

Fordham Environmental Law Review

Volume 18, Number 1

2006

Article 4

Asbestos and Overcriminalization: A Pro-Compliance Solution

Abba Abramovsky*

*Fordham University School of Law

Copyright ©2006 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

NOTES

ASBESTOS AND OVERCRIMINALIZATION: A PRO-COMPLIANCE SOLUTION

*Abba Z. Abramovsky**

I. INTRODUCTION

In May 2005, the United States Department of Justice in conjunction with several environmental enforcement agencies “announced a major enforcement . . . initiative” for “inter-agency coordination and prosecution of workplace safety violations through the use of environmental statutes.”¹ This means that, in contrast to the “relatively modest penalties contemplated by traditional workplace-safety laws and regulations,” employers will now face the potential of “criminal liability and lengthy incarceration.”² Moreover, the prison terms faced by employers may be quite long; in December 2004, two asbestos abatement contractors received 19 and 25-year sentences which were the harshest yet imposed for environmental crimes in the United States.³

Given that “even routine workplace-safety incidents” may subject employers to this scrutiny,⁴ management of hazardous substances in the workplace has become fraught with the potential for criminal liability. This prospect may be an important factor in promoting the safe use and disposal of hazardous substances. However, it also carries the danger of “overcriminalization” – i.e., imposition of criminal sanctions for offenses best resolved through civil litigation or admin-

* J.D. Candidate, Fordham University School of Law, 2007.

1. See Daniel Riesel & Dan Chorost, *Initiatives Hit Workplace Violations With Environmental Laws*, 234 N.Y.L.J. 47 (2005).

2. *Id.*

3. See Mark Weiner, *Asbestos Scammers Get Record Sentence: Father Gets 19-Plus Years, Son Gets 25*, POST-STANDARD (Syracuse, N.Y.), Dec. 24, 2004, at A1.

4. See *id.*

istrative enforcement.⁵ In many cases, the penalties available under the Federal environmental statutes, as well as the fraud and racketeering statutes under which environmental offenders are increasingly being prosecuted,⁶ are entirely disproportionate to the seriousness of the crime.⁷ Moreover, the enhanced use of criminal sanctions in workplace safety cases may actually chill attempts at compliance, because statements made by employers in the course of conducting self-audits or seeking compliance advice may be used against them in criminal prosecutions.⁸

This Note will examine one particularly acute instance of Federal overcriminalization: the criminal enforcement of workplace asbestos violations. Given that asbestos was once routinely used as a building material, any employer whose office or factory was constructed before 1980 can be virtually presumed to have an asbestos hazard.⁹ Moreover, the asbestos abatement standards are extremely technical and can easily be violated through inadvertence or negligence. Therefore, employers may now find themselves under criminal sanction for well-intentioned attempts to abate workplace asbestos hazards.¹⁰

As a possible alternative to overcriminalization, this Note will also discuss the less harsh enforcement model exemplified by the New York State Attorney General's office. Despite having enforcement options similar to their Federal counterparts, New York prosecutors have focused on using the criminal law as a tool to achieve compliance.¹¹ In most cases, the New York Attorney General has eschewed long prison sentences in favor of obtaining plea agreements that correct the violations and remove dangerous companies from the

5. See Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, 27 *CHAMPION* 28, 36 (2003).

6. See *infra* notes 84-136 and accompanying text (discussing the *Thorn* and *Salvagno* prosecutions).

7. See Stephen F. Smith, *Proportionality and Federalization*, 91 *VA. L. REV.* 879, 885 (2005) (discussing how the Federal criminal code imposes penalties out of proportion to the blameworthiness of the crime).

8. See Andrew Oliveira et. al., *Environmental Crimes*, 42 *AM. CRIM. L. REV.* 347, 363 (2005) (stating that “[s]elf-audits can be a double-edged sword” because “[a] thorough audit may become a prosecutor’s roadmap”).

9. See Lt. Col. James V. Cannizzo, *Asbestos: A Legal Primer for Air Force Installation Attorneys*, 54 *A.F. L. REV.* 39, 42 (2004).

10. For an example of one such instance, see *United States v. Rubinstein*, 403 F.3d 93 (2d Cir. 2005). The *Rubinstein* case is discussed in detail *infra* at notes 48-56 and accompanying text.

11. See *infra* notes 183-230 and accompanying text.

asbestos abatement business.¹² It will be argued that this compliance-based criminal enforcement is superior to the Federal model in that it neutralizes threats to the environment while not resulting in harsh sentences against relatively minor offenders.¹³

Finally, this Note will build from the New York model, as well as alternatives suggested by scholars, in an attempt to resolve the overcriminalization of asbestos-handling violations in a way that preserves the goal of promoting compliance and environmental safety. First, this Note will outline the history of environmental legislation and the use of asbestos in the United States. Second, it will discuss the Federal statutes under which asbestos-handling offenses may be criminally prosecuted. Third, it will analyze the factors that give rise to a danger of overcriminalization. Fourth, it will discuss New York substantive law and enforcement priorities as an alternative model of criminal enforcement. Finally, it will suggest certain evidentiary privileges and restrictions on prosecution that will encourage compliance while preventing the overuse of criminal sanctions.

II. ENVIRONMENTAL LEGISLATION AND ASBESTOS: HISTORY AND INTERSECTION

American environmental legislation has two roots: fish and game regulation and the conservationist movement.¹⁴ Legal regulation of fishing and hunting has an ancient history, with the roots of American wildlife management law extending to 14th-century England.¹⁵ The medieval hunting and fishing laws were more a matter of property rights and social control than environmental management, and were designed to ensure that the upper classes either had a monopoly on exploitation of wildlife or received substantial revenue from it.¹⁶

12. See *infra* notes 212-30 and accompanying text.

13. See *infra* notes 231-54 and accompanying text.

14. Most histories of environmental legislation begin with the conservationist and preservationist movements of the late 19th and early 20th centuries. Many environmental codes, however, have their root in even older wildlife management legislation. For instance, the current New York State Environmental Conservation Law, which was enacted in 1971, is built on the framework of the prior Conservation Law, which in turn began as a codification of the 19th-century hunting and fishing laws.

15. See Thomas A. Lund, *American Wildlife Law* 8-10, 19 (1980).

16. See *id.*

Over time, however, these laws evolved into a regulatory system designed to protect wildlife resources for public exploitation.¹⁷

The conservationist movement began in the late 19th century.¹⁸ During the presidency of Theodore Roosevelt between 1901 and 1909, it achieved its first notable legislative successes, including the creation of the national park system and the establishment of agencies to promote scientific resource management.¹⁹ This period also saw the emergence of a distinction between classic conservationists, who believed that resource management was a tool to ensure “right use of wilderness resources,” and “preservationists” who argued that the wilderness should be preserved for its own sake.²⁰

During the 1960s, environmentalism coalesced into a mass social movement that combined features of the conservationist and preservationist philosophies.²¹ By that time, the importance of the environment to human health and the interrelationship between the natural environment and human society were becoming better understood.²² In addition, a number of high-profile environmental disasters such as the 1969 Ohio River fire focused attention on the damage that pollution was causing to public health.²³ As such, the preservationists’ romantic notion of nature as a “fountain of life” evolved into a more sophisticated understanding of the importance of an intact environment and the costs of unregulated pollution.²⁴

This growing awareness of the effects of environmental pollution coincided with the rise of the civil rights and antiwar movements, both of which used techniques of mass protest.²⁵ The nascent environmentalist movements adopted these techniques of mass organization in its own struggle, culminating with the first national Earth Day

17. See Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 557-58 (2004).

18. See Stacy J. Silveira, Comment, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497, 499 (2001).

19. See *id.* at 500.

20. See *id.* at 500-02.

21. See *id.* at 502.

22. See *id.* at 503-05. The publication of Rachel Carson’s *Silent Spring* in 1962 is often regarded as the beginning of the modern environmental movement. See *id.* at 503-04.

