industries which may otherwise treat the possibility of the civil penalty or a fine as a cost of doing business.

Increasingly, prosecutors are convincing juries that a homicide can be committed by a manager wielding nothing more deadly than a pen. However, major legal obstacles to successful prosecutions still remain in many parts of the country.

The first reported homicide prosecution against an employer for the death of employees resulted in dismissal of the grand jury's indictment in *People v. Warner-Lambert Co.* (1980) 434 New York Supplement 2nd Series, p. 159. Defendants in the *Warner-Lambert* case were a chewing gum manufacturer and several of its officers and employees. They were charged with manslaughter and criminally negligent homicide for the death of six employees in an explosion and fire in the corporate defendant's manufacturing plant. The grand jury indicted defendants after the People presented evidence that Warner-Lambert's insurance carrier had advised defendants that the use of magnesium stearate and liquid nitrogen could result in a dust explosion hazard. The insurance carrier recommended installation of a dust exhaust system and modification of certain electrical equipment. Although some work was done, defendants declined to shut down the operation pending modifications. The evidence showed that the cause of the explosion was related to the dust hazard, but the exact catalyst was the subject of considerable speculation. As a result, the Court of Appeal held that the corporation and individual defendants could not be held criminally liable, because the triggering mechanism was not identified. The Court said that despite the defendant's awareness of the risk of explosion from the use of magnesium stearates, the risk was "undifferentiated," and therefore the explosion was "neither foreseen or foreseeable." (*People v. Warner-Lambert Co.* (1980) 434 NYS 2d 159 at 160.)

The *Warner-Lambert* decision constituted a regrettable setback in the effort to achieve more responsible corporate conduct. It appears to misconstrue legal principles relating to foreseeability.[12]

In California in 1983, the State Court of Appeal specifically held that a corporation could be charged with manslaughter for the workplace deaths of its employees (*Granite v. Superior Court* (1983) 149 Cal. App. 3d 465). More importantly, in a prosecution by the Los Angeles District Attorney's Office, the superintendent of the City of Burbank's water reclamation system was found guilty of involuntary manslaughter for the deaths of two workers who were allowed to enter confined spaces as part of the plant's maintenance. The defendant repeatedly had been warned of the inadequacy of the plant's safety procedures.[13]

While a few successful prosecutions were taking place, national attention did not focus on the viability of criminal prosecutions for OSHA violations until June of 1985. Then, three management officials from Film Recovery Systems were found guilty of murder for the cyanide poisoning of one of their employees, 39-year-old Polish immigrant Stephen Golab.[14] The evidence showed that the managers knew of the hazards of cyanide and the appropriate antidote. A ventilation system had been recommended. Numerous employees suffered nausea, vomiting, and bleeding from the nostrils before Stephen Golab's death. When office workers became ill, they were protected by moving the office to a building next door. More large vats utilized in the recovery of silver from used film were crammed into the plant area. Ironically, Federal OSHA inspectors had come to in-

spect the facility several months before the death. Unfortunately, they only conducted a review of the records, which were not properly maintained, and did not go into the plant.[5]

On February 10, 1984, Steven Golab went into convulsions as a result of exposure to cyanide fumes. He was one of many employees who physically entered the vats to remove residue. No antidote was administered and Golab died. According to Jay Magnuson, the lead prosecutor on the case, the turning point in the trial was when another former employee raised his pants leg during trial to expose the scar tissue where cyanide had eaten the flesh down to the bone.

Defense counsel waived jury in the Film Recovery Systems Case. The court found defendants guilty, sentenced the three individuals to 25 years in state prison, and fined the company $24,000. At last, corporate managers were on notice that they may be held criminally liable for unsafe working conditions. The consequences might no longer be a mere slap on the wrist.

The Film Recovery Systems prosecution quickly was followed by several other newsworthy cases. The Milwaukee District Attorney obtained a jury verdict finding defendants guilty of homicide after an employee was crushed to death when a bulldozer he was driving fell off a cliff. The employer had prior notice that the young driver had a history of epilepsy. In *People v. Pymm Thermometer*, the jury likewise reached a quick verdict that defendants were guilty of assault for the mercury poisoning of employees.[6] In *Pymm Thermometer*, employees worked in an unventilated basement which was closed off and hidden from view when health officials conducted inspections. Unfortunately, the judge set aside the verdict, holding that state prosecution violations were preempted by the Federal OSHA Act, a subject discussed below.

Despite some reversals, prosecutors around the country are expressing a heightened interest in investigating and prosecuting the more egregious violations of occupational safety and health laws. Nowhere has the effort been institutionalized as completely as in the County of Los Angeles.

The Los Angeles District Attorney's OSHA Prosecution Program

In December of 1983, Ira Reiner, a co-author of this article, took office as Los Angeles District Attorney. At that time, the first occupational safety and health section in a local prosecutor's office in the country was established.

After several months of relying upon referrals from Cal OSHA, the state agency with responsibility for occupational safety and health, the District Attorney concluded that a more aggressive program was needed to identify and investigate cases potentially appropriate for criminal prosecution. Letters were sent to all police chiefs and the County Sheriff, asking that all occupational fatalities be investigated as potential homicides. A one-day occupational fatality investigation seminar was conducted for approximately eighty homicide investigators. Subsequently, OSHA fatality investigation training videotapes were prepared and distributed county-wide to law enforcement.

In September of 1985 the District Attorney initiated a program in which a deputy District Attorney and an investigator are on call 24 hours a day, 7 days a week, to respond to the scene of traumatic occupational fatalities in Los Angeles County. District Attorney personnel are notified by law enforcement, the fire department, or the Coroner's Office. They in turn notify the appropriate state or federal occupational safety and health agency. The program is known as the "roll-out" program, and is the linchpin of the District Attorney's OSHA prosecution efforts.

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

Since establishment of the OSHA Section, District Attorney personnel have responded to over 100 workplaces. At several of the locations there were multiple deaths. Twenty-two cases have been filed thus far. All but two of those cases involve fatalities. Of the nonfatal cases, one concerned a chlorine leak which sent over 80 people to the hospital. Approximately half of those hospitalized were students and teachers from a nearby school. The other nonfatality was due to safety violations at an oil refinery which resulted in third degree burns over approximately 90 percent of the body of a plant worker.

The first involuntary manslaughter case filed by the OSHA Section was against Michael Maggio.[7] Mr. Maggio was president of a small drilling company, and was personally present when a shaft for an elevator was being drilled. At approximately 15 feet in depth, an obstruction was hit. Maggio directed the victim to go to the bottom of the shaft and remove the obstruction. After doing so, the victim was lifted out of the shaft. Drilling continued with a 10 inch diameter drill bit. At about 33 feet, another obstruction was hit. Maggio again sent the victim down to remove the obstruction.

The victim was lowered by cable to the bottom of the hole with his foot inserted in a sling. The air was not tested, the walls or sides of the hole were not encased or shored, and the victim was not placed in a safety harness. Almost immediately the victim went into convulsions. The fire department was called. When they arrived, they sought to blow fresh air into the hole. Maggio told them they could not do so, since the walls of the well were not encased and might collapse, burying the victim. By the time the victim was removed, he was dead.

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

Two other involuntary manslaughter cases involved deaths caused by unshored excavations. In *People v. Gonterman*,[48] Gonterman, who was the manager of the trenching company, was personally present when the excavation was being made. A cave-like undercut was made under a street, with no shoring. A series of small cave-ins refilled the excavation. Shoring materials were present, but were not of adequate size. Gonterman directed the workers to continue to dig. The entire embankment collapsed, burying the victim. After Gonterman was held to answer at a preliminary hearing, he pled guilty. He was sentenced to 90 days in county jail and was required as a condition of probation to adopt and implement a comprehensive accident prevention plan.

In the third excavation case, charges were filed against five defendants, including the soils engineer on the project. This case is believed to be the first time in the United States that a professional consultant was charged with involuntary manslaughter for the death of a worker based upon gross negligence in the exercise of his professional responsibilities.[49] Also charged were the owner and foreman of the construction firm employing the victim, the construction company, and the corporate general contractor. In this case, the victim was removing dirt from a trench where footings were to be poured. The dirt apparently was in the trench as a result of a slide that had occurred the night before. While he was working in the trench, a 14-foot embankment collapsed and buried the victim. The investigation showed that the soils report was grossly inadequate because it failed to recommend shoring for a vertical cut when exposed planes of rock angled toward the excavation area into the hillside at almost a 45 degree angle. There is substantial evidence of the personal knowledge of the soils engineer regarding the conditions and warnings from the excavation contractor who did the work. In addition, G.A.L. Concrete Construction Company, the employer, had received 40 citations from Cal/OSHA for violations at 10 different construction sites. At least three of the citations were for the same type of hazards which led to the victim's death.

The fourth involuntary manslaughter case was filed against the owner of an unreinforced brick building and the contractor who was doing remodeling work on the building.[50] Representatives from the concrete coring company who made the cuts in the walls of the building repeatedly warned defendants that bricks should not be removed without the bricks above the cut being shored. After a portion of the bricks were so removed, the brick wall collapsed, burying the victim, who was an undocumented day laborer.

All of the other cases prosecuted by the section have been filed under either Labor Code Section 6423, which makes it a misdemeanor to willfully violate an OSHA regulation when such violation results in death or permanent or prolonged impairment;[51] Labor Code Section 6423(a), which makes it a misdemeanor to knowingly or negligently violate a Cal/OSHA regulation, when that violation is serious;[52] or Penal Code Section 385, which makes it a misdemeanor to work within six feet of a high voltage line.[53] Under all of these sections, a supervisor or management official who exercises responsibility, management, custody or control of the place of employment can be charged. As a result, all of the cases except one have resulted in the naming of an individual as well as the corporation. The only case which was filed solely against a company was for an electrocution of an employee of Southern California Gas Co.[54] The death occurred before the District Attorney instituted the roll-out program. The referral from Cal OSHA came so late that it was impossible to investigate the case adequately to determine which individuals were responsible prior to the running of the statute of limitations.

A major concern of critics considering the effectiveness of occupational safety and health prosecutions has been the ability of prosecutors to determine the culpability of higher level corporate officials in large companies. Although a number of the defendants in those cases have been small employers and supervisors from those companies, several have been large employers. These include Golden State Foods Co., which is the nationwide distributor of meat for McDonalds restaurants, and one of its general managers;[55] Reliance Steel and Aluminum Co., which is one of the largest metal processing companies in the Southwest United States and its president;[56] and GTE, a large electrical supplier.[57]

OSHA prosecutions include several for violation of California requirements for a lock-out device or some means of preventing inadvertent movement of equipment during cleaning and operation. Those deaths include situations where an individual was literally

ground up in a meat blender,[38] crushed to death in a poultry blender,[39] and cut in half in a steel scrapping machine.[40] Federal OSHA has no equivalent standard mandating equipment lock-out.

Two cases have been filed based upon electrocutions where an individual was allowed to work too close to a high voltage line. In one of those cases, the evidence showed that the tree trimmers employed by defendants were not trained regarding the dangers of touching anything that fell on high voltage lines. Moments before the victim was electrocuted, a fellow employee removed a palm frond from the line. The supervisor was present, but took no action. When the victim attempted to remove a similar palm frond, he was electrocuted.[41] The supervising partner of the tree trimming company was sentenced to 30 days in county jail. The other partner was required to institute a comprehensive safety program and pay a fine of $8,500 as a condition of probation.

