June 1992

Criminal Prosecution of Workplace Safety Violations

Michael T. Cimino
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Criminal Law Commons, and the Labor and Employment Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol94/iss4/8

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
CRIMINAL PROSECUTION OF WORKPLACE SAFETY VIOLATIONS

I. INTRODUCTION............................................................ 1007

II. HISTORY AND ANALYSIS OF CRIMINAL PROSECUTION UNDER OSHA .............................................................. 1008

III. STATE CRIMINAL PROSECUTION OF WORKPLACE SAFETY VIOLATIONS ........................................................... 1010

A. People v. Warner-Lambert Company .................. 1010
B. People v. Film Recovery Systems .................... 1012

IV. THE PREEMPTION ARGUMENT ............................... 1014

V. DIFFICULTY IN OBTAINING CONVICTIONS OF DEFENDANT CORPORATIONS AND CORPORATE OFFICERS IN STATE COURTS ................................................................. 1018

A. New York v. Pymm Thermometer, Inc. .......... 1018
B. People v. Chicago Magnet Wire Corporation.... 1021

VI. INCREASED FEDERAL INTEREST IN CRIMINAL PROSECUTION OF WORKPLACE SAFETY VIOLATIONS .......................... 1024

A. Legislative Reform ................................................. 1025
B. United States v. S. A. Healy .............................. 1027

VII. CONCLUSION ............................................................. 1028

I. INTRODUCTION

In 1970, unions succeeded in persuading Congress to pass the Occupational Safety and Health Act (OSHA) legislation that delineated minimal standards for safety and health in the workplaces of the United States. OSHA was enacted by Congress1 “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”2 OSHA did not have the impact on workplace safety as anticipated, however, and the agency’s staff was reduced, new rules and standards were delayed, civil fines compromised, and criminal prosecutions of the most serious violations


1007
thwarted. During the 1980's, due to the ineffectiveness of OSHA in deterring workplace safety violations, several states began to criminally prosecute employers for workplace safety violations under state criminal statutes. Such state criminal prosecution is the primary focus of this article.

Part two of this article discusses the perceived failure of OSHA to deter workplace safety violations. Part three of the article focuses on the shift from prosecution under OSHA to state criminal prosecution of workplace safety violations. The fourth part examines the possibility of federal preemption of state criminal prosecution of health and safety violations in the workplace. Part five discusses two very recent cases involving the prosecution of defendant corporations and corporate agents for safety violations under state criminal statutes. Finally, Part six looks at proposed legislation to expand criminal sanctions under OSHA and also discusses a recent case that suggests that the federal government may become more active in the prosecution of willful criminal violations of OSHA standards.

II. HISTORY AND ANALYSIS OF CRIMINAL PROSECUTION UNDER OSHA

Finding "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments," Congress enacted OSHA in an effort to provide safer and healthier working conditions for every working man and woman in the nation. OSHA provides that each employer:

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
(2) shall comply with occupational safety and health standards promulgated under this Act. 5

OSHA also provides civil and criminal penalties for specific violations of its provisions. Civil penalties may be as high as $70,000 for an employer who willfully or repeatedly violates the requirements of the Act. In addition, "any employer who fails to correct a violation for which a citation has been issued . . . within the period permitted for its correction . . . may be assessed a civil penalty of not more than $7,000\textsuperscript{7} for each day during which such failure or violation continues."\textsuperscript{8} OSHA further provides criminal sanctions for any employer who willfully violates any standard or rule of the act and such violation causes death to any employee. Criminal penalties range from a fine of not more than $10,000 or imprisonment for not more than six months for first time offenders, to a fine of not more than $20,000 or imprisonment for not more than one year, or both, for repeat offenders.\textsuperscript{9}

Despite the enactment of OSHA and the presence of both civil and criminal penalties for violations of the standards set forth therein, the number of workplace-related deaths, injuries and diseases did not decrease dramatically during the 1970's. The National Safety Council calculated the number of workplace-related deaths in 1970, the year before OSHA's effective date,\textsuperscript{10} at 13,800,\textsuperscript{11} and ten years later, in 1980, at 13,200.\textsuperscript{12} Although the total number of workers increased from 1970 to 1980,\textsuperscript{13} the result was still the same: far too many workers were killed in workplace-related accidents in the United States.