23. See *id.* at 506.

24. See *id.* at 501, 505-06.

25. See Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”*, 47 AM. U. L. REV. 221, 259 (1997).

in 1970.²⁶ The result was that environmentalism was transformed from an elite movement into a mainstream one with great political influence.²⁷ This in turn resulted in the first comprehensive Federal anti-pollution laws, including the Clean Air Act²⁸ and the Clean Water Act.²⁹

In the generation since 1970, environmental regulation has taken an increasingly central place in the consciousness of the American public and government. In part, this was due to the continuing occurrence of high-profile toxic chemical and nuclear waste spills, such as Three Mile Island and Love Canal, which “brought greater publicity, energy and momentum to the movement.”³⁰ In addition, the 1970 creation of the Environmental Protection Agency (EPA) resulted in environmental regulation having an institutional constituency in Washington.³¹ This resulted in both an increase in enforcement actions³² and a demand for a broader array of enforcement options.³³ During the late 1970s and early 1980s, this trend manifested itself in the criminalization of environmental regulatory violations, first as misdemeanors and then as felony-grade offenses.³⁴

It was at about this time that American environmental legislation began to interact with asbestos abatement. Asbestos is a “naturally occurring silicate mineral fiber” which is “resistant to heat, corrosion, and friction, and has a high tensile strength and stiffness.”³⁵ As such, it was deemed a “seemingly superb insulating and construction material,” and was widely marketed and used as such prior to the 1980s.³⁶ Indeed, use of asbestos in construction was sufficiently widespread that any building constructed prior to 1980 can be presumed to contain asbestos.³⁷

26. *See id.*

27. *See id.*

28. 42 U.S.C. §§ 7401-7671q (2006).

29. 33 U.S.C. §§ 1251-1376 (2006).

30. *See Silveira, supra* note 18, at 508.

31. *See id.* at 508-09.

32. *See id.* at 509 (noting that “[d]uring its first sixty days, EPA brought five times as many enforcement actions as the agencies it inherited had brought during any similar period”).

33. *See id.* at 509-11.

34. *See id.* at 511.

35. Cannizzo, *supra* note 9, at 39-40.

36. *See id.* at 40.

37. *See id.* at 42.

By the 1980s, however, it had become known that asbestos had carcinogenic properties and that prolonged exposure could cause lung cancer, mesothelioma and asbestosis or scarring of lung tissue.³⁸ These health hazards result from inhalation of microscopic dust created by the breakdown of asbestos fibers.³⁹ When inhaled over an extended period of time, this dust causes scarring of the lung tissue, leading to “decreased lung capacity and increased resistance to oxygen in the airways.”⁴⁰ In addition, asbestos inhalation has been proven to cause malignant tumors to grow on the bronchial covering of the lungs.⁴¹

The health risk from asbestos is highest when it is in a “friable” state.⁴² Asbestos is friable when it is “sufficiently degraded that it can be crumbled to a powder with hand pressure, thereby causing a potential release of asbestos fibers into the air.”⁴³ Given that asbestos often degrades from a nonfriable to a friable state through age, older buildings with asbestos insulation frequently pose a significant health risk to the people who live and work in them.⁴⁴ Moreover, demolition and renovation of buildings containing asbestos may also cause the release of friable asbestos fibers into the atmosphere and create further environmental health risks.⁴⁵

By the 1980s, these risks were sufficiently well established that asbestos was added to the list of hazardous substances regulated by Federal law.⁴⁶ Although attempts to ban asbestos outright have been unsuccessful,⁴⁷ the storage and handling of asbestos was made subject to numerous technical regulations designed to minimize health hazards.⁴⁸ Moreover, Federal laws mandated the abatement of asbestos hazards in school buildings⁴⁹ and, while abatement was not specifically mandated in other locations, any construction or demolition work performed on buildings containing asbestos was subjected

38. See Jennifer L. Leonardi, Comment, *It's Still Here! The Continuing Battle Over Asbestos in America*, 16 *VILL. ENVTL. L.J.* 129, 133-34 (2005).

39. See *id.* at 132-33.

40. See *id.* at 133.

41. See *id.*

42. See Cannizzo, *supra* note 9, at 40.

43. See *id.*

44. See *id.* at 40-41.

45. See *id.*

46. See Leonardi, *supra* note 38, at 135.

47. See *id.* at 135-37, 142-46.

48. See *infra* notes 54-60 and accompanying text.

49. See 15 U.S.C. §§ 2641-56 (2006).

to rigorous safety standards.⁵⁰ As a result, asbestos abatement became a multi-billion-dollar industry.⁵¹

The interplay between asbestos and stricter environmental regulation, while necessary to promote public health, has also exposed many employers and landowners to extensive financial costs and the prospect of criminal liability. As noted above, asbestos is widespread in older buildings, and many owners of such buildings are not fully aware of the health hazards posed by asbestos or the regulatory regime surrounding its storage and handling.⁵² As such, any construction work performed on such premises has become fraught with traps for unwary property owners.⁵³ As will be seen in the succeeding sections of this Note, many unwitting employers and landowners have been transformed – often through the actions of others – into criminals.

III. THE STATUTORY FRAMEWORK FOR FEDERAL CRIMINAL ENFORCEMENT IN ASBESTOS CASES

Federal law regulates asbestos through several statutes, but criminal enforcement is accomplished primarily through two of them. Specifically, Federal criminal charges in asbestos cases are typically brought under the Clean Air Act (CAA)⁵⁴ or the Resource Conservation and Reclamation Act (RCRA),⁵⁵ depending upon the context.⁵⁶ In most cases, violations of asbestos abatement and disposal stan-

50. See *infra* notes 56-60 and accompanying text.

51. See Kenneth M. Block & Neil Marantz, *Recent Scientific Evidence Questions Perception of Asbestos Exposure Risks*, N.Y.L.J., Mar. 14, 1990, at 39 (noting that asbestos abatement had “become a multi-billion dollar business, with a total market potential which may exceed \$ 200 billion”).

52. See *infra* notes 93-101 and accompanying text.

53. See *infra* notes 1-3 and accompanying text.

54. 42 U.S.C. §§ 7401-7671q (2006).

55. *Id.* §§ 6901-72.

56. See Cannizzo, *supra* note 9, at 42. Lt. Col. Cannizzo notes that the Toxic Substances Control Act (“TSCA”), 15 U.S.C. §§ 2601-71, also governs asbestos abatement in some circumstances, but because it relates specifically to educational institutions, it is of limited utility as a statute of general enforcement. See *id.* It should also be noted that the TSCA is enforceable only by civil and administrative penalties and not by criminal sanction. See 15 U.S.C. § 2647 (2006).

dards are punishable under the CAA, while violations relating to storage and transportation are punishable under RCRA.⁵⁷

The Clean Air Act, which is the most frequently used statute of enforcement in asbestos prosecutions, was originally enacted in 1970 to provide for the control of “hazardous air pollutants.” Such pollutants include both those defined by statute and those specified in regulations promulgated by the Environmental Protection Agency.⁵⁸ Asbestos was on the initial list of pollutants specified by Congress.⁵⁹ The act also empowered the EPA to regulate emissions of hazardous air pollutants by promulgating rules and issuing permits.⁶⁰

The criminal penalties of the CAA apply broadly to violations of EPA-promulgated rules, permits and administrative orders as well as a “catchall” clause prohibiting the release of hazardous air pollutants into the atmosphere.⁶¹ Those who knowingly violate any regulation, permit or order relating to emissions, construction or disposal of air pollutants may be penalized by a prison term of up to 5 years for a first offense, with the penalties being doubled for subsequent offenses.⁶² Other specific provisions punish those who knowingly tamper with any monitoring device, fail to make any required report, or make false statements in reports or permit applications.⁶³

The “catchall” clause contains two parts, one pertaining to knowing release of pollutants and one pertaining to negligent release. Specifically, any person who “knowingly releases into the ambient air any hazardous air pollutant . . . and who knows at the time that he thereby places another person in imminent danger of serious bodily injury” is liable to imprisonment of up to 15 years, with penalties

57. In cases where asbestos debris is discharged into public waterways, the Clean Water Act, 33 U.S.C. §§ 1251-1376 (2006), may also provide a basis for criminal sanction. *See, e.g.,* *United States v. Phillips*, 356 F.3d 1086 (9th Cir. 2004) (affirming conviction under Clean Water Act for releasing asbestos into navigable waters). Certain failures to report releases of asbestos to the environment may also be subject to criminal sanction under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). *See* 42 U.S.C. § 6903 (2006). In the great majority of cases, however, asbestos handling violations have been prosecuted as atmospheric or health hazards rather than water pollution.

58. *See* 42 U.S.C. § 7412(a)(6) (2006).

59. *See id.* § 7412(b)(1).

60. *See id.* § 7412(e).

61. *See id.* § 7413(c).