On April 5, 1988, a jury found Reliance Steel and Aluminum Co. and two corporate managers guilty of failing to train employees on the unique hazards of their job. The case arose after an employee was killed when caught in the recoiler of a steel slitter. A recoiler acts like a large spindle to rewind the steel after it is slit on a steel slitting machine. The standard practice of the company had been to have the employees insert pieces of cardboard at the pinchpoint where the steel was rewound. The slitter had the capacity to run at over 1,100 feet per minute, although the actual speed at which the steel was normally running was substantially less.

There had been no policy against wearing gloves when inserting cardboard. The victim apparently was pulled into the machine when his gloves became caught. In *Reliance Steel*, evidence obtained during execution of a search warrant showed repeated prior recommendations from Reliance's insurance company regarding the need for more safety training, and prior injuries of a nature that should have put the company on notice of safety hazards. What was more shocking was that normally 30 days of training was provided to a new operator on the machine. In this case, the victim was given only three to four hours of training, and was then left to operate the machine with a Spanish speaking helper. The victim did not speak Spanish.[42]

Thus far only one of the cases, against Dial Corporation,[43] involved health issues. However, the District Attorney's Office anticipates that there will be a substantial number of prosecutions for illegal exposure of workers to asbestos, in violation of various asbestos business practice requirements set forth in the California Labor Code and California Business and Professions Code. Further, the provisions of California's Proposition 65, which prohibits discharges of known carcinogens and reproductive hazards into drinking water and also requires all persons to warn individuals exposed to such hazards, went into effect at the end of February, 1988. This law will be very useful as applied to chemicals in the workplace.

In addition to the 22 cases the District Attorney's Office has filed, a substantial number of cases are referred to local city attorneys for misdemeanor prosecutions. Approximately one dozen of these cases have been filed, including a second death of a tree trimmer, utilizing the investigation conducted by the District Attorney's Office.

The Los Angele District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. This conclusion has been confirmed by the comment of numerous safety engineers and industrial hygienists located throughout the County of Los Angeles.

Defendants Attempt to Use the OSHA Act as a Shield from Criminal Prosecution

Despite encouraging signs regarding the potential for using criminal prosecutions to deter unsafe work practices, prosecutions in a number of jurisdictions have been thwarted by arguments of federal preemption.

In 1970, business interests opposed enactment of the Federal OSHA Act, arguing that it provided an unnecessary federal sword for forcing changes in the workplace. State regulation was preferable, according to many of these interests. Ironically, it is largely these same interests which now argue the Federal OSHA law provides a shield against state prosecutions, except in those states with federally approved State OSHA plans.

Although the District Attorney believes the argument is unfounded, thus far it has achieved considerable success in the courts, prompting a recent Harvard Law Review article entitled "Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents."[44]

Essentially, defendants argue that section 18 of the Act precludes states from exercising jurisdiction over occupational safety and health, unless Federal OSHA has approved a state plan. Such a plan must be at least as effective as the federal plan to be approved by Federal OSHA. Section 18 provides:

> a. Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.
>
> b. Any State which, at any time, desires to assume responsibility for development and enforcement

> therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement. 29 USCS Section 667.

This preemption argument was rejected by a trial court in Texas but accepted by a Texas court of appeals in *State v. Sabine Consolidated, Inc.*[45] Shortly thereafter, however, an appellate court in Illinois, in *People v. Chicago Magnet Wire Corporation*,[46] held that the Act preempted a state prosecution for aggravated battery and reckless conduct. The People appealed, and the Los Angeles District Attorney, Brooklyn, New York District Attorney; and Middlesex, Massachusetts District Attorney filed an amicus curiae brief in support of the Illinois prosecutor. The U.S. Chamber of Commerce, and others, filed an amicus curiae brief supporting the preemption arguments of the defendants. A decision is currently pending.

Another decision adverse to the interest of the People was handed down by a New York trial court when it set aside a jury verdict that defendants were guilty of assault, conspiracy, and reckless endangerment for the mercury poisoning of their employees at a thermometer plant.[47]

The sole appellate court decision rejecting preemption came on April 21, 1988, when the Wisconsin Court of Appeals, District 4, ruled that the Federal Occupational Safety and Health Act does not preempt a homicide by reckless conduct prosecution against an officer of a fireworks company for the death of an employee.[48]

Our position, and that of other prosecutors, is that the Act neither expressly nor implicitly preempts criminal prosecutions for safety and health violations through applicable state criminal laws. Rather, Section 18 of the Act is designed to preclude adoption of weaker state regulatory standards. This same position is fully articulated in the Harvard Law Review article, "Getting Away With Murder."[49]

On February 4, 1988, before the U.S. House of Representatives, Housing and Labor Subcommittee of the Government Organizations Committee, regarding use of criminal prosecutions for safety and health violations, we recommended that Congress attempt to determine whether President Reagan would sign legislation making it absolutely clear that the Act does not preclude state prosecutors from using criminal laws of general applicability to pursue cases involving employee illnesses, injuries, and death. It is believed Congress would quickly pass such legislation, but a Presidential veto would only muddy the legal waters. Absent enactment of such legislation, the issue undoubtedly will not be resolved until it is ultimately decided by the U.S. Supreme Court.

Conclusion

Legal and practical hurdles impede the more extensive use of criminal prosecutions to achieve safety in the workplace. Small prosecution offices often lack the resources to file and try this type of case, which is often technically complex and generally requires expert witnesses. Most offices will await resolution of the preemption issue before proceeding. However, the Los Angeles District Attorney's Office, and a few others, are committed to pursuing these cases. We hope to make the path easier for those prosecutions yet to come.

References

1. S. Rep. No. 1282, 91st Congress, Second Sess. (1970), Leg. Hist. Note 6, at 142–144.
2. 29 USC Section 651–678.
3. 29 USC Section 651(b).
4. *U.S. v. Park* (1975) 421 U.S. 658.
5. *State v. Ford Motor Co.* (filed February 2, 1979) No. 5324 Indiana Superior Court.
6. 29 USC Section 666(j).
7. 29 USC Section 666(a).
8. 29 USC Section 666(d).
9. 29 USC Section 666(e).
10. *Criminal Referrals by OSHA to the Department of Justice and Cases Initiated by U.S. Attorneys* (as of February 2, 1988), attached to testimony of Jerry G. Thorn, Deputy Solicitor of Labor, before the subcommittee on Employment and Housing, Committee on Government Operations, U.S. House of Representatives, February 4, 1988.
11. *United States v. Dye Construction Co.* No. 73-CR-417 (Denver, Colorado, February 6, 1974), affd. 510 F.2d 78 (10th Cir. 1975).
12. Cr. No. 74-1832 F. (C.D. Cal. Jan 14, 1975).
13. *United States v. Pinkston-Hollar, Inc.*, No. 75-33-CR6 (D. Kan., February 26, 1976, verdict entered October 12, 1976).
14. Cr. No. 72-0-239 (D. Neb., January 27, 1974).
15. Cr. No. G-80-11 (S.D., Tex., November 13, 1981).
16. Cr. No. 81-16 D (W.D., Oklahoma, February 25, 1982).
17. Cr. No. 81-71A (M.D., Louisana, October 26, 1981).
18. 29 USC Section 666(g).
19. 18 USC Section 1001 and 1505.
20. Stephen Redin, "Corporate Criminal Liability for Employee Endangering Activities," *18 Columbia Journal of Law and Social Problems* (1983), 39, at 52–54.
21. Michael H. Levin, "Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act," *American Criminal Law Review*, 1977, Vol. 14: 717.
22. The *Warner-Lambert* decision was strongly, and we believe properly, criticized by Stephen Redin in "Corporate Criminal Liability for Employee Endangering Activities," supra. Perhaps as a result of the *Warner-Lambert* decision, criminal sanctions were not sought to be imposed upon employers due to unsafe working conditions with any regularity until the

mid 1980s. An exception to this was prosecution under specific laws applicable to employers in California.

23. *People v. Guglione* (1982) 138 CA3d 32.

24. *People v. Film Recovery Systems Inc., et al.*, Nos. 84 C5083 and 84CR10091 Cir. Ct. of Cook County, Ill., June 14, 1985. This case, and criminal prosecutions of OSHA violations in general, is discussed at length in "Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.," Notre Dame Law Review (1987) Vol. 62 p901.

25. Over the past several years, Federal OSHA has adopted a policy favoring "records inspections." Under that policy, where records show that the employer has fewer than average injuries and illnesses, inspections of that operation are waived. As a result, there is an increased incentive for employers to under-report. In fact, the largest fines imposed by Federal OSHA of late have been for such recordkeeping violations, rather than substantive safety and health violations.

26. *People v. Pymm Thermometer*, No. 930-86. Appeal filed March 21, 1988.

27. *People v. Michael Charles Maggio*. #A790779. filed March 26, 1986.

28. *People v. Jeffrey Gonterman*. #A919973. filed July 21, 1987.

29. *People v. Dr. Richard Hu, Benjamin Louie, Michael Berry, G.A.L. Concrete Construction Co., and Panda Development and Construction Company*. #A962210. filed January 6, 1988. A preliminary hearing was scheduled for May 31, 1988.

30. *People v. Charles Wilson and James Lee*. #A954496. filed July 21, 1987.

31. Labor Code Section 6423—Any employer, and every employee having direction, management, control, or custody of any employment, place of employment, or other employee, who wilfully violates any occupational safety or health standards, order, or special order, or Section 23910 of the Health and Safety Code, and that violation caused death of any employee, or caused permanent or prolonged impairment of the body of any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than twenty thousand dollars ($20,000) or by imprisonment for not more than one year, or by both.

32. Labor Code Section 6423.1—Except where another penalty is specifically provided, every employer, and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee, who does any of the following shall be guilty of a misdemeanor:

a. Knowingly or negligently violates any standard, order, or special order, or any provision of this division, or of any part thereof, in, or authorized by, this part the violation of which is deemed to be a serious violation pursuant to Section 6432.

33. Penal Code Section 385.b.—Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects or moves any tools, machinery, equipment, material, building or structure within six feet of a high voltage overhead conductor is guilty of a misdemeanor.

34. *People v. Southern California Gas Company*. #M864456. filed July 18, 1985.

35. *People v. Golden State Foods, Jack Reily, Stan Hatch and Armando Hernandez* #3138-211. filed June 11, 1985.

36. *People v. Reliance Steel and Aluminum Company Inc., Joseph D. Crider, Mark Dehl, Ed Kniewski, and Dennis Conway*. #S34359. filed July 22, 1985.

37. *People v. GTE Products Corporation, John Wayne Lanstord, and Dale Niezgocki*. #M270000. filed November 13, 1985.

38. *People v. Golden State Foods*. supra.

39. *People v. California Pacific Poultry Inc., Robert Ferro, Larry Posik, and Armando Velasquez*. #M149709. filed January 27, 1986.

40. *People v. Star Scrap Metal Co. Inc., Allen Richard Stein, and Rose Starow Stein*. #M06482. filed January 31, 1986.

41. *People v. Steve Lymon and Robert L. Henderson* #M48042. filed October 24, 1985.