More recent figures are just as startling. The National Safety Council determined the number of work-related deaths, in 1990,

\footnotesize

\textsuperscript{7} Senate bill 490 was passed by the 101st Congress, increasing maximum penalties sevenfold so that the maximum for a willful or repeated violation went from $10,000 to $70,000 and from $1,000 to $7,000 for a serious violation. Henry Reske, Observers Say Criminal Sanctions for Workplace Violations Will Remain Rare, 20 O.S.H. Rep. (BNA) No. 26, at 1110 (Nov. 28, 1990).
\textsuperscript{10} OSHA's effective date was December 29, 1970. 29 U.S.C. § 651 (1988).
\textsuperscript{12} Id.
\textsuperscript{13} Id.
were 10,500,14 time lost in 1990 due to work deaths and injuries totaled 75 million days,15 and that an additional 100 million days will be lost in future years from accidents that occurred in 1990.16 In summary, the National Safety Council estimates17 the total number of work-related deaths from 1971 to 1990 to be 246,900.18

Despite the large number of workplace-related fatalities, federal prosecution for workplace safety violations under OSHA was minimal, at best. Between 1970 and 1988, OSHA referred only forty-two cases to federal prosecutors,19 of which only fourteen were prosecuted.20 In total, the agency has referred only fifty-eight cases21 to the Justice Department for criminal prosecution during more than nineteen years of regulation.22 Only ten employers have been convicted, and only one employer has actually served time in prison.23

III. STATE CRIMINAL PROSECUTION OF WORKPLACE SAFETY VIOLATIONS

Due to the inability of OSHA to sufficiently deter workplace safety violations, several states during the 1980's took a different route in an attempt to provide safe work conditions by criminally prosecuting employers for blatant workplace safety violations.

A. People v. Warner-Lambert Co.24

In 1980, prosecutors for the state of New York charged the Warner-Lambert Company,25 along with specific officers and em-

14. Id.
15. Id.
16. Id.
17. Estimates based on data from the National Center for Health Statistics, state departments of health, and state industrial commissions. Id.
18. Id.
20. Id.
22. Id.
23. Id.
ployees of the corporation, with six counts of second degree manslaughter as a consequence of the deaths of six employees which resulted from a massive explosion and fire at Warner-Lambert’s plant. On the day of the explosion, Warner-Lambert was producing Freshen-Up gum by a process which involved passing hollowed gum pieces through a bed of magnesium stearate (MS) and into a die-cut punch, where the gum was formed into square tablets surrounding a jelly-like center. The process created a dispersal of MS dust in the air and throughout the immediate area.

A heavy concentration of MS dust, suspended in air, poses a substantial risk of explosion if ignited. Warner Lambert’s insurance carrier had advised Warner-Lambert that the quantity of ambient MS dust in the Freshen-Up gum production area created a hazardous condition and recommended the installation of a dust exhaust system and modification of electrical equipment to reduce the hazard posed by the ambient MS dust. Considering this advice, Warner-Lambert chose to move toward the eventual elimination of the MS hazard by modification of the Freshen-Up equipment. However, on the day of the explosion, only one Freshen-Up machine had been modified and a “heavy fog” or mist of MS dust filled the production area.

The Queens County Supreme Court dismissed the indictment against Warner-Lambert on the ground “that the evidence before the Grand Jury was not legally sufficient to establish the offenses charged or any lesser included offenses.” The Appellate Division reversed, but the Court of Appeals overruled the Appellate Division and dismissed the indictment. The Court of Appeals held that:

27. Id. at 662.
28. Id.
29. Id.
30. Id.
31. Id. at 663.
32. Id.
33. Id.
34. Id.
35. Id. at 661.
Although there was a broad, undifferentiated risk of an explosion in consequence of ambient magnesium stearate dust arising from the procedures employed in its manufacturing operations, the corporate and individual defendants may nonetheless not be held criminally liable, on the theory of either reckless or negligent conduct, for the deaths of employees occasioned when such an explosion occurred when the triggering cause thereof was neither forseen nor foreseeable.36

B. People v. Film Recovery Systems37

Although the New York state prosecutors were unsuccessful in gaining a conviction in Warner-Lambert, the action spurred prosecutors in other states to bring criminally negligent employers into the state arena. In 1985, state criminal statutes were used by Illinois prosecutors in the prosecution of workplace safety violations in People v. Film Recovery Systems.38

Film Recovery was involved in the business of extracting silver from used x-ray and photographic film.39 The extracting process involved "chipping" the x-ray and photographic film and soaking the granulated pieces in large barrels containing a solution of sodium cyanide and water.40 The mixture of water and sodium cyanide caused the silver content of the film to be released.41 The silver laden solution was then pumped into polyurethane tanks containing stainless steel plates to which the silver particles adhered.42 The plates were then removed from the tanks and the silver particles scraped off.43

On February 10, 1983, Stephen Golab became dizzy and faint while stirring the contents of one of the polyurethane tanks.44 He went to the lunchroom where he began trembling and foaming at the mouth.45 Golab eventually lost consciousness and was pronounced dead upon arrival at a local hospital.46

36. Id. at Syl. pt. 1.
38. Id.
40. Id. at 1092.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
Evidence at trial indicated Golab died of acute cyanide toxicity as a result of inhaling poisonous fumes. The warning signs on the cyanide-filled drums were written in Spanish and English and were of no benefit to the Polish workers, such as Golab, who could not read or write English or Spanish. Workers were never informed that the solution in the vats was cyanide and could be harmful if inhaled, nor were they given safety instructions, eye goggles, or protective clothing.