62. *See id.* § 7413(c)(1).

63. *See id.* § 7413(c)(2). Violations of these provisions are punishable by two years in prison for a first offense and four years for subsequent offenses. *See id.*

doubling for second and subsequent offenses.⁶⁴ Those who negligently release a pollutant into the ambient air and thereby place a person in imminent danger of death or serious bodily injury are subject to penalties of up to one year for a first offense and two years thereafter.⁶⁵

The culpable mental state for the offense of knowing release of air pollutants is twofold: the defendant must not only knowingly release the pollutant but know that other persons are in imminent danger of death or serious injury.⁶⁶ In addition, the statute specifically provides that knowledge cannot be presumed, that the defendant is “responsible only for actual awareness or actual belief possessed,” and that the knowledge of others – such as employees or agents – cannot be imputed to him.⁶⁷

However, knowledge may be proven circumstantially, and may be presumed if “the defendant took affirmative steps to be shielded from relevant information.”⁶⁸ In other words, the statute incorporates the well-settled Federal principle of “conscious avoidance,” which holds that deliberate attempts to avoid learning incriminating information are equivalent to knowledge.⁶⁹ In addition, the courts have interpreted the scienter requirement to only require proof that the defendant knew he was handling asbestos, not that he was handling a sufficient quantity to trigger Federal compliance standards.⁷⁰

The statute does, however, contain provisions that mitigate criminal liability for lower-level employees. Specifically, an employee acting under orders from his employer and carrying out his normal job duties cannot be prosecuted criminally unless he knowingly and willfully violates the statute.⁷¹ The definition of “employee,” for

64. *See id.* § 7413(c)(5)(A). “Serious bodily injury” is “bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” *See id.* § 7413(c)(5)(F).

65. *See id.* § 7413(c)(4).

66. *See United States v. Weintraub*, 273 F.3d 139, 145 (2d Cir. 2001).

67. *See* 42 U.S.C. § 7413(c)(5)(B) (2006).

68. *See id.*

69. *See United States v. Zedner*, 401 F.3d 36, 50 (2d Cir. 2005) (conscious avoidance charge may be given where element of knowledge is in dispute and “the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact”).

70. *See Weintraub*, 273 F.3d at 145.

71. *See* 42 U.S.C. § 7413(h).

purpose of this shielding provision, extends to lower-level supervisors as long as they are acting under the orders of a higher-ranking corporate figure.⁷² In addition, any “stationary engineer or technician” who is not a “senior management personnel or a corporate officer” can also not be held criminally liable for performance of his normal job duties absent a knowing or willful violation.⁷³

The application of the Clean Air Act in the context of criminal asbestos enforcement is illustrated by the cases of *United States v. Technic Services, Inc.*,⁷⁴ and *United States v. Thorn*.⁷⁵ In *Technic Services*, an Alaska asbestos abatement company and one of its officers were charged in connection with an asbestos removal project at a Sitka pulp mill.⁷⁶ The defendants, rather than complying with applicable regulations and safeguards, disabled their employees’ personal air monitoring devices and cut asbestos from the walls without adequate protection.⁷⁷ In addition, they disposed of the asbestos by dumping it in such a way that clouds of hazardous dust escaped into the atmosphere.⁷⁸

The defendants were charged both with knowing release of pollutants into the atmosphere and with violating various provisions of 60 C.F.R. § 61.145 and 61.150, which respectively establish standards for asbestos removal and disposal.⁷⁹ At issue with respect to each of these charges was whether the defendants had released “visible emissions” of asbestos into the atmosphere.⁸⁰ Specifically, the defendants argued that no witness had actually seen asbestos dust escape the confines of the mill and enter the public airspace.⁸¹ The court, however, found that the meaning of “visible” is “capable of being seen,” and that as long as dust was released in an area from which it could escape into the environment, the statute did not require that anyone actually have seen the dust blow into the atmos-

72. See *United States v. Pearson*, 274 F.3d 1225, 1232 (9th Cir. 2001).

73. See 42 U.S.C. § 7413(h) (2006).

74. 314 F.3d 1031 (9th Cir. 2002). For a general discussion of the *Technic Services* case, see Case Summaries, 2002 *Ninth Circuit Environmental Law Summaries*, 33 ENVTL. L. 665, 741-46 (2003).

75. 317 F.3d 107 (2d Cir. 2003).

76. See *Technic Services*, 314 F.3d at 1035.

77. See *id.*

78. See *id.* at 1039.

79. See *id.* at 1035-37.

80. See *id.* at 1039-42.

81. See *id.* at 1039-40.

phere.⁸² In addition, the court upheld the defendants' convictions of tampering with their employees' air monitoring devices on the basis that these devices were required by Federal regulations and that the data they collected was used in Federal compliance programs.⁸³

In *Thorn*, the defendant was charged with violating various New York State and Federal regulations concerning asbestos removal, such as failure to notify the EPA prior to abatement, failure to set up containment areas for hazardous debris, and failure to supply employees with adequate protective gear, putting a number of workers at risk of serious injury.⁸⁴ Visible emissions of asbestos were released into the atmosphere in such a way as to resemble a "snow storm" or "blizzard."⁸⁵ In addition, the defendants faced numerous counts of falsifying reports and medical clearances, and conspiring with supposedly independent laboratories to conceal hazardous emissions.⁸⁶

The *Thorn* case is significant in its clarification of the standard of proof that the prosecution must meet in order to show that a person other than the defendant was put in imminent danger of death or serious bodily injury. At trial, the Government presented expert testimony that asbestos-related diseases typically "appear[ed] long after exposure, generally, twenty-five to thirty years from the onset."⁸⁷ The expert testified within a "reasonable degree of medical certainty," however, that the concentrations of asbestos to which the employees were exposed were sufficient to make future asbestos-related diseases a virtual certainty.⁸⁸ The court found that, because the susceptibility to disease accrued immediately, this was a sufficiently imminent risk to warrant criminal liability under the CAA and, moreover, to warrant a sentencing enhancement.⁸⁹

Notably, the defendants were charged not only with violating the Clean Air Act but with mail fraud, on the basis that their bids for asbestos abatement jobs were supported by letters promising that they would comply with all applicable regulations and laws.⁹⁰ This

82. *See id.* at 1040.

83. *See id.* at 1046-47.

84. *See Thorn*, 317 F.3d at 111-12.

85. *See id.* at 113-14.

86. *See id.* at 112-13.

87. *See id.* at 115.

88. *See id.*

89. *See id.* at 117-18.

90. *See id.* at 115.

tactic represents an additional option for Clean Air Act enforcement prosecutions involving false statements. Not only can the defendants be charged directly under the CAA for false statements to the government, but they can also be charged under the overall mail and wire fraud statutes for material false representations to their customers.⁹¹ In the *Thorn* case, the defendants were particularly blatant in their falsification of reports and compliance information, going so far as to “maintain[] a computer file labeled ‘Fraud’ to generate falsified reports stating that workers had received required medical clearances.”⁹²

Another illustrative case with respect to the *mens rea* of Federal environmental offenses is *United States v. Rubenstein*.⁹³ The defendants in *Rubenstein* were Hasidic Jews who owned a knitting factory in Brooklyn that contained asbestos.⁹⁴ In 2000, they entered into an agreement to lease the factory, and “orally agreed to remove the asbestos as a condition of the lease.”⁹⁵ They then “directed [their employees] to remove the material with a knife or scissors and put it in boxes.”⁹⁶ Both the owner and his wife were present during the removal and did not wear protective gear.⁹⁷ Subsequently, although New York State law enforcement agents ordered them to hire a licensed contractor and apply for a permit, the defendants engaged an unlicensed asbestos handler from within the Hasidic community to complete the work.⁹⁸

On appeal, the defendants raised a novel argument: that since knowledge of the hazards and regulations of asbestos wasn’t common among members of the insular Hasidic community, they could not be charged with knowingly violating the Federal standards.⁹⁹ In support of this contention, they pointed to the fact that they oversaw the removal themselves without protective gear, indicating that they were oblivious to the hazards to their own health. The court, however, held that all that is required under the statute is that the defen-

91. See 18 U.S.C. §§ 1341, 1343 (2006).

92. See *Thorn*, 317 F.3d at 113. The defendants raised a remarkably weak defense to these charges, claiming that they “forced to violate the law to stay competitive in the corrupt abatement industry.” See *id.* at 115.