42. Sentencing in *Reliance Steel* has been delayed pending a ruling on a motion for a new trial.

43. *People v. Dial Corporation, Skip Foster, Daniel King, and Nelson Landman*. #87-M00849. filed February 21, 1986.

44. *Harvard Law Review* 1987 Vol. 101: 535.

45. *Loveless v. Sabine Consolidated* 1988 750 S.W. and 865.

46. 147 Ill. App. 3d 797, 510 NEad 1173 1987.

47. *People v. Pymm Thermometer*, N.Y. Sup. Ct. November 13, 1987.

48. *State of Wisconsin ex rel. Corneilier v. Black* No. 87-1120-W.

49. Supra, note 41.

Final to be found in the Western Reporter
Law Review

WHEN IT IS NOT AN ACCIDENT, BUT A CRIME: PROSECUTORS GET TOUGH WITH OSHA VIOLATIONS

Ira Reiner[*] *and Jan Chatten-Brown*[**]

I. INTRODUCTION

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

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

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

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

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

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II. Scope of the Problem

Workplace-related deaths, injuries, and disease are far more pervasive than often perceived. There is no comprehensive national survey of occupational fatalities, nor is there a standardized state reporting system. As a result, estimates of deaths range widely. The Bureau of Labor Statistics, which relies solely on employer surveys, estimated the number of occupational fatalities in 1984 at 3,750. The National Safety Council, on the other hand, calculated the figure for the same year at 11,500. In a report entitled *National Traumatic Occupational Fatalities, 1980-1984*, the National Institute for Occupational Safety and Health estimates that approximately 7,000 traumatic occupational fatalities occurred each year during 1980-1984. This figure, which represents 8.8 persons per 100,000 workers, excludes deaths from asbestos exposure and other occupationally related diseases which do not result in traumatic or immediate death. The National Safe Workplace Institute, in a 1987 report,[1] estimated 120,000 men and women died traumatic deaths in American workplaces since July 1971, when the OSH Act was signed into law. The Bureau of National Affairs concludes that more than 100,000 workers may have died nationally in job-related accidents since 1984.[2]

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

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

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1. J. Holshauer & J. Kinney, Safety at Bay — The Failure of the Department of Justice to Prosecute Criminal OSHA Cases (National Safe Workplace Institute 1987).

2. Bureau of National Affairs, Occupational Safety and Health: Seven Critical Issues for the 1990s at 9 (July 1989) (hereinafter Seven Critical Issues).

3. Committee on Government Operations, Occupational Illness Data Collection: Fragmented, Unreliable, and Seventy Years Behind Communicable Disease Surveillance (1988).

4. Statement of Dr. Phillip Landrigan, Mount Sinai School of Medicine, to the Senate Comm. on Labor and Human Relations (Apr. 1988).

> [D]eaths caused by work-related injuries result in more years of human life lost than those caused by cancer and heart disease combined. In fact, from ages 1 through 44, injury is the leading cause of death in the nation. The cost to our nation exceeds $100 billion annually.
>
> Every day of the year an average of 32 workers die on the job, and 5,500 suffer a disabling injury. In addition, an average of 165 workers die of illness that is work-related while another 1,000 new cases of work-related illness develop. The cost to our nation exceeds $50 billion annually.[5]

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

III. The Criminal Sanctions in the OSH Act Are Rarely Applied

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

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

> The criminal penalty provisions of the OSH Act, as presently written and as enforced by OSHA, provides no deterrent to employers violating the statute. A company official who willfully and recklessly violates Federal OSHA laws stands a greater chance of

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5. National Safe Workplaces Institute, Faces — The Toll of Workplace Deaths on American Families 21 (April 1989).

6. Faces, *supra* note 5, was released contemporaneously with the AFL-CIO sponsored first national day of mourning for workers killed on their jobs. The National Day of Mourning, held April 28, 1989, marked the anniversary of Congress' passage of the Occupational Safety and Health Act.

7. 29 U.S.C. § 651(b) (1982).

8. 29 U.S.C. § 666(a-d).

9. 29 U.S.C. § 666(e).

> winning a State lottery than being criminally charged by the Federal Government for workplace safety violations.[10]

For good reasons this congressional committee concluded the likelihood of federal prosecution is slight. Between 1970 and 1988, a mere 42 cases were referred by OSHA to federal prosecutors. Of those, only 14 were prosecuted. The reasons for the scant number of prosecutions are several. First, early efforts to prosecute under the OSH Act were often unsuccessful. In four federally prosecuted cases, either the grand jury did not return an indictment, or there was an acquittal or a hung jury. In at least two cases, the individual defendants were dismissed so that only the corporate defendant remained charged.[11]

Second, the deterrent value of a successful prosecution under the federal Act is perceived as small. The maximum penalty under the Act is a fine of $10,000 and up to six months imprisonment. A second conviction could result in a fine of up to $20,000 and not more than one year in jail.[12] More important than the amount of the maximum fine available is the limited jail time that can be imposed. To federal prosecutors accustomed to seeking and obtaining long prison terms, six months in jail must seem short indeed. Nevertheless, while jail time is provided as an option at sentencing, the reality is, no one has ever spent a day in jail for a criminal violation of the OSH Act.[13] It is unclear whether a U.S. Justice Department Official has ever sought the sanction of jail time.

Third, federal case law defining "willful" places a heavy burden on prosecutors. Essentially, the employer's action must exhibit an intentional disregard of a standard, or a "knowing, conscious, and deliberate flaunting of the Act."[14] According to outgoing OSHA Assistant Secretary, John Pendergrass, before making a referral the agency reviews their records to determine whether the employer:

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10. HOUSE COMMITTEE ON GOV'T OPERATIONS, GETTING AWAY WITH MURDER IN THE WORKPLACE: OSHA'S NONUSE OF CRIMINAL PENALTIES FOR SAFETY VIOLATIONS at 4 (Oct. 4, 1988) [hereinafter GETTING AWAY WITH MURDER].

11. *Id.*

12. However, it is the opinion of some Department of Justice officials that higher fines for violations of OSHA standards resulting in death would be available under the 1984 statute, increasing the maximum fine for misdemeanors to $250,000 for individuals and $500,000 for corporations. 18 U.S.C. § 3623. However, that theory has yet to be tested.

13. GETTING AWAY WITH MURDER, *supra* note 10.

14. Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1207 (3d Cir. 1974).

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

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

IV. State Prosecutors Fill the Void

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

15. Statement of John Pendergrass to the House Comm. on Government Operations, Subcomm. on Employment and Housing (Feb. 4, 1988).

16. National Safe Workplace Institute, Ending Legalized Workplace Homicide, Barriers to Job Safety Prosecutions in the U.S. (July 1988).

17. Cal. Lab. Code § 6315 (West 1984).

18. As will be discussed infra in Section VI, California has been unique in its approach to OSHA violations, with prosecutions since the early 1970s.

hazard, but the exact catalyst was the subject of considerable speculation. As a result, the New York Court of Appeals held that the corporation and individual defendants could not be held criminally liable, because the triggering mechanism was not identified. The court said that despite the defendants' awareness of the risk of explosion from the use of magnesium stearates, the risk was "undifferentiated," and therefore the explosion was "neither foreseen or foreseeable."[19]

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

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

On February 20, 1983, Stefan Golab went into convulsions as a result of the exposure to cyanide fumes after repeatedly going

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19. People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 749, 431 N.Y.S.2d 139 (1980), *cert. denied*, 450 U.S. 1031 (1981).

20. People v. Film Recovery Systems, Nos. 84-5064, 83-11001 (Cir. Ct. Cook County, Ill., June 14, 1985), *appeals docketed*, Nos. 85-1853, 85-1854, 85-1952, 85-1953 (1st Dist. July 1, 1985). This case, and criminal prosecutions of OSHA violations in general, is discussed at length in Magnuson & Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913 (1987).

21. For several years, federal OSHA had a policy favoring "records inspections." Under that policy, where records show that the employer has fewer than average injuries and illnesses, inspections of that operation are waived. As a result, there was an increased incentive for employers to under-report. Fortunately, the policy was reversed in 1987.

into vats to remove residue. No antidote was administered. After being convicted of murder, the three managers were sentenced to 25 years in state prison. With extensive national coverage of the convictions, notice of the potential criminal prosecutions spread from courtrooms to boardrooms.

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

> In January 1981, a worker at the Pymm Thermometer plant in Brooklyn, New York, wrote to OSHA:
> "Mercury is being used, gas and ovens. Please, we don't know how to describe any violations, but we are sure there are more. Please send an inspector down to see for himself. We only make the minimum wage, so at least we will know our health is okay."
> In March 1981, OSHA inspected the Pymm plant and found serious violations. No protective gear was being used to reduce workers' exposure to mercury — no respirator masks, no aprons, and no gloves. Work surfaces were covered with mercury, and even the area where workers ate their lunch was contaminated with mercury. OSHA issued a citation, assessed a fine of $1,400, and set a deadline of October 1981 for the company to clean up the factory. However, over the next few years, OSHA regularly extended the compliance deadline.
> In 1984, the New York City Department of Health was alerted by a local doctor to elevated levels of mercury in the body of a Pymm worker. The New York City Health Department went to the Pymm factory, inspected it, conducted tests, found violations of the health code and discovered elevated levels of mercury in the workers.
> In October 1985, tipped off by a former Pymm worker, an OSHA inspector discovered a hidden cellar operation at the Pymm plant — a cellar virtually without ventilation, filled with broken thermometers, with pools of mercury on the floor, and noxious vapors in the air, which produced permanent brain damage in one employee, Vidal Rodriguez, and exposed many others to serious health risks.[22]

Based upon these facts, the Brooklyn District Attorney and New York Attorney General prosecuted Pymm Thermometer and its owners and managers for criminal assault and reckless en-

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22. GETTING AWAY WITH MURDER, *supra* note 10, at 6.

dangerment for exposing employees to mercury.[23] After a four-week trial, the jury was quick to convict, but the trial judge set aside the conviction, on grounds of preemption.[24]

Chicago Magnet Wire,[25] like *Film Recovery,* was prosecuted by the Cook County, Ill., District Attorney. The charge involved not a death but, rather, exposure of 42 employees to various hazardous substances during the coating of wire. Charges filed included aggravated battery, reckless conduct, and conspiracy.

Aside from the prosecutions in California, which are based on unique criminal provisions for OSHA violations, perhaps a dozen other prosecutions for workplace safety violations have occurred across the country since 1985.[26] However, the momentum for criminal prosecutions has been delayed, if not derailed, by the contention that the existence of the federal OSHA law preempts state criminal prosecutions.

V. THE PARADOX OF [illegible]

The Appellate Division of the New York Supreme Court subsequently overturned the trial judge's ruling and reinstated the jury verdict.

People v. Pymm Thermometer Corp., [illegible]

App. Div. [illegible]

[illegible]

24. Id.

25. People v. Chicago Magnet Wire Corp., 126 Ill. 2d 356, 534 N.E.2d 962, *cert. denied sub nom.* ASTA v. Illinois, 58 U.S.L.W. 3202 (U.S. Oct. 3, 1989).