The Grand Jury charged the individual defendants with murder and fourteen counts of reckless conduct, stating that "as officers and high managerial agents of Film Recovery, they had, on February 10, 1983, knowingly created a strong probability of Golab’s death." Following a bench trial, individual defendants Stephen O’Neil, Charles Kirschbaum, and Daniel Rodriguez were convicted of murder and fourteen counts of reckless conduct. The individual defendants each received sentences of twenty-five years imprisonment for murder and fourteen concurrent one year terms for reckless conduct.

The Appellate Court of Illinois, nearly five years later, reversed and remanded the case, holding that:

[b]ecause the offenses of murder and reckless conduct require mutually exclusive mental states, and because we conclude the same evidence of the individual defendants’ conduct is used to support both offenses and does not establish, separately, each of the requisite mental states, we conclude that the convictions are legally inconsistent.

Despite the Appellate Court’s subsequent reversal, Film Recovery Systems had a lasting impression on the prosecution of workplace safety violations. As one author has since noted, Mr. Golab’s death

47. Id.
49. Id.
50. Film Recovery Systems, 550 N.E.2d at 1098.
51. Id.
52. Id. at 1092.
53. Id.
54. Id.
55. Id. at 1098.
and the subsequent action "presented a stark contrast between the weak penalties that are typically imposed by OSHA and those that could be brought by local prosecutors." In addition, the action taken by the Illinois state prosecutors has spurred prosecutors in other states to bring similar actions against defendant corporations and corporate officials.

IV. THE PREEMPTION ARGUMENT

The primary defense asserted by most defendant corporations and corporate officials in response to state criminal prosecution for workplace safety violations is that Section 18 of OSHA preempts state criminal prosecution for a work-related death over which OSHA has jurisdiction, unless such prosecution is part of a state plan which has been federally approved. Section 18 states, in 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 655 of this title.

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 655 of this title shall submit a State plan for the development of such standards and their enforcement.

The first argument made by proponents of OSHA preemption is that Section 18(a) expressly precludes states from asserting authority over any issue for which a federal standard has been established, unless the state obtains approval from OSHA to set up and enforce its own state plan under Section 18(b). In response, prosecutors and opponents of OSHA preemption argue that Section 18(a) preserves state jurisdiction over matters for which no federal standard has been adopted; it does not expressly state that states do not have any authority over issues for which federal standards


59. Getting Away With Murder, supra note 57, at 541.
have been adopted.\textsuperscript{60} Section 18(b), according to opponents of OSHA preemption, "extends only to the development and enforcement of state standards, not to enforcement of generally applicable state criminal laws."\textsuperscript{61}

Secondly, courts imply preemption if Congress intended to occupy a given field, leaving no room for State regulation.\textsuperscript{62} An intent by Congress to occupy a given field may be illustrated by the comprehensiveness of its legislation.\textsuperscript{63} Proponents of OSHA preemption argue that the comprehensiveness of OSHA demonstrates that Congress intended to occupy the field of occupational health and safety. Opponents of OSHA preemption, on the other hand, contend that "[a]lthough OSHA regulations are complex and extensive, they reflect the complexity of the subject matter, not an intent by Congress to make safety and health regulation an exclusively federal concern."\textsuperscript{64}

Finally, preemption arises if state law conflicts with federal law.\textsuperscript{65} Proponents of OSHA preemption contend that state criminal prosecution of health and safety violations in the workplace conflicts with the administration of OSHA or its goals and purposes.\textsuperscript{66} Prosecutors and opponents of OSHA preemption, however, argue that nothing in the language, structure, or history of OSHA suggests that state criminal prosecution of workplace safety violations conflicts with its goals or purposes.\textsuperscript{67} Rather, the prosecution of employers whose workers are killed because of blatant safety or health violations advances OSHA's stated goal of "assuring so far as possible every working man and woman in the Nation safe and healthful working conditions."\textsuperscript{68}

Several state courts have recently addressed the issue of OSHA preemption. In \textit{People v. Hegedus},\textsuperscript{69} for example, the Supreme Court

\textsuperscript{60} \textit{Id}. at 542.
\textsuperscript{61} \textit{Id}
\textsuperscript{63} See, \textit{e.g.}, R. J. Reynolds Tobacco Co. v. Dunham County, 479 U.S. 130, 143 (1986).
\textsuperscript{64} \textit{Getting Away With Murder}, supra note 57, at 547.
\textsuperscript{65} Pacific Gas, 461 U.S. at 204.
\textsuperscript{66} \textit{Getting Away With Murder}, supra note 57, at 548.
\textsuperscript{67} \textit{Id}. at 549.
\textsuperscript{68} \textit{Id}
\textsuperscript{69} \textit{People v. Hegedus}, 443 N.W.2d 127 (Mich. 1989).
of Michigan held that prosecution under state criminal statutes was not preempted by Section 18 of OSHA. In that case, Patrick Hegedus, a supervisor at Jackson Enterprises, was charged with involuntary manslaughter stemming from the death of William Hatherhill, an employee of Jackson-Enterprises. Hatherhill died of carbon monoxide poisoning while working in a company van. The prosecution alleged that the deteriorated condition of the van’s undercarriage and exhaust system permitted exhaust fumes to seep into the van, causing Hatherhill’s death.