93. 403 F.3d 93 (2d Cir. 2005).

94. See *id.* at 95-96.

95. See *id.* at 96.

96. *Id.*

97. See *id.*

98. See *id.* at 97.

99. See *id.* at 98.

dants know “that the material being removed is asbestos.”¹⁰⁰ Moreover, the court found that even if a “good faith” defense were available, the fact that the defendants were given explicit warning by law enforcement agents precluded any claim that they were unaware of the unlawfulness of their conduct.¹⁰¹

A second statute commonly used in asbestos-related prosecutions is the Resource Conservation and Reclamation Act. As a solid waste that can “pose a substantial present or potential hazard to human health or the environment when improperly . . . managed,”¹⁰² asbestos qualifies as a hazardous waste for RCRA purposes.¹⁰³ As such, a person who knowingly transports, stores, treats or disposes asbestos waste without a permit or in violation of a permit may be subject to imprisonment of two years for a first offense and four years for subsequent offenses.¹⁰⁴ Similar penalties apply to those who knowingly make false statements on required reports or documents, or who knowingly fail to file such reports.¹⁰⁵ Finally, those who knowingly expose others to imminent danger of death or serious bodily injury from unlawful transportation, storage, disposal or export of hazardous waste may be subject to a penalty of 15 years imprisonment.¹⁰⁶ However, as with Clean Air Act violations, such defendants are responsible only for their own knowledge.¹⁰⁷

RCRA is not as commonly used as a basis for criminal penalties in asbestos cases as the CAA. This may be due to the fact that asbestos is not explicitly listed as a hazardous waste in the RCRA implementing regulations.¹⁰⁸ However, a RCRA conviction does not require

100. *See id.*

101. *See id.* *See also* United States v. Weintraub, 273 F.3d 139, 147 (2d Cir. 2001) (finding that, for CAA purposes, “the phrase ‘knowingly violates’ requires knowledge of facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one’s conduct is illegal”).

102. *See* 42 U.S.C. § 6903(5)(B) (2006).

103. *See, e.g.,* Metal Trades, Inc. v. United States, 810 F. Supp. 689, 697-99 (D. S.C. 1992) (finding that asbestos was a hazardous waste within the meaning of RCRA even though not specifically listed as such in the implementing regulations). It should be noted that waste from the mining and milling, as opposed to storage and disposal, of asbestos is exempt from RCRA, although it remains covered by the Clean Air Act. *See* United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1147 (D. Ariz. 1984).

104. *See* 42 U.S.C. § 6928(d)(1) (2006).

105. *See id.* §§ 6928(d)(2)-(3).

106. *See id.* §§ 6928(e)-(f).

107. *See id.*

108. *See Metal Trades*, 810 F. Supp. at 697.

proof that asbestos be released into the atmosphere, and encompasses situations such as transportation, storage and export of waste that the CAA does not. Therefore, RCRA penalties can under certain circumstances fill in the gaps left by the CAA.¹⁰⁹

Moreover, given that asbestos abatement frequently occurs in workplaces and that employees' health is affected by unsafe disposal practices, prosecution under the Clean Air Act may dovetail with enforcement under the Occupational Safety and Health Act (OSHA).¹¹⁰ While OSHA does not specifically mention asbestos, it permits the Occupational Safety and Health Administration to issue regulations for asbestos in the workplace, and such regulations have indeed been promulgated.¹¹¹ Moreover, the statute contains criminal enforcement provisions specifying that any employer who willfully violates any OSHA regulation, and thereby causes the death of an employee, may be imprisoned for up to six months for a first offense and up to one year for a second offense.¹¹² In addition, persons who knowingly make false statements on "any application, record, report, plan, or other document" required to be filed under OSHA may be punished by up to six months' imprisonment.¹¹³

Since the penalties available under OSHA are considerably lower than those under the CAA, the Clean Air Act provides the primary vehicle for Federal criminal enforcement of the asbestos regulations. In workplace cases, however, CAA charges are frequently combined with false statement charges under OSHA or civil enforcement of the OSHA regulations.¹¹⁴ Moreover, the Justice Department in cooperation with the EPA has recently announced an initiative to step up criminal enforcement of hazardous waste violations in workplaces, including asbestos violations.¹¹⁵

In sum, the various statutes providing for criminal liability for environmental offenses, combined with ancillary offenses such as mail and wire fraud, provide an array of options for Federal prosecutors in cases involving unlawful handling or disposal of asbestos. Indeed,

109. See Riesel & Chorost, *supra* note 1, at 4.

110. 29 U.S.C. §§ 651-78 (2006).

111. See Cannizzo, *supra* note 9, at 39.

112. See 29 U.S.C. § 666(e) (2006).

113. See 29 U.S.C. § 666(g) (2006).

114. See Riesel & Chorost, *supra* note 1, at 4. For a discussion of the frequency with which false statement charges have been used in Federal environmental crime prosecutions, see Daniel Nooter & Jennifer Wright, *Employment-Related Crimes*, 41 AM. CRIM. L. REV. 397, 406-07 & n.58 (2004).

115. See *id.*

in cases where fraud is alleged, prosecutors have availed themselves of the enhanced penalties provided by the Racketeer-Influenced Criminal Organizations Act (RICO).¹¹⁶ One such case occurred recently in *United States v. Salvagno*,¹¹⁷ which is the first racketeering prosecution brought against an asbestos contractor.¹¹⁸

This case, which was factually related to *Thorn* and litigated by the same prosecutor, involved a major Syracuse asbestos abatement firm that performed more than 1500 substandard “rip and run” abatement jobs over a period of ten years.¹¹⁹ In addition to numerous violations of removal, containment and disposal standards, it was alleged that approximately half the defendants’ employees worked routinely without respirators.¹²⁰ This resulted in their exposure to quantities of friable asbestos that, according to prosecution experts, rendered lung disease and premature death a virtual certainty.¹²¹

What set the *Salvagno* case apart, however, was the means by which the defendants contrived to thwart Federally imposed auditing requirements. One of the principal defendants was not only an officer of the abatement firm but was also a secret owner of the supposedly “independent” company that was hired to audit the firm’s compliance.¹²² By this means, the defendants violated Federal rules prohibiting asbestos abatement contractors from monitoring their own work sites, and succeeded in covering up their noncompliance for a period of ten years.¹²³

Because of this and numerous other false statements and acts of document destruction, the defendants were charged with mail and wire fraud and money laundering as well as Clean Air Act offenses.¹²⁴ Moreover, the prosecution seized upon the fraud offenses

116. 18 U.S.C. §§ 1961-68 (2006).

117. Ind. No. 02-CR-51 (N.D.N.Y. 2002).

118. Stuart B. Horowitz, a New York City Board of Education official, also faced RICO charges in connection with an asbestos removal contract, but his underlying acts involved the acceptance of bribes and kickbacks and he did not participate in the actual abatement.

119. See Government Sentencing Memorandum in *United States v. Salvagno*, Ind. No. 02-CR-51 (N.D.N.Y. 2002) (on file with author).

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See Indictment in *United States v. Salvagno*, Ind. No. 02-CR-51 (N.D.N.Y. 2002) (on file with author).

as predicate acts for a RICO conspiracy charge.¹²⁵ In addition to the abatement firm and the auditor, nearly every contractor that worked in conjunction with the defendants was alleged to be part of the RICO enterprise.¹²⁶

The defendants moved to dismiss the RICO count, arguing that “the underlying acts upon which the government relies are insufficient to sustain such a charge.”¹²⁷ In addition, they contended that the Government did not establish an association in fact with the other contractors specified in the indictment, and therefore failed to establish the existence of an enterprise.¹²⁸ They argued that the other firms alleged to be members of the RICO enterprise were “seven separate and legal identities,” most of which were “competitors with interests adverse to each other.”¹²⁹

This argument, however, was doomed to fail because of the stringent federal standards for reviewing the sufficiency of indictments. Federal courts may not infer anything from the language of indictments to determine whether the evidence before the grand jury was sufficient to make out a charge.¹³⁰ Moreover, an indictment charging conspiracy need not “allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy.”¹³¹ Instead, Federal indictments “need only track the language of the statute and . . . state the time and place [of the offense] in approximate terms.”¹³²

In light of this standard, the district court in *Salvagno* concluded that the RICO charge had been sufficiently pled. It found that, “regardless of the complexity of the alleged criminal scheme,” the Government was not required to detail the manner in which the members of the enterprise allegedly worked together.¹³³ In addition, it found that legally distinct and competing companies can form an “associative group” under RICO if they cooperated in performing illegal

125. *See id.* It should be noted that violations of Federal environmental statutes are not in themselves predicate acts cognizable under RICO. *See* 18 U.S.C. § 1961(1) (2006).