26. Reported cases include Wisconsin *ex rel.* Cornellier v. Black, 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988) (prosecution of a fireworks manufacturer for reckless homicide, based upon knowledge of numerous fire hazards); People v. Hegedus, 169 Mich. App. 62, 425 N.W.2d 729 (1988), *rev'd,* 432 Mich. 598, 443 N.W.2d 129 (1989) (cable TV splicer's supervisor was charged with involuntary manslaughter for the carbon monoxide poisoning of the slicer in a defective truck); and Sabine Consol., Inc. v. Texas, 756 S.W.2d 865 (1988) (company and its managers charged with negligent homicide for two trenching deaths).

employees of the longstanding protections provided by state criminal law.[27]

Yet, so some courts have ruled.[28]

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

> (a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

Proponents of preemption argue § 18(a) precludes states, including local prosecutors, from exercising authority over any subject for which federal OSHA has adopted a standard, unless the state has submitted, and gained approval for, a state plan.[30] Prosecutors believe that § 18 refers only to the process of standard-setting.[31] Furthermore, the savings clause found in the

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27. Cohen, *Preemption: A Union Lawyer's View*, SEVEN CRITICAL ISSUES, *supra* note 2, at 43. Mr. Cohen's article is reprinted in its entirety in this volume. 17 N. KY. L. REV. 149. (Fall 1989).

28. Sabine Consol., Inc., v. Texas, 756 S.W.2d 865 (1988); People v. Hegedus, 169 Mich. App. 62, 425 N.W. 2d 729 (1988) *rev'd*, 432 Mich. 598, 443 N.W.2d 127 (1989); Colorado v. Kehran Constr. Inc., 13 O.S.C. 1898 (Colo. Dist. Ct. 1988); and the intermediate appellate court in People v. Chicago Magnet Wire, 137 Ill. App. 3d 797, 510 N.E.2d 1173, *rev'd*, 126 Ill. 2d 356, 534 N.E.2d 962 (1989), *cert. denied sub nom.* ASTA v. Illinois, 58 U.S.L.W. 3202 (U.S. Oct. 3, 1989).

29. 29 U.S.C. § 667.

30. Approximately half the states have their own plans.

31. 29 U.S.C. § (emphasis added). The Illinois Supreme Court, in *Chicago Magnet Wire* agreed:

> [W]e cannot say that the language of section 18 of OSHA can reasonably be construed as explicitly preempting the enforcement of the criminal law of the States as to conduct governed by OSHA occupational health and safety standards. The language of section 18 refers only to a State's development and enforcement of "occupational health and safety standards." 29 U.S.C. § 667(a) (1982). Nowhere

Act precludes an interpretation of § 18(a) that would result in express preemption. Section 4(b)(4) of the Act provides:

> *Nothing in (the Act) shall be construed* to supersede or in any manner affect workmen's compensation law or *to enlarge or diminish or affect in any manner the common law* or statutory rights, duties, or liabilities of employers with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.[32]

We believe the right to prosecute an employer for murder, manslaughter, battery, or any similar crimes found at common law would be retained under § 4(b)(4), while defendants argue this section should be construed only as saving tort and worker compensation laws. In reconciling and interpreting these sections, an important principle is the presumption against preemption.[33] This presumption is particularly strong when the historic police powers of the states are at issue, where preemption is allowed only if it was the "clear and manifest purpose of Congress."[34] Further, the U.S. Supreme Court rejected a similar preemption argument like that made by defendants in a case regarding state action for injuries in areas regulated under the Federal Atomic Energy Act of 1954.[35] In light of these presumptions against preemption, and the language of §§ 18(a) and 4(6)(4), it is difficult to see how the argument of express preemption can prevail.

However, proponents of preemption are not limited to arguments regarding express preemption pursuant to § 18(a). There are three other theories under which courts may preclude state action.[36] Courts imply preemption, even in the absence of express legislative language, when the Congress intended to occupy the field,[37] when state regulation conflicts with federal law by making compliance with both laws impossible,[38] or when preemption can

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in section 18 is there a statement or suggestion that the enforcement of State criminal law as to federally regulated workplace matters is preempted unless approval is obtained from OSHA officials.

126 Ill. 2d at ___, 534 N.E.2d at 955.

32. 29 U.S.C. § 653(b)(4) (emphasis added).

33. Roy v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

34. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1946).

35. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

36. The rationale applies with equal force when state legislation preempts local regulation.

37. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982).

38. Hillsborough County, Fla. v. Automated Medical Laboratories, 471 U.S. 707, 712-13 (1985).

be inferred by the legislative history of the act.[39] None of these theories apply to the OSH Act.

By maintaining state authority under § 18(a), providing for submission and adoption of more stringent state plans under §§ 18(b) and 6,[40] and enacting the savings clause under § 4(b), Congress made it clear that it did not intend to occupy the field.

> [T]he purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards. (*See United Airlines, Inc. v. Occupational Safety & Health Appeals Board*, 82 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982)). It was not fear that the States would apply more stringent standards or penalties than OSHA that concerned Congress but that the States would apply lesser ones which would not provide the necessary level of safety.[41]

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

> [P]rosecutions of employers who violate State criminal law by failing to maintain safe working conditions for their employees will surely further OSHA's stated goal of assuring so far as possible every working man and woman in the Nation safe and healthful working conditions. (29 U.S.C. Section 651(b)(1982)).[42]

Finally, there is no legislative history to support the conclusion that Congress intended to preempt the field. Indeed, in light of the dearth of earlier prosecutions, it is unlikely that state prosecutors were a matter of concern, and discussion of such prosecutions is absent from the Act's legislative history.

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

> To adopt the defendants' interpretation of OSHA would, in effect, convert the statute, which was enacted to create a safe work environment for the nation's workers, into a grant or immunity for employers responsible for serious injuries or deaths of employ-

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39. Malone v. White Motor Corp., 435 U.S. 497, 504 n.8 (1978).

40. 29 U.S.C. § 655.

41. People v. Chicago Magnet Wire Corp., 126 Ill. 2d at ___, 534 N.E.2d at 967. The Los Angeles District Attorney joined the Brooklyn and Middlesex District Attorneys as amicus curiae in support of the People.

42. *Id.* at ___, 534 N.E.2d at 969

ees. We are sure that that would be a consequence unforeseen by Congress.[43]

We believe the decisions in *Chicago Magnet Wire* and *Wisconsin ex rel. Cor ellier v. Black*[44] bode well for a successful resolution of the preemption question.[45]

Fortunately, prosecutions under California law do not need to await resolution of the preemption issue.

VI. The Los Angeles District Attorney's OSHA Prosecution Program

California law contains two criminal provisions far more expansive than that provided under the federal Act. Labor Code § 6425 makes it a misdemeanor to willfully violate an OSHA regulation when such violation results in death or permanent or prolonged impairment.[46] Labor Code § 6423(a) makes it a misdemeanor to knowingly or negligently violate a Cal-OSHA regulation, when that violation is serious.[47] Both of these provisions

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43. *Id.*

44. 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988)

45. We note that the U.S. Department of Justice in a letter to Congressman Tom Lantos dated December 9, 1998, opined that they, "see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability." The letter is reproduced in Seven Critical Issues, *supra* note 2, at B3 B6 (1999). *See also* the well-reasoned analysis of this preemption question in Note, *Getting Away With Murder: Federal OSHA Preemption of State Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535 (1987).

46. Cal. Lab. Code § 6425 (West 1977):

> Any employer, and every employee having direction, management, control, or custody of any employment, place of employment, or other employee, who willfully violates any occupational safety or health standards, order, or special order, or section 25910 of the Health and Safety Code, and that violation caused death of any employee, or caused permanent or prolonged impairment of the body of any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by fine of not more than twenty thousand dollars ($20,000) or by imprisonment for not more than one year, or both.

47. Cal. Lab. Code § 6423(a) (1973):

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

are incorporated in California's state plan. Additionally, Penal Code § 385 makes it a misdemeanor to work within six feet of a high-voltage line.[48]

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

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

In September 1985, a program was initiated in which a deputy district attorney and an investigator are on call 24 hours a day, seven days a week, to respond to the scene of traumatic occupational fatalities in Los Angeles County. District Attorney personnel are notified by law enforcement, the fire department, or the Coroner's Office. We in turn notify Cal-OSHA.[49] The program is known as the "roll-out" program and is the linchpin of the District Attorney's OSHA prosecution efforts.

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48. CAL. PENAL CODE § 385(b) (West 1988):

> Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects, or moves any tools, machinery, equipment, material, building or structure within six feet of a high voltage overhead conductor is guilty of a misdemeanor.

49. Between July 1987 and May 1989, while federal OSHA exercised jurisdiction for private sector enforcement, we notified federal OSHA.

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

Since establishment of the OSHA Section, District Attorney personnel have responded to more than 140 workplaces. At many of the locations, there were multiple deaths. Twenty-five criminal cases had been filed by the Los Angeles District Attorney as of May 1989. Most of the cases involve multiple defendants. More than 15 other cases investigated by the Los Angeles District Attorney have been filed by local city attorneys with authority for misdemeanor prosecutions in their jurisdiction. All but five of the cases filed by the Los Angeles District Attorney's Office involve fatalities. Of the nonfatal cases, one concerned a chlorine leak that sent more than 80 people to the hospital.[50] Approximately half of those hospitalized were students and teachers from a nearby school. Another nonfatality prosecution was due to safety violations at a refinery[51] and a third at a metal forging plant.[52] Both resulted in third-degree burns to workers. A fourth filing was for amputation of fingers on a punch press.[53] A recent case involved an 18-foot unshored trench cited by OSHA as a willful violation. We filed even though the trench had not collapsed and no one was injured.[54] Deaths from unshored trenches are so frequent that it is very important to prosecute whenever we learn of a violation in order to maximize the deterrent effect.

The first involuntary manslaughter case filed by the OSHA Section was against Michael Maggio.[55] Maggio was president of

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50. People v. Dial Corp., No. 87 M00549 (Feb. 21, 1986).
51. People v. American Plant Services, No. 31296587.
52. People v. Weber Metals, No. 89M04226 (Apr. 10, 1989).
53. People v. Inwesco, No. 88M17974 (Dec. 29, 1989).
54. People v. Pagnborn Plumbing Corp., No. 89M00594 (June 15, 1989).
55. People v. Maggio, No. A780779 (Mar. 26, 1986).

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

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

Two other involuntary manslaughter cases involved deaths caused by unshored excavation. In *People v. Gonterman*,[36] Gonterman was the manager of a trenching company and was present when a cave-like excavation was made under a street with no shoring. A series of small cave-ins partially refilled the excavation. Shoring materials were present but were not of adequate size. Gonterman directed the workers to continue to dig. The entire embankment collapsed, burying the victim. After Gonterman was held to answer at a preliminary hearing, he pleaded nolo contendere to involuntary manslaughter. He was sentenced to 90 days in county jail and required as a condition of probation to adopt and implement a comprehensive accident prevention plan.

In a third excavation case,[37] charges were filed against five defendants, including the owner and foreman of the construction firm employing the victim, the construction company, the corpo-

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36. People v. Gonterman, No. A91972 (Jan. 21, 1987).
37. People v. Hu, No. A262219 (Jan. 6, 1988).

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

The fourth involuntary manslaughter case was filed against the owner of an unreinforced brick building and the contractor who was doing remodeling work on the building.[58] Representatives from the concrete coring company, who made the cuts in the wall of the building, repeatedly warned defendants that bricks should not be removed without the bricks above the cut being shored. After a portion of the bricks were so removed, the brick wall collapsed, burying the victim, who was an undocumented day laborer. Both defendants pleaded nolo contendere to involuntary manslaughter, were fined, required to adopt safety programs, and sentenced to 90 days in jail.