The circuit court granted the defendant’s motion to quash the information on the ground that the defendant either had no duty to inspect the van or no duty to remove it from service. The Court of Appeals affirmed the trial court’s decision on the ground that criminal prosecution was preempted by OSHA. The Michigan Supreme Court of Appeals reversed, however, holding that the existence of regulations under OSHA governing carbon monoxide emissions did not preempt state criminal prosecution for involuntary manslaughter arising out of a worker’s death through inhalation of carbon monoxide. The Supreme Court of Appeals reasoned:

[section 18(a) has the clear effect of actually preserving state jurisdiction over safety and health issues with respect to which no federal standard exists, while the language of section 18(b) is expressly limited to the development and enforcement of state standards relating to such issues, and this does not affect the enforcement of a state’s general criminal laws.]

In addition, the Court noted that the inclusion of a “savings clause” within OSHA guards against undue restrictions upon state action in the area of occupational safety and health. Section 4 states:

Nothing in this chapter 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

70. Id. at 128.
71. Id.
72. Id.
73. Id.
74. Id. at 129.
75. Id.
76. Id. at 128.
77. Id. at 132.
78. Id. at 134.
manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.\textsuperscript{79}

In a more recent case, \textit{Maine v. Moores-Neron, Inc.},\textsuperscript{80} a Maine Superior Court ruled that state criminal prosecution for workplace health and safety violators was not preempted by OSHA.

Moores-Neron, Inc., a contractor in Portsmouth, New Hampshire, was indicted on charges stemming from the October 1989 death of a construction worker on a Maine drawbridge.\textsuperscript{81} Moores-Neron was using a counterweight, a device which serves as a balance when the draw span of the bridge is used as an elevator for transporting workers.\textsuperscript{82} The corporation had originally complied with an OSHA citation to install a guardrail on the counterweight, but had later removed the guard for convenience.\textsuperscript{83} When a laborer, Todd Dawson, stuck his head out of the elevator, he was crushed by a girder on the bridge.\textsuperscript{84}

Moores-Neron argued that OSHA preempted Maine’s corporate manslaughter statute and general manslaughter statute because Maine was attempting to apply criminal penalties to a field where OSHA already had established standards enforceable by its own penalties, both civil and criminal.\textsuperscript{85}

Superior Court Justice G. Arthur Brennan rebuffed the firm’s argument, holding that the Maine law which holds employers accountable for negligence that results in workplace deaths is not preempted by OSHA.\textsuperscript{86} Brennan reasoned that “Maine’s manslaughter statute is not criminalizing the violation of OSHA standards, but rather, it is criminalizing behavior which the state legislature, acting

\textsuperscript{80} Maine v. Moores-Neron, CR 90-581 (Maine Superior Court, York County, Feb. 19, 1991).
\textsuperscript{82} Id. at 1426.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
within its police power, has determined requires punishment for the protection of its citizens.”

V. DIFFICULTY IN OBTAINING CONVICTIONS OF DEFENDANT CORPORATIONS AND CORPORATE OFFICERS IN STATE COURTS

A growing number of state courts, similar to the court in Hegedus, have held that prosecution of workplace safety violations under state criminal statutes is not preempted by OSHA. Despite this trend, however, state prosecutors have not been successful in obtaining major convictions of defendant corporations and corporate officials who knowingly violate safety standards and endanger the health and safety of their workers. This fact is evidenced by the decisions in two recent cases, People v. Pymm, and People v. Chicago Magnet Wire Co.

A. People v. Pymm

In Pymm, defendants William Pymm, Edward Pymm, Jr., and Pymm Thermometer Corporation (PTC) were charged with criminal assault and reckless endangerment for exposing workers at PTC to mercury. The Pymms were officers of PTC, a company engaged in the business of manufacturing thermometers for clinical use.

87. Id.
91. The indictment charged the defendants with 1) conspiring to commit the crime of falsifying business records in the first degree by hiding from OSHA inspectors the existence of the cellar reclamation projects; 2) falsifying business records in the first degree by preventing the making of a true entry concerning the existence of the cellar reclamation project and, with intent to defraud, including the intent to conceal the crime of reckless endangerment, causing the omission thereof in the business records of an enterprise, namely OSHA; 3) assault in the first degree in that defendants, in the course of and in furtherance of the commission of a felony, i.e., the crime of falsifying business records in the first degree, caused serious physical injury to Vidal Rodriguez, a former employee of PTC; 4) assault in the second degree in that defendants recklessly caused serious physical injury to Vidal Rodriguez by means of a dangerous instrument, i.e., mercury; and 5) reckless endangerment in the second degree in that the defendants recklessly engaged in conduct which created a substantial risk of serious physical injury to the employees of PTC. People v. Pymm, 546 N.Y.S.2d 871 (N.Y. App. Div. 1989), aff’d, 563 N.E.2d 1 (N.Y. 1990), cert. denied, 111 S. Ct. 3555 (1991).
93. Id.
Mercury contamination had been a recurring problem at PTC, posing a serious health hazard to PTC’s employees.\textsuperscript{94} Mercury used in the thermometers readily evaporates into the surrounding air.\textsuperscript{95} Prolonged exposure to this highly toxic mercury vapor can cause permanent damage to the neurological system.\textsuperscript{96}