126. *See id.*

127. *See* *United States v. Salvagno*, 306 F. Supp. 2d 258, 263 (N.D.N.Y. 2004).

128. *See id.* at 264.

129. *See id.*

130. *See* *United States v. Calandra*, 414 U.S. 338, 343 (1974).

131. *United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002).

132. *United States v. Flaharty*, 295 F.3d 182, 189 (2d Cir. 2002).

133. *Salvagno*, 306 F. Supp. 2d at 264.

acts.¹³⁴ Finally, the court upheld the fraud charges underlying the RICO count, finding that the defendants defrauded their customers of the right to honest services by lulling them into the false belief that their asbestos abatement would be performed safely and legally.¹³⁵

After the denial of their motion to dismiss, the defendants proceeded to trial and were convicted on all counts including the RICO conspiracy charge. On December 22, 2004, the two principal defendants were sentenced to 19 and 25 years in prison, marking the longest sentence ever imposed in the United States in an environmental prosecution.¹³⁶ In light of the success of the Salvagno prosecution, further RICO charges against environmental defendants are likely, and the trend toward more zealous prosecutions and longer sentences seems certain to continue.

IV. THE DANGER OF OVERENFORCEMENT IN ASBESTOS-RELATED FEDERAL CRIMINAL CASES

Although criminal enforcement is an important tool in enforcing the asbestos regulations and protecting the environment, the breadth of criminal liability provided under the statute is frequently criticized. There is little argument that criminal liability should exist for willful violations or false statements. However, scholars have argued that at the lower end of the culpable mental states - particularly negligence - administrative or civil enforcement is more appropriate.¹³⁷

This argument is predicated upon several grounds. First, few if any of the standards governing asbestos handling and abatement are explicitly set forth in the statute. Instead, the great majority of these

134. *Id.* at 264-65.

135. *See id.* at 266-67.

136. *See* Weiner, *supra* note 3, at A1. The Salvagno defendants' sentence was subsequently vacated in light of the Supreme Court's invalidation of the Sentencing Guidelines; they are currently awaiting resentencing. *See* Defendants' Sentencing Memorandum in *United States v. Salvagno*, Ind. No. 02-CR-51 (N.D.N.Y. 2002) (on file with author).

137. *See* Rosenzweig, *supra* note 4, at 31-32. Application of the Clean Air Act to asbestos cases has also been criticized on Commerce Clause grounds. *See* Nathaniel Stewart, Note, *Turning The Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 197-204 (2004).

standards are established by OSHA regulations or rules promulgated by the EPA, which are very technical in nature. As such, it has been argued that the statute does not provide adequate notice of what conduct might subject defendants to criminal liability.¹³⁸

This is an acute concern given that criminal charges have been brought not only against licensed asbestos handlers who presumably have some knowledge of the relevant technical rules, but employers and landowners who may be entirely ignorant of them. Possibly the most outstanding example of this was the *Rubinstein* case, where the defendant's conduct in exposing his own person to asbestos without protective gear indicated a genuine ignorance of its dangers.¹³⁹ Given that the courts have rejected a "good faith" defense and require only that the defendant knew he was handling asbestos, this could lead in some cases to entirely inadvertent commission of criminal offenses.¹⁴⁰

In addition, not all regulations are of equal importance to protecting the environment. For instance, those regulations that mandate protective gear for workers and prescribe substantive removal and dumping procedures are critical to maintaining occupational health and a clean atmosphere. However, the regulations also contain many ancillary record-keeping requirements that are intended to aid federal agencies in monitoring compliance rather than to directly protect the environment or workplace safety. Such record-keeping violations are less serious and damaging to the environment than the direct release of pollutants. Nevertheless, the CAA does not distinguish between regulations in imposing criminal liability; failure to file a report is an offence as equally serious as failure to provide employees with protective clothing.¹⁴¹

The difference between these two categories of regulation can be summarized in terms of "blameworthiness," which, as Professor Stephen F. Smith has argued, is often inadequately considered by federal criminal legislation.¹⁴² Professor Smith has argued that the federal criminal code meets its threshold responsibility of ensuring

138. See Rosenzweig, *supra* note 5, at 31.

139. See *supra* notes 48-56 and accompanying text.

140. See, e.g., Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 620 n.68 (2001) (noting that, with respect to "an offense of failing to remove exposed asbestos from one's building . . . the failure to act may lack mens rea and yet be a very serious offense").

141. See *supra* notes 58-73 and accompanying text.

142. See Smith, *supra* note 7, at 885.

that all punishable acts are morally blameworthy in some degree, but does not adequately distinguish between degrees of moral culpability.¹⁴³ Specifically, he contends that the combination of excessively inclusive statutory language with broad judicial interpretations of that language make relatively un-blameworthy acts subject to the same punishment as those that are more harmful and morally wrong.¹⁴⁴

Although Professor Smith did not explicitly refer to environmental statutes in making these arguments, they bear considerable force. As one commentator has noted, most environmental violations are regulatory crimes that are “wrongful not because of [their] intrinsic nature (*malum in se*) but because [they are] prohibited wrong[s] (*malum prohibitum*).”¹⁴⁵ The exceptions are offenses that involve placing others in danger of bodily harm, which can be analogized to traditional *malum in se* crimes such as reckless endangerment,¹⁴⁶ but the statutes do not prescribe different penalties for these and for mere regulatory offenses.

This is a particularly acute problem now that the United States Sentencing Guidelines have been given advisory status.¹⁴⁷ The Guidelines attempted to calibrate penalties according to the extent of the offense, the degree of risk posed and the culpable mental state of the offender.¹⁴⁸ For instance, offenses that pose a serious risk of death or bodily injury are subject to a nine-level sentencing enhancement, while “simple record-keeping or reporting violation[s]” merit a two-level reduction.¹⁴⁹ Given that recommended Guideline sentences double with every six-level increase, this creates a substantial difference in penalties between the most and least blameworthy environmental offenses. With the end of the mandatory Guidelines, however, judges are now constrained only by the statutory maximum sentences, thus raising the possibility of substantial disproportionality in the penalties imposed.

Environmental statutes also fail to distinguish between levels of blameworthiness in their imposition of criminal liability for the

143. *See id.*

144. *See id.*

145. Rosenzweig, *supra* note 5, at 29 (emphasis in original).

146. *See* District of Columbia v. *Colts*, 282 U.S. 63, 73 (1930) (describing reckless driving and reckless endangerment as *malum in se* offenses).

147. *See* United States v. *Booker*, 543 U.S. 220, 248-49 (2005).

148. U.S. Sentencing Comm’n, Guidelines Manual, § 2Q (2004).

149. *Id.* § 2Q1.2(b).

acts of third parties. As Professor Paul Rosenzweig writes, the incorporation of criminal liability for acts committed with a negligent mental state has permitted environmental prosecutions of managers for “felony failure to supervise.”¹⁵⁰ Indeed, managerial liability has even been imposed for acts having a knowing culpable mental state, with knowledge being imputed to supervisory defendants “on the basis of [their] authority and responsibility.”¹⁵¹ Professor Rosenzweig argues that this not only fails to deter crime but actually deters socially useful conduct:

Those who voluntarily choose to engage in productive economic conduct place themselves at the risk of criminal sanction for their felony failure to supervise. There is no better way to dissuade those who work to produce goods and services for society from continuing to do so than to criminalize their conduct without reference to whether or not they have personally acted in a culpable manner.¹⁵²

Although the most serious Federal environmental offenses require proof of the defendant’s personal knowledge, the majority do not.¹⁵³ Moreover, even the most serious offenses that carry a potential 15-year penalty apply the personal knowledge requirement only to the element of knowledge that the release of pollutants places other persons in imminent danger of death or serious bodily injury.¹⁵⁴ For all other such offenses – which carry maximum penalties of five years imprisonment – defendants can be convicted based on imputed knowledge. The Sentencing Guidelines do not provide an advisory distinction between offenses based on personal knowledge and those based on the knowing conduct of others.¹⁵⁵

An example of the inequities produced by this provision is illustrated by the case of *United States v. Hanousek*.¹⁵⁶ The defendant in *Hanousek* was a roadmaster for an Alaskan railroad who was con-

150. Rosenzweig, *supra* note 5, at 31.

151. *Id.* (quoting *United States v. Dotterweich*, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting)).