All of the cases filed except two, named one or more individuals as well as the corporation. One of the cases which was filed solely against a company was for an electrocution of an employee of Southern California Gas Company.[59] The death occurred before we instituted our roll-out program. The referral from Cal-OSHA came so late that it was impossible to adequately investigate the case to determine which individuals were responsible prior to the running of the statute of limitations.

The other case where no individual was charged was against eight corporations for violations of the Labor Code and Fire

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58. People v. Wilson, No. A954496 (July 1, 1987).
59. People v. Southern Calif. Gas Co., No. M864456 (July 19, 1985).

519 Code, resulting in the death of a maintenance worker during the
520 First Interstate Bank Building fire in May 1988.[60] At the time,
521 the First Interstate Bank Building was the tallest building in
522 Los Angeles. It was completed in 1972, before the Fire Code
523 required sprinkler systems. Although not legally required to
524 retrofit, the building management decided to do so, and the
525 installation of the sprinkler system was proceeding for approxi-
526 mately a year before the fire. Because the construction work
527 involving the installation of th sprinkler system generated dust,
528 between 30 and 40 false alarms occurred a month. In order to
529 avoid the audible alarms, the electronic alarm system was mod-
530 ified. The modification allowed lights to show alarms without an
531 audible signal. The modification also resulted in overriding the
532 fire safety return of all elevators to the mezzanine level.
533 When the warning alarm was bypassed, communications were
534 by hand-held radio with engineers working in the building. The
535 engineers were asked to check the areas in which the alarms
536 were activated to see if there was actually a fire. It was a routine
537 practice for the engineers to utilize the elevators in responding
538 to an alarm.
539 The City Fire Code requires audible alarm and that the alarm
540 immediately be transmitted from the place at which it occurs to
541 the Fire Department. Several notices of violation were issued by
542 the Fire Department. In December 1987, First Interstate man-
543 agement and the Fire Department agreed on a procedure to
544 avoid false alarms during construction or repair work by remov-
545 ing the smoke detectors in the work area and replacing them
546 when the work was complete. However, the procedure was not
547 followed.
548 On May 4, 1988, installation of sprinklers was taking place
549 during the night shift on the fourth, fifth, and 58th floors. The
550 smoke detectors were not disconnected. Instead, the alarm sys-
551 tem was overridden. When a series of alarms went off, a security
552 officer asked for a maintenance person to check the 12th floor
553 for a possible fire. Alexander Handy responded and was engulfed
554 in flames when the elevator doors opened on the 12th floor. The
555 fire doors to the elevator vestibule had been propped open by
556 the cleaning crews with combustible materials, and the "fire
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529 60. People v. Equitable Life Assurance Soc'y, May 1989,

mode" (where the elevator doors would not automatically open) was not operative. Many other workers and tenants were trapped for hours in the worst high-rise fire in Los Angeles history. No individual was charged because the culpability was so diffused amongst the various corporate defendants.

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

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

Four cases have been filed in Los Angeles County based on electrocutions, where an individual was allowed to work too close to a high-voltage line. In one of those cases, the evidence showed that the tree-trimmers employed by defendants were not trained regarding the dangers of touching anything that fell on high voltage lines. Moments before the victim was electrocuted, a fellow employee removed a palm frond from the line. The supervisor was present but took no action. When the victim attempted to remove a similar palm frond, he was electrocuted.[67] The supervising partner of the tree-trimming company was sentenced to 30 days in county jail. The other partner was required to institute a comprehensive safety program and pay a fine of $8,500

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61. People v. Golden State Foods, No. 31356211 (June 11, 1985).
62. People v. GTE Prod. Corp., No. M270690 (Feb. 6, 1986).
63. People v. Reliance Steel, No. 534359 (July 22, 1985).
64. *Golden State Foods*, No. 31356211 (
65. People v. California Pacific Poultry, Inc., No. M139709 (Jan. 27, 1986).
66. People v. Star Scrap Metal Co., No. M96482 (Jan. 31, 1986).
67. People v. Lymon, No. M48042 (Oct. 21, 1985).

on guarding and safety training and to develop a model safety and health program, which includes:

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

Thus far, only two prosecutions have been based on health hazards in the workplace. These were against Dial Corporation,[70] for a chlorine exposure, and *People v. Federated-Weiner Metals, Inc.*,[71] for lead exposures. However, several State Hazardous Waste Control Act prosecutions for illegal disposal of asbestos have involved the exposure of employees to asbestos. In one such asbestos case,[72] the defendant was sentenced to six months in jail. We anticipate that over the next several years there will be a substantial number of prosecutions for illegal exposure of workers to asbestos (in violation of various asbestos business practice requirements set forth in the California Labor Code and California Business and Professions Code) and other hazardous substances. Further, the provisions of California Proposition 65, which prohibits discharges of known carcinogens and reproductive hazards into drinking water and also requires all persons to warn individuals exposed to such hazards, went into effect as to the first group of substances listed in February 1988.[73] It goes into effect as to the warning requirement for specific substances 12 months after they are identified by the state as known carcinogens or reproductive toxins. Eighteen months after such listing, the discharge of such substances is prohibited where it may contaminate drinking water. We anticipate utilizing the provisions of Proposition 65 in conjunction with the California Worker's Right to Know Law.

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69. *Id.*
70. *See supra* note 50 and accompanying text.
71. People v. Federated-Weiner Metals (May 23, 1989).
72. People v. Industrial Salvage, Inc., No. 790399 (Oct. 8, 1989).
73. CAL. HEALTH & SAFETY CODE § § 25249.5-25249.13 (West 1986).

VII. Conclusion

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

It is our belief, confirmed by the comments of numerous safety engineers and industrial hygienists throughout the County of Los Angeles, that the Los Angeles District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. We believe this is true of similar prosecution programs across the country.[74] The number of prosecutions may be small, but, like a barking dog, their very presence may deter thousands of violations.

74. Strong commitments to OSHA prosecutions also have been made by prosecutors in Cook County, Ill.; Brooklyn, N.Y.; Milwaukee, Wis.; and Austin, Tex.

The Job Safety and Health Act of 1989

Title One: Joint Worker/Management Committees

A. Worker/Management Committees must be authorized to:
   1. Stop work until hazardous conditions are abated.
   2. Review appointment and employment of safety and health personnel.
   3. Conduct monthly inspections.
   4. Obtain employer's information concerning safety and health practices.
   5. Investigate accidents.

B. Worker participation must be legitimate.

C. Committee members must receive sufficient training.

D. All businesses with eleven or more employees must designate a safety and health officer.

Title Two: Rights of Victims and Whistleblowers

A. Victims must have:
   1. The right to obtain copies of OSHA investigative files and citations quickly and free of charge.
   2. The right to participate in appropriate deliberations and adjudicative processes, personally or through their representatives, as proposed in the Construction Safety and Health Improvement Act, S. 2518.

B. Whistleblowers must have:
   1. The right to disclose hazards which violate federal law or threaten health and safety.
   2. The right to participate in a federal agency proceeding relating to the dangerous activities of an employer.
   3. The right to refuse to perform dangerous work, as proposed in the Uniform Health and Safety Whistleblower Act, S. 2095.

Title Three: Civil and Criminal Penalty Structures

A. Civil penalty changes.
   1. Minimum penalty increases should:
      a. Adjust all civil penalties for inflation (a maximum willful violation penalty would be increased from $10,000 to $29,700).
      b. Tie future penalties to the cost-of-living index, as proposed in the Federal Civil Penalties Inflation Adjustment Act, S. 1014.
   2. NSWI recommends penalty increases of:
      a. $50,000 (up from $10,000) for a willful violation.
      b. $10,000 (up from $1,000) for a serious violation.

B. Penalty settlement guidelines.
   1. Penalty reductions must not exceed 30%.
   2. Settlement discussions must not occur until after abatement of hazardous conditions.

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3. Written rationalizations for any reduction must be made available to all concerned parties.
4. Settlements over $100,000 should be entered into U.S. District Court records.

C. Criminal penalties.
   1. Current maximum fine of $10,000 and a six month prison sentence for an individual or a corporation are too weak.
   2. An increased fine of $250,000 for an individual and $500,000 for a corporation (as proposed by former Assistant Attorney General William Weld) should set the new standard.

D. Willfulness.
   1. The current willfulness standard, requiring an employer to have a history of previous citations, and subsequently to have a repeat violation involving a fatality, makes it very difficult to convict serious offenders.
   2. A new definition of willfulness, based on the California penal code, should be adopted.

E. Reckless endangerment.
   1. A new standard for reckless endangerment should be based on the following criteria:
      a. Any violator with one serious or willful violation during the previous four years would potentially be liable of reckless endangerment.
      b. Willfulness would not be considered in applying the reckless endangerment test.
      c. Reckless endangerment would carry a maximum fine of $100,000 and a prison sentence of one-to-five years.

F. Fatalities.
   1. Increase penalties for violations involving fatalities to a maximum prison sentence of 20 years, as proposed in S. 2518.

Title Four: Public Welfare Cost Recovery

A. In cases where federal funds provide support for victims of job-related injury or illness, the government should litigate to recover costs from employers for standards-related violations.
B. The Departments of Labor and Justice would litigate under this provision.

Title Five: Rights of Local and State Governments

A. Current case law discourages a state or local government from pressing criminal charges against an employer in a federally-regulated OSHA state.
B. Federal preemption of state or local laws, including criminal laws, which provides more stringent job safety and health standards should be prohibited, as proposed in S. 2518.

Title Six: State-Plan States

A. State-Plan States should be encouraged to experiment in developing safer workplaces by providing a grant program for special initiatives.
B. The Secretary of Labor should develop standard reporting measures for State-Plan States and make reports available to the public.
C. Workers in State-Plan States should have the right to demand inspections by federal officials when state inspections fail to eliminate hazardous conditions.
D. The Secretary of Labor should terminate inadequate State-Plan programs.

Title Seven: **Safety and Health Standards**

A. The revision of existing standards and promulgation of new standards lags far behind sound scientific knowledge.
B. The Secretary of Labor's responsibility to promulgate standards should be strengthened by:
    1. Reasserting the right to propose individual standards.
    2. Reasserting the right to promulgating consensus standards.

Title Eight: **Licensed Technicians**

A. In oversight of all high-risk activities, the law should:
    1. Require licensing of all key supervisory personnel.
    2. Provide general definitions of the work functions to be supervised by licensed technicians.
B. An employer's failure to comply with this provision should constitute a serious violation.

State Government Impact on Job Fatalities in California

Testimony before the
California General Assembly
October 27, 1988

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be evaluated on a case-by-case basis. In fact, tomorrow the NSWI will release a report which is highly critical of a state run program of a Midwest state. If that particular program does not show immediate improvement, the NSWI will recommend that the Secretary of Labor take action to return it to federal control.

For the record, NSWI favors Proposition 97 which will provide a mandate to return job safety and health in California's private sector to state jurisdiction. The NSWI takes this position because of its professional judgment that federal jurisdiction, unless drastically changed from its present form, will result in substantially more job-related fatalities and injuries. Moreover, state job safety and health regulation in California was clearly economically beneficial to both employers and to the state's taxpayers.