Inspections dating back to the early seventies indicated that PTC employees were not adequately protected from the hazards of mercury contamination.\textsuperscript{97} Both William and Edward Pymm were advised of the danger of mercury contamination, and OSHA cited PTC on at least two separate occasions for hazardous workplace conditions at the plant.\textsuperscript{98}

OSHA learned in 1985 that PTC was operating a secret mercury reclamation business in the plant’s basement.\textsuperscript{99} Upon inspecting the basement operation, OSHA discovered “boxes loaded with broken thermometers piled against the walls with mercury seeping out of the boxes and leaking out onto the floor.”\textsuperscript{100} The level of mercury vapor at the time was nearly five times higher than the level allowed by OSHA.\textsuperscript{101} One year earlier, in 1984, Vidal Rodriguez, a PTC employee working in the mercury reclamation operation, was diagnosed as having neurological symptoms consistent with mercury poisoning.\textsuperscript{102}

The jury convicted the defendants of the various offenses arising from the hazardous condition of the workplace.\textsuperscript{103} The Kings County Supreme Court set aside the verdict, however, holding that OSHA preempts New York prosecution of employers for criminal activity in the workplace.\textsuperscript{104} The New York Supreme Court, Appellate Division, reversed, stating that “the goals of State criminal law com-

\textsuperscript{94} Id.  
\textsuperscript{95} Id.  
\textsuperscript{96} Id.  
\textsuperscript{97} Id. at 2-3.  
\textsuperscript{98} Id. at 3.  
\textsuperscript{99} Id.  
\textsuperscript{100} Id.  
\textsuperscript{101} Id.  
\textsuperscript{102} Id.  
\textsuperscript{103} Pymm, 546 N.Y.S.2d at 873.  
\textsuperscript{104} Id.
plement rather than conflict with OSHA so as to ensure that workers are adequately protected and that particularly egregious conduct receives appropriate punishment.\textsuperscript{105} The Court of Appeals affirmed, holding that 1) OSHA does not expressly preempt State criminal prosecution of workplace safety violations\textsuperscript{106} and 2) OSHA does not occupy the field of occupational health and safety so as to \textit{impliedly} preempt state criminal prosecution of workplace safety violations.\textsuperscript{107}

The defendants in \textit{Pymm} appealed the ruling of New York's highest court to the United States Supreme Court, arguing that the Court of Appeals erred in ruling that OSHA did not preempt state criminal prosecution of employers for criminal activity in the workplace. However, in February of 1991, the United States Supreme Court denied certiorari on the preemption claim, thus letting stand the decision of the State Court of Appeals.\textsuperscript{108}

Upon remand, the New York State Supreme Court for King’s County dismissed the first degree assault charges against William Pymm and Edward Pymm, Jr., but imposed jail sentences and fines on the remaining counts of the 1987 jury verdict convicting the defendants of felonies for their role in the unsafe operation of the clandestine mercury reclamation facility.\textsuperscript{109} William Pymm and Edward Pymm, Jr., were each sentenced to serve weekends in the city jail for six months and pay a fine of $10,000 on felony charges of second degree assault and falsifying business records.\textsuperscript{110}

Justice Thaddeus Owens of the State Supreme Court of Cook County refused to sentence the Pymms on the first degree assault charge, which was punishable by a prison sentence ranging from eighteen months to fifteen years.\textsuperscript{111} Then New York Attorney General Robert Abrams, one of the two joint prosecutors in \textit{Pymm},

\textsuperscript{105} \textit{Id.} at 876.
\textsuperscript{106} \textit{Pymm}, 563 N.E.2d at 6.
\textsuperscript{107} \textit{Id.}
\textsuperscript{109} \textit{Most Serious Charges Dismissed}, supra note 108, at 1743.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
denounced Justice Owen's sentencing, complaining that Owens, who originally set aside the jury verdict on the ground that it was preempted by OSHA, "still refuses to adequately punish these convicted employers for their serious criminal acts."\textsuperscript{112}

Justice Owens also spurned state pleas to set a national deterrent by imposing the maximum second-degree assault sentence of twenty-eight months to seven years, which would involve serving time in the state penitentiary rather than the city jail.\textsuperscript{113} In response to Assistant Attorney General Clive Morrick's statement that "the nation is looking at this case," Owens replied, "You're telling me I'm supposed to set the standard for the rest of the forty-nine states? I'm not interested in being a hero. I'm interested in doing the right thing."\textsuperscript{114}