152. *Id.*

153. *See supra* notes 61-70 and accompanying text.

154. *See supra* notes 66-67 and accompanying text.

155. *See* U.S. Sentencing Comm’n, Guidelines Manual, § 2Q1.2 (2004).

156. 176 F.3d 1116 (9th Cir. 1999).

tractually responsible for maintenance of tracks and structures.¹⁵⁷ As part of his duties, he hired an independent contractor to load quarried rocks onto railroad cars.¹⁵⁸ During the course of this operation, a backhoe operator employed by the independent contractor punctured a pipeline, causing oil discharge into an adjacent river.¹⁵⁹ On these facts, Hanousek was convicted of failing to appropriately supervise the construction project, and the Ninth Circuit affirmed his six-month prison sentence.¹⁶⁰

It is easy to imagine a similar case involving asbestos abatement. Like Hanousek, managers of large companies frequently have wide-ranging duties with extensive geographic scope, and must trust employees and independent contractors to perform their jobs competently. Moreover, given that asbestos abatement is a highly technical area, managers who hire abatement contractors are frequently ill-equipped to supervise and monitor their compliance. To hold under such conditions that such managers can be held criminally liable and exposed to prison sentences based on the negligent acts of their subordinates and agents opens the door to virtually limitless and unjust use of criminal prosecution.

Precisely such a case occurred in *United States v. Pearson*,¹⁶¹ which involved asbestos removal from a Navy installation in Washington State. The defendant, Thomas Pearson, was a certified asbestos supervisor who was hired by a civilian contractor to assist in overseeing one phase of the work.¹⁶² In this capacity, he “performed functions such as correcting time cards, instructing others on how much water to use, and conducting daily meetings to give instructions to the crew.”¹⁶³

While the work was in progress, inspections demonstrated that certain workplace standards were not upheld during the removal. For instance, an insufficient amount of water was used to wet the asbestos and substandard containment procedures were used.¹⁶⁴ Based on these deficiencies, Pearson was charged with knowingly violating the asbestos regulations. The jury convicted him, making a specific

157. *Id.* at 1118.

158. *Id.*

159. *Id.*

160. *Id.* at 1119-21.

161. 274 F.3d 1225 (9th Cir. 2001).

162. *Id.* at 1228.

163. *Id.*

164. *See id.* at 1229.

finding that he acted in a supervisory capacity, and he was sentenced to 10 months in prison.¹⁶⁵

On appeal, Pearson argued that he had insufficient authority to be considered a “supervisor” for purposes of federal criminal liability since his duties were primarily administrative.¹⁶⁶ However, the Ninth Circuit held that the legal threshold for supervisor status meant “having the *ability* to direct the manner in which work is performed and the *authority* to correct problems” regardless of whether the defendant’s day-to-day duties involved such direction.¹⁶⁷ Thus, any employee denominated a “supervisor” – even if his duties primarily involve correcting time cards and performing paperwork off the job site – may find himself a criminal defendant if things go wrong.

Prosecutions such as *Hanousek* and *Pearson* are not only inequitable to the defendants, but also illustrate the federal authorities’ inconsistent attitude toward rank and file asbestos workers. On the one hand, the workers supervised by Pearson and Hanousek were treated as victims of asbestos exposure for purposes of liability and sentencing. On the other hand, given that the same workers’ violation of the asbestos regulations was imputed to the defendants to establish criminal liability, they were in effect treated as accomplices to the crime. It is through such circumlocutions that federal authorities have been able to secure indictments and convictions against supervisors of relatively low culpability.

As Professor Rosenzweig notes, the overuse of criminal statutes in the environmental field is particularly egregious because enforcement agencies have an array of other sanctions available to them.¹⁶⁸ Specifically, environmental laws and regulations can be enforced through administrative fines, orders, injunctive relief and litigation to recover cleanup costs.¹⁶⁹ Moreover, the standard of proof that enforcers must meet under these mechanisms is often no different from that necessary for criminal liability.¹⁷⁰ In light of these alternative sanctions and corrective measures, using criminal prosecution as anything other than a last resort constitutes overdeterrence.¹⁷¹

165. *Id.*

166. *Id.* at 1230.

167. *Id.* at 1231 (emphasis added).

168. See Rosenzweig, *supra* note 5, at 33-34.

169. See *id.*

170. See *id.*

171. See *id.* at 34-35.

Indeed, even *Salvagno* can be characterized as overenforcement in some respects. Although the principal defendants were fraudulent operators who richly deserved a substantial prison sentence, the RICO enterprise charged in the indictment included numerous other companies, the activities of which were less egregious. One of the flaws commonly noted with RICO prosecutions is that it can subject people or entities whose illegal acts are relatively minor, through their membership in the "enterprise," to enhanced penalties similar to those received by more serious offenders.¹⁷²

If RICO becomes a tool of choice for environmental prosecutors, the risk will increase that relatively marginal actors will receive heavy penalties through their association with more egregious violators. This will be especially true if, as has been proposed, the environmental statutes themselves are made predicate offenses for RICO.¹⁷³ Proponents of this measure have argued that it would enable serious environmental crimes to be prosecuted under RICO without the use of ancillary fraud offenses as a subterfuge.¹⁷⁴ It has also been argued that the infiltration of organized crime into the sanitation industry, resulting in such offenses as illegal dumping, brings environmental crime within the statute's intended scope.¹⁷⁵ At least one court has cited the commission of environmental offenses by organized crime entities as an indication that Congress did not intend to exclude such acts from prosecution under RICO.¹⁷⁶

On the other hand, unless careful limitations are placed upon the use of environmental crimes as RICO predicate acts, overcriminali-

172. See Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 715 (1989) (noting "RICO's potential to impute guilt by association").

173. See Brendan Rielly, *Using RICO to Fight Environmental Crime: The Case for Listing Violations of the RCRA as Predicate Offenses for RICO*, 70 NOTRE DAME L. REV. 651, 679-80 (1995) (noting that Professor Robert Blakey, the progenitor of the RICO statute, advocated the listing of environmental crimes as predicate offenses).

174. See *id.* See also David R. McAvoy, Note, *The Applicability of Civil RICO to Toxic Waste Polluters*, 62 IND. L. J. 451, 492 (1987); Elizabeth E. Mack, *Another Weapon: The Rico Statute and the Prosecution of Environmental Offenses*, 45 SW. L.J. 1145, 1151 (1991).

175. See Rielly, *supra* note 173, at 675-77.

176. See *United States v. Paccione*, 738 F. Supp. 691, 699 (S.D.N.Y. 1990), *aff'd*, 949 F.2d 1183 (2d Cir. 1991). (While the *Paccione* court acknowledged that environmental offenses were not RICO predicate acts in themselves, it approved the use of ancillary fraud charges to bring a primarily environmental conspiracy within the scope of RICO). See *id.*

zation could extend entirely new levels. The reach of the environmental statutes extends to negligent conduct as well as knowledge imputed through the actions of others.¹⁷⁷ Moreover, although RICO also requires that actors undertake predicate criminal acts on behalf of an "enterprise,"¹⁷⁸ the statute defines this term broadly to encompass any "group of individuals associated in fact," including corporations.¹⁷⁹ Therefore, a supervisor whose subordinates commit two or more environmental offenses within a five-year period on behalf of their employer may face enhanced criminal penalties under a statute originally designed to combat organized crime. This potential for prosecutorial abuse arguably outweighs any incremental gains from the ability to prosecute major environmental offenders directly under RICO.