The remainder of this testimony is divided into two parts. First, the NSWI will focus on its criticisms of the U.S. Occupational Safety and Health Administration (OSHA). This examination will demonstrate why regulatory programs that existed until July 1, 1987, were particularly effective in reducing job-related injuries. Second, the NSWI will examine what levels of job-related fatalities and costs California would have experienced if safety regulation had been under federal jurisdiction. This review will consider overall fatalities with a more detailed look

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State Government Impact on Job Fatalities in California

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Background

The National Safe Workplace Institute (NSWI) is a 501(c)3 not-for-profit organization based in Chicago. The NSWI's primary activities include investigative research, intervention, and social service dedicated to safer and healthier workplaces. The NSWI's primary funders are the Joyce Foundation, the J. Roderick MacArthur Foundation, and the Chicago Resource Center.

Since the NSWI was established in 1987, it has engaged in a number of national and regional job safety and health studies. The NSWI has established a national reputation for its work in evaluating a wide variety of occupational safety and health issues and for its leadership in changing public policy.

Introduction

The NSWI fully supports restoring California's private sector job safety and health jurisdiction to state government. In the U.S., 20 state governments have successfully petitioned the Secretary of Labor for the right to regulate job safety and health. In turn for this responsibility, the federal government will pay up to 50% of the cost of program administration.

The NSWI neither favors nor opposes the idea of state job safety regulation. The NSWI believes that state programs should

be evaluated on a case-by-case basis. In fact, tomorrow the NSWI will release a report which is highly critical of a state run program of a Midwest state. If that particular program does not show immediate improvement, the NSWI will recommend that the Secretary of Labor take action to return it to federal control.

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at the construction industry. While NSWI hopes otherwise, it is difficult to envision a scenario for the next five years where the federal government would adopt a regulatory system as comprehensive and as effective as that which existed here until 1987.

In closing this part of this testimony, it is imperative that the reader understand that regulatory posture is only one of several elements that influences job-related fatality, injury, and disease levels. An important factor is workers' compensation. As a general rule, there is an inverse relationship between the level of workers' compensation benefits and job-related fatalities. In other words, higher average compensation claims yields to the recipients correspond to lower fatality levels in the state. In other words, a state can almost assuredly reduce fatality (and injury) levels by increasing workers' compensation benefits.

California is an exception to this important rule. California, at best, provides only average workers' compensation benefits. As we can see in Table 1 below, California has very modest benefit levels.

Table 1. 1984 Workers' Compensation Average Benefit Levels

State	Average per Case
CALIFORNIA	$ 7,192.29
Illinois	$ 15,079.93
Indiana	$ 2,850.72
Virginia	$ 10,056.89
Washington	$ 3,421.33

As Table 1 shows, California trails two of the five states considered in terms of workers' compensation benefit levels. However, California workers are much less likely to die on-the-job than are workers in any of the states included in this group. Incidentally, Indiana, Virginia, and Washington are states, like California, where the state government has jurisdiction over job safety and health.

California has demonstrated a very important lesson for job safety and health advocates. The lesson is that strong enforcement and moderate workers' compensation benefit levels are strong inducements to employers to prevent job injuries. In fact, it is reasonable to project, absent a return to a strong regulatory regime, that job-injury and fatality levels in California will eventually rise to the levels of states with comparable workers' compensation benefit levels.

Federal OSHA

One lesson can be learned from federal OSHA's performance over the last eight years. The lesson: Leadership is critical to sound regulation. There can be no question that the federal government backed away from strong regulation in the early and mid-1980s. Since 1986, federal OSHA has engaged in some widely visible penalty actions against major corporations, a reversal of its "bended-knee" approach during the early years of the departing Administration. However, this reversal is far less than

what meets the eye. The NSWI researched federal OSHA's mega-fines. As NSWI reported (1), federal OSHA's mega-fines nearly always resulted in mega-sweetheart deals. Indeed, OSHA seldom gains meaningful abatement in turn for penalty reduction. It is possible that this dealmaking strategy has greatly weakened the respect employers have for OSHA. In reviewing fine collection data compiled by the Department of Labor's Inspector General, NSWI found-out that less than 24% of U.S. employers cited by OSHA paid their fines in a timely fashion(2). No business or state government could tolerate such a debt collection record.

CAL/OSHA Versus Federal OSHA

There are several key differences in the operations of federal OSHA and what was CAL/OSHA. In general, federal OSHA lacks the tools and/or the will to exercise the level and scope of enforcement that existed in California. As we will see later in this testimony, that difference can be measured in lives.

There are key elements in any program designed to gain safety and health compliance. These elements really can be grouped into three areas: standards, enforcement, and education. For the purpose of this report, education will not be considered. However, the education function takes on special meaning when employers know that the standards which have been promulgated are sound and will be faithfully enforced. Economists have demonstrated that employers want to inject as much certainty as possible into their

business operations. Safety-oriented employer strongly favor sound regulation and enforcement, particularly if the regulation results in an even playing field, forcing unsafe competitors to invest in safety measures.

Standards. The record of federal OSHA in promulgating effective standards is poor. Indeed, nearly all of the standards promulgated by OSHA in recent years came as a result of litigation by public interest groups or organized labor. Testimony before the U.S. Senate earlier this year demonstrated that OSHA has suffered from a shortage of will to regulate and sufficient resources (3). Likewise, the U.S. Office of Management and Budget began demanding, in the early 1980s, extensive cost-benefit analysis for each regulation, an intervention which effectively stalled OSHA's rulemaking process (4).

The story in California was substantially different. Until recently, there appeared to be strong, bipartisan support for CAL/OSHA. The differences that emerged over time were dramatic. CAL/OSHA successfully promulgated stricter exposure limits for 267 chemicals, including 23 reproductive hazards, 29 cancer-causing agents, and 34 pesticides (5).

More importantly, CAL/OSHA promulgated effective standards for the construction industry. CAL/OSHA has a construction permit system, and regulations concerning logging, petroleum drilling

and production, crane operation, high hazard tunneling, accident prevention programs, and high voltage line work. By comparison, the federal government has not promulgated standards for any of these areas.

The absence of federal regulations does not mean that federal OSHA does not regulate. However, the absence of standards forces OSHA to rely on what is known as the general duty clause. The general duty clause has been inconsistently applied by federal OSHA, a source of irritation for many employers. Employers are entitled--and should demand--clear rules.

Enforcement. California authorities learned several years ago that strict enforcement is an important tool for achieving compliance. Clearly, neither the federal government nor CAL/OSHA have proposed a level of fines which could force employers into bankruptcy. For the federal government, the absence of significant penalties means that the government must rely, in large part, on the good intentions of those employers who consistently avoid compliance. Here, once again, CAL/OSHA has differentiated itself from the federal government in two very important ways. First, CAL/OSHA could demand immediate abatement or correction of unsafe working conditions. By comparison, the federal government, if required, must seek a court order. That difference alone has probably cost lives. The right to seek immediate abatement is critical and cannot be adequately emphasized.

The second enforcement-related issue concerns the use of criminal prosecutions. The National Safe Workplace Institute has studied the federal government's record in considerable detail. The record is shockingly weak. Since 1981, the federal government has indicted only two firms. One firm was convicted and another was acquited. A third, non-indicted firm arranged for a plea bargain. During that same period, the State of California achieved 112 successful prosecutions. The message: California will enforce the law when employers take actions that threaten lives. The federal government does not.

So What?

To this point, we have reviewed important differences in job safety enforcement between what was CAL/OSHA and the federal government. This left that task of evaluating the impact of these two strategies on: (1) Lives-saved; and (2) Potential costs. The analysis conducted by NSWI indicates that continued jurisdiction by the federal government, given current trends, will result in substantially more job-related fatalities in California is future years. Indeed, short of restoring CAL/OSHA, the only way for California lawmakers to prevent an increase in fatalities will be to sharply increase workers' compensation. Otherwise, there will not be adequate incentive for California employers to prevent job-related fatalities and injuries.

A word of caution is in order. The analysis that follows

relies heavily on death certificate data. Other job safety and health related statistics are unreliable. For example, both the Bureau of Labor Statistics (BLS) and the National Safety Council (NSC) rely, to some extent, on employer surveys, which is a poor way to collect such important data. While death certificates provide the best information available, we do not know how much underreporting by cornoners of proper cause of death may exist. For the purpose of this analysis, there is no reason to believe that California coroners underreport proper cause of death more than coroners in other states.

NIOSH Fatality Data

The best available source of information concerning job related fatality data is the National Institutes of Occupational Safety and Health (NIOSH) which purchases death certificates from all states. NIOSH has analyzed the cause of death in each instance. Recently, NIOSH released a survey report covering job related fatalities from 1980-1985. NSWI used NIOSH data to assess California's experience as compared with selected State Plan (state regulated) states and with selected federally regulated states. Table 2 (page 10) reveals that California would have experienced 203 additional deaths per year during the NIOSH reporting period if it had been under federal jurisdiction.

It is likely that future fatalities will significantly outpace the 203 annual fatality rate reported in Table 2, since

California's actual reduction in job-related fatalities was dropping at a much faster rate during the end of the reporting period (1984-1985). During that same period, the weak enforcement of the departing federal Administration was resulting in an increase in the rate of fatalities, particulary for high-risk workers (7). Again, it is important to emphasize that strong enforcement will stimulate investments in safety equipment, worker training, and safety personnel, causing a ripple effect in fatality and injury reductions.

Table 2. Fatality Comparisons Between California and Selected States, 1980-1985

Category	Fatality Rate Per 100,000 Workers	Average Annual Fatalities
California	7.1	739
Federal Group*	8.4	876
State Group*	9.7	1,008
Fed/State Average	9.1	942
Difference		203

*Federal Group: Florida, Illinois, Ohio, Pennsylvania, and Texas.

**State Group: Indiana, Kentucky, Michigan, Oregon, and Washington.

Compiled by NSWI from NIOSH Data.

There is reason to believe that California's coroners do a more accurate job in recording the cause of death California has a strong Department of Public Health and coroners receive primary medical reports. In general, other states are far less

systematic and complete. Preliminary results from a study being conducted in Oklahoma indicate that coroners there underreport job-related deaths by 50% (8). If one were to assume that California coroners record the cause of death more accurately, then it is possible that the difference could be an additional 50 or more deaths per year.

Construction

Probably the most important research on safety-related fatalities was done in 1987. This study considered only safety related deaths in the 35 most populous U.S. cities. This analysis ranked these cities by fatalities per billion dollars worth of construction (9). The economic value of the construction was regionally weighted to eliminate distortions from high cost of living cities. California's major cities (San Francisco, Long Beach, San Diego, Los Angeles, and San Jose) ranked at the bottom.

Table 3. Urban Construction Fatality Rates, 1979-1986

Category	Safety-Related Fatalities	Deaths Per Billion Dollars
California	56	1.26
Federal Group*	272	5.89
State Group*	79	4.26
Fed/State Average	176	5.08
Difference		.170

*Federal Group: New York, Denver, Jacksonville, Houston, and Kansas City.