\section*{B. People v. Chicago Magnet Wire Corp.\textsuperscript{115}}

Illinois prosecutors in \textit{People v. Chicago Magnet Wire Corp.} fared worse than their New York counterparts in a highly publicized case involving criminal charges for workplace safety violations. In \textit{Chicago Magnet Wire Corp.}, officials at the Chicago Magnet Wire Corporation were acquitted of the criminal charge of aggravated battery for intentionally injuring their workers.\textsuperscript{116}

Chicago Magnet Wire Corporation was engaged in the business of coating wire with various substances and chemical compounds.\textsuperscript{117} Indictments returned in the circuit court charged the defendants with aggravated battery, alleging that the defendants exposed the employees to toxic substances "with the conscious awareness that a substantial probability existed that their Acts would cause great bodily harm" in violation of section 12-4(a) of the Criminal Code of 1961.\textsuperscript{118} The indictments also alleged that the defendants failed to

\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} 534 N.E.2d 962 (Ill. 1989).
\textsuperscript{116} \textit{Chicago Magnet Wire Executives Acquitted by State Criminal Court}, 20 O.S.H. Rep. (BNA) No. 47, at 1655 (May 1, 1991) [hereinafter \textit{Chicago Magnet Wire Executives Acquitted}].
\textsuperscript{117} \textit{People v. Chicago Magnet Wire Corp.}, 534 N.E.2d 962 (Ill. 1989).
\textsuperscript{118} \textit{Ill. Rev. Stat.} ch. 38, para. 12-4(a) (1985); \textit{Chicago Magnet Wire Corp.}, 534 N.E.2d at 963.
provide safety instructions and adequate safety equipment, provided inadequate ventilation, and exposed the workers to dangerously overheated working conditions.\footnote{119}

Over one hundred workers testified at trial that the company exposed workers to toxic chemicals and failed to equip them with adequate protective equipment.\footnote{120} Witnesses testified that the plant was often filled with hazy, clouded air, poisoned with such chemicals as aluminum dust and poly-vinyl chloride.\footnote{121} The prosecution alleged that the exposure to toxic chemicals and inadequate protective gear had caused the workers to suffer various respiratory ailments, severe headaches, and kidney pains.\footnote{122} One worker testified that he often vomited "foam" for hours after working at the plant.\footnote{123}

The trial court, on the defendant’s motion, dismissed the charges, holding that OSHA preempted the State from prosecuting the defendants for the alleged egregious conduct in the workplace because the conditions in the workplace were specifically regulated by OSHA.\footnote{124} The Appellate Court affirmed,\footnote{125} but the Supreme Court of Illinois reversed, holding OSHA did not preempt the state from prosecuting Chicago Magnet Wire Corporation and its officers for workplace conduct, even though such conduct was regulated by the occupational health and safety standards promulgated in OSHA.\footnote{126} The Supreme Court of Illinois stated:

\begin{quote}
[\textit{w}hile additional sanctions imposed through state criminal law enforcement for conduct also governed by OSHA safety standards may incidentally serve as a regulation for workplace safety, there is nothing in OSHA or its legislative history to indicate that Congress intended to preempt the enforcement of State criminal law simply because of its incidental regulatory effect.\footnote{127}]
\end{quote}

\footnotesize
119. \textit{Chicago Magnet Wire Corp.}, 534 N.E.2d at 963.
120. \textit{Chicago Magnet Wire Executives Acquitted, supra} note 116, at 1655.
122. \textit{Chicago Magnet Wire Executives Acquitted, supra} note 116, at 1655.
123. \textit{Id.}
125. \textit{Id.}
126. \textit{Chicago Magnet Wire Corp.}, 534 N.E.2d at 962.
127. \textit{Id.} at 967.
The Court reasoned that state criminal prosecution of employers who maintain unsafe and hazardous working conditions will "further OSHA's stated goal of assuring so far as possible every working man and woman in the Nation safe and healthful working conditions." Moreover, the court stated that "state criminal law can provide valuable and forceful supplement to insure that workers are more adequately protected and that particularly egregious conduct receives appropriate punishment."

The case was remanded, and following a nine month trial, Judge Earl Strayhorn of Chicago's Cook County Criminal Court ruled that while the Chicago Magnet Wire officials may have been "careless housekeepers," they were not guilty of knowingly or recklessly violating the standards of care dictated by federal OSHA standards. Judge Strayhorn found that the Chicago Magnet Wire executives had knowledge of the toxic substances in the plant and the hazardous working conditions, but ruled that the state failed to prove beyond a reasonable doubt that the workers' illnesses resulted from the hazardous conditions at the plant. In addition, Judge Strayhorn found no evidence of a conspiracy among the defendant officials to manage the plant in a manner that would cause great bodily harm to their employees and no evidence of reckless conduct.