As a final measure of overcriminalization, employers' good-faith efforts at compliance may form the basis of criminal charges against them. Statements made to federal agents in the course of seeking compliance advice, or reports generated during self-audits, are fully admissible at a criminal trial.¹⁸⁰ Moreover, Justice Department guidelines specifically allow such statements to be reviewed as part of the assessment of whether to prosecute, and do not preclude prosecution of defendants who have made good-faith efforts to comply with the law.¹⁸¹ Thus, not only can defendants be convicted based on the conduct of their subordinates or for acts that are merely negligent, but their very efforts to comply with the law can themselves form criminal pitfalls.¹⁸²

V. NEW YORK STATE: AN ALTERNATIVE ENFORCEMENT MODEL

It is clear that while criminal liability is necessary to protect the environment and punish substantial violations of asbestos-handling regulations, the current system extends its reach into areas where

177. See *supra* notes 153-67 and accompanying text.

178. See 18 U.S.C. § 1962(c) (2006).

179. See *id.* § 1961(4).

180. See Oliveira, *supra* note 8, at 363.

181. See *id.*

182. See *id.* (citing Donald A. Carr & William L. Thomas, *Devising a Compliance Strategy Under the ISO 14000 International Environmental Management Standards*, 15 PACE ENVTL. L. REV. 85, 89 (1997) (discussing the use of voluntary audits in criminal proceedings)); U.S. Dep't of Justice, *Factors in Decisions on Crim. Prosecutions for Envtl. Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991).

other forms of enforcement are more appropriate. This has prompted calls for a reduction in the scope of criminal liability, particularly in the case of low-level employees or merely negligent actors,¹⁸³ but these calls have often been more theoretical than specific. However, there is at least one existing counterpoint to federal enforcement: the parallel criminal enforcement regime that has developed in New York State. The New York model, as administered by successive state Attorneys General, differs relatively little from the federal model in substantive law, but has involved different practical enforcement priorities.

Asbestos in New York is regulated in three ways: as an air pollutant,¹⁸⁴ a water pollutant¹⁸⁵ and a solid waste.¹⁸⁶ Its listing in all three categories makes it subject to abatement, transportation and disposal regulations that largely mirror federal standards.¹⁸⁷ Violation of these standards is often subject to relatively nominal criminal liability. For instance, any person who violates the New York regulations for disposal of asbestos waste is guilty of a violation punishable by up to 15 days imprisonment or a fine of \$15,000 per day, regardless of culpable mental state.¹⁸⁸ The gravity of the offense rises to a Class B misdemeanor if more than ten cubic yards of solid waste are released into the environment,¹⁸⁹ a Class A misdemeanor

183. See, e.g., Rosenzweig, *supra* note 5.

184. See N.Y. COMP. CODES R. & REGS. tit. 6, § 200.1(ai) (2006) (designating asbestos as a “hazardous air pollutant”).

185. See *id.* § 597.2(c) (listing asbestos as a “hazardous substance”).

186. See *id.* § 360-1.2(11) (defining “asbestos waste” for purposes of solid waste regulation as “friable solid waste that contains more than one percent asbestos by weight and can be crumbled, pulverized or reduced to powder, when dry, by hand pressure.”).

187. See, e.g., *id.* § 200.10(c) (adopting Federal asbestos air quality standards); see also *id.* § 360-2.17(p) (adopting Federal asbestos waste disposal and landfill operation standards); *id.* § 360-11.4(m) (adopting Federal removal and packaging standards).

188. N.Y. ENVTL. CONSERV. LAW § 71-2703(2)(a) (2006). Liability under Section 71-2703 arises from the violation of “any duty imposed by title 3 or 7 of article 27 of this chapter, or any rules and regulations promulgated pursuant thereto, or any final determination or order of the commissioner.” See *id.* The asbestos waste disposal standards set forth in N.Y. COMP. CODES R. & REGS. §§ 360-2.17(p) and 360-11.4(m) were promulgated pursuant to Title 7 of article 27, so violation of those standards thereby falls within the criminal liability provisions of Section 71-2703. See Statutory Authority Appendices to N.Y. COMP. CODES R. & REGS. tit. 6, §§ 360-2.17, 360-11.4.

189. N.Y. ENVTL. CONSERV. LAW § 71-2703(2)(b)(i) (2006). Under New York law, Class B misdemeanors are subject to a maximum penalty of 90 days’ impris-

if more than 70 cubic yards are released,¹⁹⁰ and a Class E felony upon a second offense involving at least 70 cubic yards of solid waste.¹⁹¹ Likewise, willful violation of the asbestos release regulations is punishable as a misdemeanor and carries a penalty of up to one year's imprisonment.¹⁹²

There are three methods by which greater penalties may be assessed for asbestos violations. One method applies if asbestos is discharged into public waters without a permit, which is considered a "prohibited discharge" under title 8 of article 17 of the Environmental Conservation Law.¹⁹³ Such a prohibited discharge, if committed with criminal negligence, constitutes a Class A misdemeanor.¹⁹⁴ The gravity of this offense increases to a Class E felony if the discharge is knowing,¹⁹⁵ and to a Class C felony if the defendant intentionally discharged asbestos into public waters with the knowledge that he exposed a third party to "imminent danger of death or serious bodily injury."¹⁹⁶ A Class C felony conviction permits a maximum penalty of 15 years imprisonment, which is as great as any penalty available under federal law.¹⁹⁷

Another avenue of imposing felony-level criminal liability arises from the regulatory listing of asbestos as a water pollutant under the authority of Section 37-0103(1) of the Environmental Conservation Law.¹⁹⁸ As such, it is classified as a "substance hazardous to public

onment, rising to one year for Class A misdemeanors, four years for Class E felonies, seven years for Class D felonies and 15 years for Class D felonies. *See* N.Y. Penal Law §§ 70.00(2) (setting maximum penalties for felony offenses), 70.15(1)-(3) (establishing maximum penalties for misdemeanors).

190. N.Y. ENVTL. CONSERV. LAW § 71-2703(2)(c)(i) (2006).

191. *Id.* § 71-2703(2)(c)(ii).

192. *Id.* § 71-2105(1) (establishing criminal liability for violation of any New York State air pollution regulation, including N.Y. COMP. CODES R. & REGS. tit. 6 § 200.10).

193. N.Y. ENVTL. CONSERV. LAW § 17-0807(4) (2006).

194. *Id.* § 71-1933(3)(a) (providing criminal penalties for persons who violate any provision of title 8 of article 17 of the ENVTL. CONSERV. LAW. with a criminally negligent mental state).

195. *Id.* § 71-1933(4)(a).

196. *Id.* § 71-1933(5)(a), (b). For purposes of determining whether the defendant knew that a third person was in danger of death or serious injury, he is "responsible only for actual awareness or actual belief that he possessed," and the knowledge of others cannot be imputed to him. *See id.* § 71-1933(5)(c).

197. *See* N.Y. PENAL LAW § 70.00(2)(c) (2006).

198. *See* Statutory Authority Appendix to N.Y. COMP. CODES R. & REGS. tit. 6 § 597.2 (2006) (listing, *inter alia*, N.Y. ENVTL. CONSERV. LAW. § 37-0301 as authority for listing asbestos as a hazardous substance). Section 37-0103(1) man-

health, safety or the environment” for purposes of criminal enforcement.¹⁹⁹ This means that certain releases of asbestos into the environment are subject to criminal penalties even if the asbestos waste is not discharged into public waters.²⁰⁰

Specifically, anyone who, with criminal negligence, “engages in conduct which causes the release of more than five gallons or fifty pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to public health, safety or the environment” is guilty of the Class B misdemeanor of endangering public health, safety or the environment in the fifth degree.²⁰¹ The knowing or reckless release of any quantity of such a hazardous substance constitutes the Class A misdemeanor of endangering public health, safety or the environment in the fourth degree, as does the negligent release of 1000 pounds of hazardous waste.²⁰² Defendant commits the third-degree form of the offense, a Class E felony, is committed when he recklessly releases 2000 pounds of a hazardous substance or knowingly releases 1000 pounds.²⁰³ The Class D felony of endan-

dates that the commissioner of the Department of Environmental Preservation promulgate a list of substances hazardous to public health and the environment, based on the risk that they will cause physical injury or illness or pose a hazard to the environment if “improperly treated, stored, transported, disposed of or otherwise managed.” See N.Y. ENVTL. CONSERV. LAW. § 37-0103(1)(a) (2006).

199. See N.Y. ENVTL. CONSERV. LAW. § 71-2702(10)(b) (2006). It should be noted, however, that the New York State Department of Environmental Conservation has designated asbestos as a “hazardous substance” but not an “acutely hazardous substance.” See N.Y. COMP. CODES R. & REGS. tit. 6 § 597.2(c) (2006). As such, certain enhanced penalties available under the Environmental Conservation Law for release of acutely hazardous substances into the environment are inapplicable to asbestos violations. See, e.g., N.Y. ENVTL. CONSERV. LAW. § 71-2714 (2006) (providing Class C felony penalties for certain releases of acutely hazardous substances into the environment).