**State Group: Memphis, Seattle, Baltimore, Honolulu, and Detroit.

Compiled by NSWI from data collected by The New York Times

Table 3 clearly suggests that under federal regulation, we can expect 170 additional construction fatalities each year just in California's major cities! If just the fatality level from federally regulated cities were considered, then California fatalities would have increased by 206 or by 467%! This data and analysis is important because construction remains the most significant source of occupational death in the U.S. Also, it demonstrates the impact that CAL/OSHA, with its thoughtful and effective programs, had on the lives of California workers.

Economics of Job Safety

Job safety and health programs have important economic implications for workers, employers, and government. In the U.S., the cost of a job-related injury is seldom internalized to the business environment that generated the injury. When costs are successfully internalized, employers have sufficient incentive to invest in injury-prevention strategies. Until 1987, California adopted a program of strong regulation and enforcement, featuring immediate hazard abatement and the potential for criminal enforcement. Unlike other states, California has avoided dramatic increases in workers' compensation levels as a means of injury prevention.

The National Safety Council (NSC) has estimated the cost of a job-related fatality at $460,000 and the cost of a job-related injury at $12,600 (10). Since the NSC is largely industry funded,

there is reason to believe that costs are not over-stated. We can assume that 25% of these costs are externalized to the public. Table 4 shows the cost impact of job-related fatalities over one-year and five-year time horizons.

Table 4. Job-Related Fatality Costs
(In million dollars)

Fatality Level	Total One Year Costs	Public One Year Costs	Total Five Year Costs	Public Five Year Costs
100	$ 46	$ 11.5	$ 230	$ 57.5
150	$ 69	$ 17.3	$ 345	$ 86.3
200	$ 92	$ 23.0	$ 460	$115.0
300	$138	$ 34.5	$ 690	$172.5

Source: NSWI calculations based on National Safety Council injury cost estimates.

Based on the preceding analysis of fatalities in federally regulated environments, it is highly possible that California's fatalities could increase by 300 per year. Fatalities are only a small part of total job-injury costs. One should expect that injuries will increase by at least 30,000 a year. By using the NSC's $12,600 cost estimate, the projected cost of injuries will be $378 million annually. The externalized cost of injury in California can be calculated by multiplying the average workers' compensation claim ($7,200) by the number of injuries (30,000) which equals $216 million. One-fourth of that cost, $54 million, is probably absorbed by the public.

There is little doubt that increases in job-related injuries will result in enormous increases in workers' compensation costs.

Moreover, the insurance industry believes that a 1% increase in injuries will increase the cost of workers' compensation to California employers by at least $40 million. Workers' compensation costs in California could easily increase by $250 million annually.

Conclusion

This analysis has not touched upon the social costs associated with job-related fatalities and injuries. Each day children will wait at the dinner table for a parent who will never arrive. The agony associated with that experience simply cannot be quantified or justly compensated. Unless one believes that the federal government is going to drastically alter its regulatory and enforcement strategies, there will be sharp increases in injuries and fatalities and children without a parent. CAL/OSHA's impact cannot be disputed. Without question, the future costs of increased fatalities and injuries will greatly exceed the $8 million that CAL/OSHA cost California taxpayers in 1987. The NSWI trusts that this testimony will assist Californians in coming to an informed judgment on Proposition 97.

FOOTNOTES

1. See Failed Opportunities (NSWI, September 2, 1988), pages 18-20.

2. Semiannual Report: Office of Inspector General, U.S. Department of Labor, page 45.

3. Testimony of several witnesses before the Committee on Labor and Human Resources, U.S. Senate, April 18-20.

4. See hearing report, OSHA Oversight, pages 18-20.

5. There are "riders" on the appropriations bill for OSHA that prohibit the Secretary of Labor from taking action to terminate California's State Plan.

6. Interviews and correspondence, including Freedom of Information Act requests, with Ron Medeiros, Senior Counsel, Division of Occupational Safety and Health, State of California, San Francisco.

7. See Footnote #1 above.

8. Interview with Anthony Suruda, M.D., M.P.H., NIOSH, October 17.

9. See The New York Times, September 21, 1987.

10. Accident Facts (National Safety Council, 1987), page 31.

About the National Safe Workplace Institute ...

BOARD OF DIRECTORS

OBJECTIVES

The National Safe Workplace Institute was founded in 1987. The Institute is funded by foundations, contributions from individuals, and through the sale of publications. The Board of Directors supports the use of appropriate tools to achieve the Institute's goals, including:

Research and Education ...

The Institute examines workplace conditions and policies and educates the public on issues relating to safety and health.

Intervention...

The Institute intervenes on behalf of individuals with regulators, law enforcement agencies, and the social welfare system to secure justice and pursues compensation and other remedies.

Acknowledgement...

Each year the Institute acknowledges, with its "Commitment to Life" award, people who have made important contributions in advancing workplace safety and health.

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Expendable Hoosiers

Job Safety & Health Problems in Indiana

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October 28, 1988

Expendable Hoosiers

Job Safety & Health Problems in Indiana

Foreword

This report has been some time in the making. Several months ago, representatives from the Foundation for the Advancement of Industrial Research (FAIR), a not-for-profit corporation concerned about protecting Indiana workers' safety and health, contacted us after the horrible industrial disaster at Bastian Plating in Auburn which claimed five lives.

Growing out of this initial contact was a recognition that FAIR and the National Safe Workplace Institute (NSWI) shared an interest in promoting workplace safety.

Since we wanted to study a state that was not under federal OSHA jurisdiction, we quickly had a convergence of interest. Thus, FAIR commissioned us to prepare a report evaluating Indiana's record of protecting worker safety and of compensating the victims of workplace accidents.

In the ensuing period, we learned that many men and women care deeply about the job safety crisis in Indiana. In conducting our study, we benefited from the insights of numerous individuals, both on and off-of-the record.

FAIR was enormously helpful in tracking down documents and in getting to know those who make a difference and those who do not. This project, we trust, will be the starting point of an enduring relationship. While the National Safe Workplace Institute's origins are substantially different from those of FAIR, we have a common bond in our dedication to dramatically reduce job-related deaths and injuries and to protect the dignity of Indiana workers and their families.

This project benefited from the special skills of David L. Nichols who recently resigned as NSWI's Director of Program Development to accept a new position with the Jacobs Engineering Group. Mr.

Nichols added greatly to NSWI and will be missed.

Both men and women are the victims of workplace homicide in Indiana. Anytime someone dies, it is a tragedy. It is our utmost responsibility to learn from those deaths, to make sure that the same does not happen again. Shamefully, Indiana's leaders have not learned these important lessons. This report must help. That is our duty.

We invite Indiana's political leaders, particularly the new Governor, to join with us in meeting the victims and family members in Indiana's sorry job safety legacy. Perhaps the new Governor will learn the lessons which his predecessors did not.

In closing, we dedicate this report to the children of victims whose lives will be shortchanged by this leadership breakdown. May their children not be so cheated.

Sincerely,

Joseph A. Kinney
Executive Director

Chapter One
Introduction

The working men and women of Indiana are not meaningfully protected from unsafe workplace conditions and once they are injured, compensation is at poverty levels.

In 1970, the U.S. Congress passed the Occupational Safety and Health Act (Job Safety Act), a law designed to ensure men and women safe and healthy workplaces. Passage of the Job Safety Act, combined with state workers' compensation laws, offered workers the promise of workplaces free of job-related injury or death.

On a national level, the U.S. has fallen far short of that goal. For Indiana, the results have been even more dismal. The working men and women of Indiana are not meaningfully protected from unsafe workplace conditions and once they are injured, compensation is at poverty levels.

The Job Safety Act provides state officials with a choice. Under law a state can gain jurisdiction of job safety and health regulation if that state can assure the Secretary of Labor that it is willing and able to provide its workers with job safety protection equal to that offered by the federal government. In turn, the federal government will make grants of up to 50% of the costs of the program. Indiana is one of 20 states which has assumed jurisdiction for job safety and health.

In this report, we strive to accomplish several objectives. We will evaluate Indiana's job safety statistics relative to its neighboring states—Michigan, Ohio, Kentucky, and Illinois.

These are the states which will compete with Indiana for new jobs and economic growth. Indeed, Indiana business groups argue that excessive regulations or a "generous" workers' compensation program will jeopardize future economic opportunities for Indiana businesses and workers alike. These claims will be examined during the course of this report.

Also, this report will focus on the effectiveness of the state agency charged with protecting workplace

Chapter Two
How Does Indiana Rate in the Midwest?

Public official have boasted that Indiana is the tenth safest state in the U.S.[1] Hoosiers could be proud of such a ranking—if only it were true. The favorable Indiana ranking depends upon a 1984 U.S. Bureau of Labor Statistics (BLS) study. A study that BLS officials have acknowledged as flawed because it depends on voluntary reporting by employers with 11 or more employees.

U.S. job safety and health statistics are significantly flawed, as a 1987 National Academy of Sciences report revealed.[2] Recent government action shows that employers dramatically underreport workplace injuries and even fatalities.[3]

The most reliable study available was published by the National Institute of Occupational Safety and Health (NIOSH). It paints a far different picture of Indiana. The NIOSH study used a form of evidence which is hard to refute, death certificates.[4] The NIOSH study team looked at death certificates in all 50 states and found Indiana to be far above average for the U.S.

Indiana's fatality results are even less impressive when one considers that the states with the highest death rates are heavily rural states such Alaska, Idaho, Montana, South Dakota, and Wyoming. These states have high fatalities because of population dispersion and the problems which exist in getting proper medical treatment to seriously injured workers. In other words, a Montana worker has a much higher chance of dying from a workplace accident than a similarly injured worker in Indiana, since travel time to hospitals is longer. Improved trauma and health care in rural areas, especially in states like Montana, would reduce job-related fatalities.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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Also, this report will focus on the effectiveness of the state agency charged with protecting workplace

safety and health, the Indiana Occupational Safety and Health Administration (IOSHA). We have scrutinized the effectiveness of IOSHA. We especially focus on the tragic community of Auburn and the unwillingness and inability of IOSHA to come to grips with problems in northwest Indiana.

Enforcement, in our view, is an important element of prevention. The second leg of prevention is the compensation system. Clearly, as long as the costs of enforcement and compensation are less than the costs of prevention, employers will have little incentive to take corrective action.

Before we begin our examination, it is important to note that safe and healthy workplaces are not a "government only" question. Many employers have worked constructively with workers to achieve reasonably safe and healthy work environments.

Clearly, as long as the costs of enforcement and compensation are less than the costs of prevention, employers will have little incentive to take corrective action.

The role of government concerns employers who have not made workplace safety and health a high priority. Effective regulation can stir those employers with whom safety and health are not priorities and engage them in initiatives which are essential for making workplaces safer and healthier. If the existence of regulation is not enough, then the enforcement agency must have the legal muscle to effectively regulate. If an agency cannot effectively regulate, then one must question the desirability of maintaining that organization.

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Indiana and Its Neighbors-- Who is Safe?

An objective determination of how safe Indiana workplaces are can be made by comparing actual workplace deaths in Indiana with its neighboring states: Michigan, Ohio, Kentucky, and Illinois.

Compared with bordering states, Indiana ranks only above Kentucky and substantially worse than Michigan, Ohio, or Illinois. While it is difficult to determine, it is very likely that Kentucky's higher death rate is due to mining fatalities.

As we can see from Table 2.1, the average fatality rate in Illinois is 13.5% below that in Indiana. The comparison is even more dramatic for Michigan, 33% below Indiana, and Ohio, which is 37% below Indiana. This means that three Indiana workers die for every two in Michigan and Ohio. Michigan and Kentucky are state-regulated, while Ohio and Illinois are federally-regulated.