The decisions handed down in both Chicago Magnet Wire Corp. and Pymm reveal that although the trend is toward allowing state prosecution of employer criminal activity in the workplace, state prosecutors are having great difficulty in obtaining convictions for egregious conduct on the part of corporate officials. Some legal observers have noted that rulings such as in Chicago Magnet Wire Corp. (and similarly in Pymm) could have a chilling effect on the trend toward more state criminal prosecution of corporate defen-

---

128. Id. at 969.
129. Id.
130. The trial was the longest in Illinois history.
131. Zeller, supra note 121.
132. Chicago Magnet Wire Executives Acquitted, supra note 116 at 1655.
133. Id.
dants in these type of workplace-related actions. The prosecutors in both Pymm and Chicago Magnet Wire Corp. expended an enormous amount of time and effort in prosecuting the two cases, only to achieve disappointing results. Smaller localities may not have the manpower or financial resources needed to prosecute these difficult cases.

In addition, observers have noted several other obstacles to state prosecutions of workplace safety violations. First, the evidence trail is often cold by the time the prosecutor begins pursuing the investigation. Usually, key witnesses cannot be found, memories fade, and vital evidence is lost or destroyed. Secondly, prosecutors are often frustrated by their lack of technical expertise in occupational safety and health law. Many prosecutors simply do not know what questions to ask or what to look for in conducting their investigations. Finally, the typical overworked prosecutor facing drug crimes and the like often delay dealing with cases involving workplace safety violations.

VI. INCREASED FEDERAL INTEREST IN CRIMINAL PROSECUTION OF WORKPLACE SAFETY VIOLATIONS

While the rulings in Pymm and Chicago Magnet Wire Corp. may slow the trend toward more state criminal prosecution of workplace safety violations, some experts expect that the rulings will encourage more stringent federal laws and criminal penalties. Some observers anticipate expanded criminal penalties for violators of occupational health and safety standards to soon become a reality, as the federal government faces continued pressure to take a more stringent stand on workplace-related deaths and injuries. According to Robert Gombar, head of the environment, health and safety litigation di-

134. Zeller, supra note 121.
135. Reske, supra note 7, at 1110.
136. Id.
137. Id.
138. Id.
139. Id.
140. Zeller, supra note 121.
vision for the law firm Jones, Day, Reavis & Pogue, much of the pressure to increase criminal penalties and "bash OSHA violators" will likely be heard from organizations representing workers and victims of unsafe workplaces, such as the Chicago-based National Safe Workplace Institute headed by Joseph A. Kinney.142

In addition to increased pressures from organizations such as the National Safe Workplace Institute, OSHA may find it necessary to accept a more stringent enforcement strategy in order to keep pace with other federal agencies, such as the Environmental Protection Agency, which has been much more aggressive in the application of criminal penalties.143

"What underlies all of this is a competition for the attention of top officers in American business," Gombar said, noting that proponents of stiffer penalties are trying to force top management to "pay more attention to safety and health and put more money toward safety and health."144

A. Legislative Reform

Illustrative of recent legislative effort for increased criminal penalties is the OSHA Criminal Penalty Reform Act proposed by Senator Howard Metzenbaum (D-Ohio).145 The proposed Reform Act would make willful OSHA violations, causing death or serious bodily injury, felonies and increase fines for criminal violations.146

The new bill is a bipartisan effort also supported by Senator James Jeffords (R-Vt.), a member of Metzenbaum's labor subcommittee.147 "It is fitting that [the bill] is a bipartisan effort because tough criminal enforcement of occupational health and safety standards is not a matter of politics,"148 Metzenbaum stated. "This bill is about saving the lives and limbs of America's working men and

142. Id.
143. Id.
144. Id.
145. Id. at 1425.
146. Id.
147. Metzenbaum Files Bill, supra note 21, at 1423.
148. Id.
women by providing a meaningful deterrent for potential violators.\textsuperscript{149}

The OSHA Criminal Penalty Reform Act targets only the most serious violators of workplace health and safety standards: cases in which an employer's willful violation of OSHA standards causes death or serious bodily injury to an employee.\textsuperscript{150} Under the proposed Reform Act, maximum prison terms for willful violations resulting in the death of a worker would be substantially increased.\textsuperscript{151} The term for a first offense would be increased from the current six months to ten years and from one year to twenty years for a second offense.\textsuperscript{152} For willful violations that cause serious bodily injury, the proposed legislation promulgates a maximum prison sentence of five years for a first-time offender and ten years for a repeat offender.\textsuperscript{153} In addition, the proposed bill could increase fines imposed for criminal violations under OSHA by applying the fine schedule of Title 18, United States Code, to OSHA violations, replacing the fine schedule contained in OSHA.\textsuperscript{154}

According to Metzenbaum, the vast majority of U.S. employers will not be affected by the Criminal Penalty Reform Act.\textsuperscript{155} However, the increased penalties should serve to put on notice the small fraction of employers who commit willful violations of workplace health and safety standards.\textsuperscript{156} According to Metzenbaum, "[t]he threat of incarceration will force potential violators to think twice before deliberately flaunting our basic workplace safety standards."\textsuperscript{157} Peg Seminario, director of occupational safety and health for the AFL-CIO, agrees with Metzenbaum, stating that the AFL-CIO will also press for expanded criminal sanctions.\textsuperscript{158} "It is important for OSHA to have the enforcement tools available to take

\begin{itemize}
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Reske, \textit{supra} note 7, at 1111.
\end{itemize}
action when employers' negligent and willful behavior results in serious injury as well as death," she said.\textsuperscript{159} "If you look across the various laws, OSHA has the weakest of all the criminal penalties. . . . Expanded criminal sanctions would send a clear message to employers that willful and negligent behavior is not acceptable."\textsuperscript{160}

\textbf{B. United States v. S. A. Healy\textsuperscript{161}}

As aggressive state and local prosecutors continue to bring criminal charges against violators of workplace safety and health standards, the Occupational Safety and Health Administration will find itself responding to inquiries as to why it is not pursuing more criminal cases.\textsuperscript{162} Such repeated inquiries, along with pressure from organizations such as the National Safe Workplace Institute and the AFL-CIO, could spur more federal prosecution of criminal OSHA violations in the near future. The Department of Justice’s prosecution of criminal willful violations of OSHA in \textit{United States v. S. A. Healy}\textsuperscript{163} illustrates the effect such pressure is having on the federal government’s use of criminal sanctions in cases involving violations of workplace safety and health standards.

In \textit{United States v. S. A. Healy}, a Wisconsin jury convicted the employer of three men who died in a sewage tunnel explosion of causing the deaths by willfully violating three OSHA regulations.\textsuperscript{164} Two months earlier, S. A. Healy was convicted of state reckless homicide felony charges arising out of the same incident.\textsuperscript{165}

The three men were killed by a methane gas explosion in a deep tunnel being constructed as part of the Milwaukee Metropolitan

\begin{footnotesize}
\begin{enumerate}
\item[159.] Id.
\item[160.] Id.
\item[162.] Expanded Sanctions, supra note 141, at 1424.
\item[163.] Wisconsin Contractor Convicted in Deaths of Three Workers Who Died in Tunnel Explosion, 20 O.S.H. Rpt. (BNA) No. 38, at 1423 (Feb. 27, 1991) [hereinafter Wisconsin Contractor Convicted].
\item[164.] Id.
\end{enumerate}
\end{footnotesize}
Sewage District's large-scale water pollution abatement program.166 The men had gone into the tunnel to inspect methane levels after a work crew had been evacuated.167

Following a three-week trial, the jury found S. A. Healy guilty of violating three OSHA regulations: 1) failure to install and maintain explosion-proof equipment in a hazardous tunnel location; 2) failure to shut off power in the presence of specific methane gas levels; and 3) failure to adequately train employees in recognizing, controlling, or avoiding hazards.168 On March 21, 1991, a Milwaukee federal district judge entered a fine of $750,000 against S. A. Healy Co. for violation of the three OSHA regulations.169 According to U.S. Attorney Richard Fiore, the verdict and fine “send a message to the entire construction industry” to meet OSHA regulations.170

The Department of Justice's success in S. A. Healy suggests that the federal government will have an enhanced interest in prosecuting similar cases in the future. As Labor Secretary Lynn Martin stated, “[t]his very important verdict supports our determination to see job safety and health standards vigorously enforced, including our increased emphasis on criminal prosecution.”171

VII. CONCLUSION

The enactment of OSHA by Congress in 1970 did not have the impact on workplace health and safety as anticipated. Despite the presence of both civil and criminal penalties for violations of the health and safety standards established by OSHA, many employers continue to provide hazardous workplaces for their employees. As a result, far too many American workers are killed or injured in workplace-related accidents.

During the 1980's, in order to fill the void created by the ineffectiveness of OSHA, states began to criminally prosecute em-

166. Id. at 1204.
167. Id.
168. Wisconsin Contractor Convicted, supra note 163, at 1423.
170. Wisconsin Contractor Convicted, supra note 163, at 1424.
171. Id. at 1423.
ployers for egregious conduct in the workplace under state criminal statutes. State criminal prosecutions became more common as high courts in several states ruled that state criminal prosecutions of workplace safety violations were not preempted by OSHA.

The unfavorable decisions handed down in two recent cases, *People v. Pymm* and *People v. Chicago Magnet Wire Corp.* illustrate the difficulty states have had in overcoming the procedural barriers and higher burden of proof present in the prosecution of criminal activity in the workplace under state criminal statutes. Despite these difficulties, until the federal government puts more "bite" into job safety enforcement programs, interest in state criminal prosecution will continue to increase and will be the primary deterrent of workplace safety violations.

*Michael T. Cimino*