Table 2.1

Traumatic Occupational Fatalities, 1980-85
Average Annual Number & Fatality Rate, for Private Sector Workers

State	*Average Annual Number*	*Fatality Rate per 100,000*
Illinois	309	7.1
INDIANA	**160**	**8.2**
Kentucky	160	14.0
Michigan	167	5.5
Ohio	200	5.2

Source: NIOSH

Construction

The largest source of job-related deaths in the U.S. is the construction industry. Only Kentucky has a higher construction death rate than Indiana of the five states reviewed in this study. Once again, however, Indiana's death rate is substantially higher than that in Michigan, Ohio, or Illinois. In this instance, Indiana's fatality rate of 34.1 per 100,000 construction workers is much higher than the national average of 24.1.

This means that three construction workers in Indiana are dying for every two in Michigan and Ohio.

Table 2.2

Traumatic Occupational Fatalities, 1980-85
in the Construction Industry

State	*Average Annual Number*	*Fatality Rate Per 100,000*
Illinois	42	26.0
INDIANA	**26**	**34.1**
Kentucky	19	42.0
Michigan	20	20.5
Ohio	30	21.4

Source: NIOSH

As we can see from Table 2.2, the construction death rate in Illinois, the next closest state is 24% lower than the death rate in Indiana. The comparison is even more dramatic for Michigan and Ohio.

The construction death rate in Michigan is 40% below Indiana's and the death rate in Ohio is 37% below its neighbor, Indiana. Again, this means that three construction workers in Indiana are dying for every two in Michigan and Ohio.

Manufacturing

Indiana has a slightly better record in manufacturing than in construction. There are a number of large, highly unionized auto manufacturing plants in Indiana which tend to provide safer workplaces than non-union manufacturing. Kentucky, consistent with trends in other areas, has a higher death rate than Indiana. Indiana and Illinois have the same death rates, but Michigan and Ohio, which are heavily unionized in relative-terms, have much lower death rates.

Table 2.3

Traumatic Occupational Fatalities, 1980-85
in Manufacturing

State	*Average Annual Number*	*Fatality Rate Per 100,000*
Illinois	39	3.4
INDIANA	**21**	**3.4**
Kentucky	13	5.1
Michigan	24	2.5
Ohio	34	2.9

Source: NIOSH

The manufacturing death rate in Michigan is 23.5% below Indiana, while that of Ohio is 14.8% below Indiana.

Public Utilities

In the fourth category which we examined, transportation, communications, and public utilities, the same pattern prevails—only Kentucky has a worse death rate than Indiana. However, Indiana's death rate of 37.8 per 100,000 Indiana workers is much higher

than its midwest neighbors.

Indiana workers are far more likely to die than their counterparts in neighboring Michigan, Ohio, and Illinois.

Table 2.4

Traumatic Occupational Fatalities, 1980-85
in Transportation, Communications, and Public Utilities

State	*Average Annual Number*	*Fatality Rate Per 100,000*
Illinois	51	21.9
INDIANA	**35**	**37.8**
Kentucky	30	57.4
Michigan	28	20.8
Ohio	46	24.9

Source: NIOSH

The relative statistics from transportation, communications, and public utilities are dramatic. An Indiana worker employed in the area of public utilities has a much higher chance of being killed than his or her counterparts in Michigan, Ohio, or Illinois. A worker in this category has a 42.1% less chance of being killed in Illinois, a 45% less chance in Michigan, and a 34.2% less chance in Ohio.

Conclusion

As we have seen, Indiana workers are far mo e likely to die than their counterparts in neighboring Michigan, Ohio, and Illinois. Unfortunately, mine-related fatalities tend to make it difficult to compare Kentucky with Indiana.

Furthermore, it is likely that Indiana's state job fatality statistics are inaccurate. Aforthcoming study reveals that one-fifth of Indiana's job-related deaths do

not yield workers' compensation claims[5] when death certificate data are matched with workers' compensation claims.

This means that fatalities are either underreported or do not involve workers' compensation claims. In the case of individuals who do not have dependents, Indiana law limits workers' compensation to only burial expenses.

Finally, this review has not considered agricultural fatality data. Purdue University has an outstanding farm safety program which benefites thousands of Indiana farmers. Generally, agriculture is not regulated in the U.S., even though agriculture may have a higher death rate than mining.[6]

Chapter Three

Auburn, Indiana
A Tragedy Waiting to Happen

It is a shame anytime someone dies. But in this case, that shame is magnified by the youth of the five workers who died. Everything that they would have produced or done in their lifetime is lost.

Auburn, Indiana has become infamous over the past five months and for some time to come it will be remember as the town where "those workers died." On June 28, 1988 tragedy struck Bastian Plating Company. It is a day that few in Auburn will ever forget.

It is a shame anytime someone dies. But in this case, that shame is magnified by the youth of the five workers who died. Everything that they would have produced or done in their lifetime is lost. It is also a shame because their deaths were needless and preventable.

The Indiana Occupational Safety and Health Administration had warning signals regarding the problems in Auburn several years before this five-person tragedy occurred. On April 4, 1986, Darrell Bland, a worker at the Auburn Foundry, was killed while working with solvents. Bland's death was the fifth at that plant since 1974.

•The first death occurred in October 1974 when Leroy Funk, 30, was killed when a casting fell through the roof striking him on the head.

•The second occured in April 1976, when John Mann, 32, died after a grinding wheel exploded and pieces struck him in the abdomen.

•The third occured in September 1978, when Thomas Takacks, 19, was killed in a conveyor belt accident.

•The fourth occured in May 1979, when Willis Chrisman, 46, was checking the electrical hook-up on a furnace and he was electrocuted. Bland's death was the fifth in a never-ending litany of death in Auburn.

A news release reported Bland's wife as saying, "What is going on where my husband and five other employees died in a 13-year period?" [7]

But apparently the warning signals were not bright enough for IOSHA to see, as citations were issued in some of those instances but the unsafe situations were allowed to remain.

On June 28, 1988, five workers at the Bastian Foundry died. They were Jeff Link, 25, Barney Sweet, 21, Larry O. Hensinger, 29, Bill M. Freeze, 19, and Craig Fogle, 19. Link was cleaning sludge out of a tank when he was overcome by hydrogen cyanide. The other workers died attempting to rescue Link or each other. Bastian had a history of problems which IOSHA ignored.

The Bastian deaths were the topic of news stories as authorities tried to get to the bottom of this tragedy. Family members lashed out at the different parties who they blamed for the accident, namely IOSHA and the company, Bastian Plating.

IOSHA issued Bastian Plating four knowing citations, two serious citations, and six non-serious citations. The total proposed fine was $41,700 for the five deaths.

For those who have had a workplace accident or for those who have had a family member die, there are many different reactions. Often these victims either want to shut themselves away and forget. Others want to prevent the same thing from happening to someone else. IOSHA has used the former approach for too long. They should begin to adopt the latter approach.

In most instances, mistakes can be a positive influence if something is learned. But IOSHA apparently did not learn from the first five deaths. One can only hope that the same cannot be said about these recent five deaths.

Chapter Four
IOSHA
A Safety Agency in Disguise?

In Indiana, the primary agency which has the task of protecting workplace safety and health is the Indiana Occupational Safety and Health Administration (IOSHA). IOSHA combined with the Indiana Occupational Safety Standards Commission (OSSC), should form an effective partnership which would lead to a reduction in job injuries and diseases.

Unfortunately, it does not work that way in Indiana. IOSHA is understaffed and lacks the political and legal clout that is essential for a meaningful program. As we saw in Chapter Two, Indiana clearly has a poor safety and health record, especially in comparison with comparable Midwest states.

As we saw in Chapter Three, the recent tragedy in Auburn is an example of what can happen if safety and health conditions are neglected over time.

In this chapter, we focus on evaluating the performance of IOSHA and its sister standards-setting agency, the OSSC. Despite the dedication of its employees, IOSHA has failed to live-up to its commitment in promoting safer and healthier workplaces for Hoosiers.

A job safety and health agency, whether at the federal or state level, maintains and increases its effectiveness and credibility depending upon its ability to:

1) *enforce the safety and health standards though the use of inspections and civil and criminal penalties;*

2) *commit adequate resources to the task; and*

3) *set standards which protect the safety and*

health of workers under its jurisdiction.

The Indiana record is shown to be less than what meets the eye—much less.

With regards to each of the aforementioned three measures upon which effectiveness and credibility rests, Indiana's Occupational Safety and Health Administration (IOSHA) falls short.

Inspections: A Cover-up?

At first glance, statistics appear to show that IOSHA is performing its inspection function at a level which exceeds federal OSHA and which compares favorably to other state administered job safety programs.

In 1986, for example, Indiana conducted 96 inspections per IOSHA inspector and inspected a total of 4% of the state's workplaces. By comparison, federal OSHA's record for that year, was 62.5 inspections per federal OSHA inspector. Only 2.8% of the workplaces under its jurisdiction were inspected.[8]

However, on closer examination, the Indiana record is shown to be less than what meets the eye—much less. As Table 4 shows, Indiana has shifted its inspection resources from private sector companies, which employ 86.8% of the state's workers and account for 92.3% of the occupational injuries and illnesses, to the public sector.

From 1982 to 1986, public sector inspections grew by 745% while private sector inspections fell by 11.6%. Workers employed by the state and local governments are now nearly 4.5 times more likely to see an IOSHA inspector than are workers on construction sites, in factories, or in private offices. The private sector employs more than 80% of the Indiana's citizens.

In addition, Indiana seriously lags behind other

Table 4.1

IOSHA Inspection Totals
1982 & 1986

1982

Type of Workplace	*Number*	*% of Total*
Industrial	1,957	44.6
Construction	1,898	43.2
Health	765	3.8
Totals		
Private Sector	4,620	91.6
Public Sector	369	8.4

1986

Type of Workplace	*Number*	*% of Total*
Industrial	651	9.5
Construction	3,080	45.1
Health	354	5.2
Totals		
Private Sector	4,085	59.8
Public Sector	2,744	40.2

Source: Legislative Services Agency, p. 22

state OSHA programs and federal OSHA in addressing the problems of occupational health inspections. In 1986, IOSHA conducted 354 health inspections. This number represented only 5.2% of the total inspections done by IOSHA in 1986.

Other state-plan states generally devote 10% or more of their inspection resources to health inspections and federal OSHA completed nearly three times the number of health inspection as Indiana. Federal OSHA devoted 15.3% of its total inspections to health inspections.[9]

Civil Penalties

To make employers comply with health and safety standards and to deter violations, job safety programs assess civil penalties against violators. As with safety and health standards, Indiana has followed the federal standard by adopting meager penalties which, at best, represent a slap on the wrist.

Penalties range from $1,000 for non-serious, serious, and failures to abate safety problems to $10,000 for employers who knowingly violate standards.[10]

The penalties for workplace safety violations have remained unaltered since 1971 when workplace safety was first regulated. If penalties had been adjusted for inflation, a $10,000 knowing citation would, in 1988, cost employers $29,700. A serious citation would carry a fine of $2,970. Inflation has eroded the value of IOSHA fines by 68%, as shown in Table 4.2.

Table 4.2