200. See N.Y. ENVTL. CONSERV. LAW. §§ 71-2710-13 (2006). “Release” of a hazardous substance is defined as “any pumping, pouring, emitting, emptying, or leaching, directly or indirectly, of a substance so that the substance or any related constituent thereof, or any degradation product of such a substance or of a related constituent thereof, may enter the environment, or the disposal of any substance.” *Id.* § 71-2702(13). The “environment” is defined as “any water, water vapor, any land including land surface or subsurface, air, fish, wildlife, biota, and all other natural resources.” *Id.* § 71-2702(12).

201. *Id.* § 71-2710.

202. *Id.* § 71-2711(2) and (3).

203. *Id.* § 71-2712(2),(4). In addition, the offense of endangering public health, safety or the environment in the third degree may be committed when the defendant recklessly releases at least one thousand pounds of hazardous waste into the environment and “creates a substantial risk of physical injury to any person who is

gering public health, safety or the environment in the second degree occurs when a person knowingly releases hazardous substances totaling 15,000 pounds or causes injury to a third person as a result of knowingly releasing a hazardous substance.²⁰⁴

Prosecution for releasing large quantities of hazardous substances is aided by the presumption of knowledge established in Section 71-2719 of the Environmental Conservation Law.²⁰⁵ This statute makes possession of more than 15,000 pounds or 1500 gallons of a substance hazardous to public health, safety or the environment presumptive evidence that the possessor knows that the substance is hazardous.²⁰⁶ Moreover, violations of title 27 of article 71 are subject to special sentencing provisions, in which the defendant can be assessed the cost of cleanup in addition to enhanced fines.²⁰⁷

A final method of bringing New York felony charges against asbestos violators is via record-keeping offenses. The offense most often charged in this respect is offering a false instrument for filing in the first degree.²⁰⁸ This crime, a Class E felony, is committed when:

[K]nowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state, [a person] offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation.²⁰⁹

A conviction under this statute requires proof of three culpable mental states: knowledge that the written instrument contains a false

not a participant in the crime.” *Id.* § 71-2712(3). This subsection has been rarely used due to the difficulty of proving a particularized risk to the health of a third person.

204. *Id.* §§ 71-2713(1) and (3).

205. *See id.* § 71-2719(1).

206. *Id.*

207. *See id.* § 71-2721.

208. *See* N.Y. PENAL LAW § 175.35 (2006).

209. *Id.*

statement, intent to defraud the state or a political subdivision thereof, and “knowledge or belief” that the statement will become part of the public record.²¹⁰ New York case law also requires that the statement be material; i.e., that it be the type of statement upon which the state or local agency is accustomed to rely.²¹¹ However, the government often chooses to prosecute on false instrument charges in preference to explicit environmental charges, because the existence of a false factual statement on a written form is easier to prove and less confusing to the jury than violation of technical asbestos disposal regulations.

It is apparent that New York prosecutors in asbestos cases have an array of criminal enforcement options similar to that available to federal law enforcement authorities. An examination of the practice of the New York State Attorney General’s office, however, reveals that the actual priorities and goals of enforcement are considerably different. Specifically, state prosecutors tend to focus on neutralizing the hazard posed by “rip and run” asbestos removers rather than imposing prison sentences, and are often willing to permit no-prison plea deals in exchange for the surrender of asbestos licenses and permits.

The first reported use of the criminal provisions of the New York Environmental Conservation Law against asbestos violators occurred in upstate Wayne County in 1992.²¹² In December of that year, the Cadbury Beverage Corporation and eight managers were charged with endangering public health, safety or the environment in the second degree for “illegally dumping thousands of pounds of asbestos-tainted debris in a Wayne County used-car lot.”²¹³ Specifically, the defendants were charged with illegally removing more than 62,000 pounds of tainted roofing material from a building at the Cadbury corporate headquarters, and dumping it at nearby East Ridge Auto Sales.²¹⁴ The indictment alleged, *inter alia*, that they “recklessly

210. *See id.*

211. *See, e.g.,* *People v. Keller*, 176 Misc. 2d 466, 468 (Sup. Ct., N.Y. County 1998) (“It is well settled that the falsity of the document involved must go to the effectiveness of the writing”). *See also* *People v. Altman*, 83 Misc. 2d 771, 774 (County Ct. Nassau County 1975) (“the false statement or information must be material to the written instrument”).

212. *Beverage Company, Workers Charged in Dumping of Asbestos*, POST-STANDARD (Syracuse, N.Y.), Dec. 23, 1992, at B1.

213. *Id.*

214. *Id.*

exposed untrained, completely unprotected workers to this cancer-causing debris.”²¹⁵

The defendants moved to dismiss on the basis that the evidence before the grand jury was insufficient.²¹⁶ The Wayne County Court upheld the charges against the corporation and two of the individual defendants, but dismissed the charges against six other individuals on the basis that “the prosecutor failed to show that they knew the roof of building 4 had been tested in 1989 and had been found to contain asbestos.”²¹⁷ On appeal, the Fourth Department reinstated the charges against all but one of the defendants, finding that there was sufficient circumstantial evidence to establish that they had culpable knowledge.²¹⁸ The case was thereafter resolved by a plea in which the individual defendants were spared imprisonment but the corporation agreed to pay the cost of cleanup and institute improved asbestos abatement procedures.

Subsequent New York State prosecutions have focused on asbestos abatement contractors but have followed a similar enforcement model. One such prosecution occurred as the result of a 1999 investigation of Quantum Environmental Services, a Hopewell Junction abatement contractor that “fail[ed] to train its workers in asbestos monitoring and falsif[ied] employee training reports.”²¹⁹ This prosecution was resolved through a plea agreement in which the corporation pled guilty to one count of offering a false instrument for filing in the second degree, paid a \$50,000 fine and surrendered all licenses and permits allowing it to train workers in asbestos removal.²²⁰

Another prosecution on false instrument charges occurred in 2001 against Paradigm Environmental Services, a Rochester contractor that “certified that [its] employees . . . had received asbestos safety

215. *Id.*

216. *People v. Cadbury Beverages, Inc.*, 203 A.D.2d 918 (4th Dept. 1994).

217. *Id.* at 918-19.

218. *Id.* at 919. In reinstating the charges, the Fourth Department also implicitly held that the aggregate weight element of endangering public health, safety or the environment in the second degree could be satisfied via proof of the total weight of the tainted roofing material rather than the pure weight of asbestos.

219. Press Release, N.Y. State Attorney General, State Obtains Conviction Against Dutchess County Asbestos Monitoring Company, (Jan. 5, 2000), available at http://www.oag.state.ny.us/press/2000/jan/jan05a_00.html.

220. *Id.*

training when, in fact, they had not.”²²¹ This prosecution was also resolved by an agreement in which the corporation, its former director of safety training and a supervisor pled guilty to offering a false instrument for filing in the first degree.²²² The company also agreed to surrender its safety training accreditation and “pay to have all of its 16 employees properly trained in asbestos safety procedures.”²²³ However, neither of the individual defendants received prison sentences.²²⁴

Another prosecution in 2002 arose from an investigation of false certifications of air monitoring by an Oneida County asbestos contractor.²²⁵ As with *Quantum* and *Paradigm*, the contractor falsely certified that its employees attended asbestos safety training when in fact they had not.²²⁶ Both the company and its part owner pled guilty to a single false instrument charge; the contractor surrendered its permits and the individual defendant was barred from working in the asbestos industry in New York.²²⁷

Most recently, in February 2004, the Attorney General’s office secured false instrument pleas against two Buffalo asbestos contractors and several of their principal owners.²²⁸ These companies had submitted fabricated documents to state and local authorities falsely stating that they had conducted required surveys and monitoring processes.²²⁹ As in the previous cases, the charges were resolved by false instrument pleas in which the defendants received non-prison sentences in exchange for exclusion from the asbestos abatement business.²³⁰

221. Press Release, N.Y. State Attorney General, Rochester Asbestos Training Company Guilty of Fraud, (Oct. 24, 2001), available at http://www.oag.state.ny.us/press/2001/oct/oct24c_01.html.

222. *See id.*

223. *Id.*

224. A check of the New York State inmate database yielded negative results for the names of both individual defendants. The search was conducted at the following web address: <http://nysdocslookup.docs.state.ny.us>.

225. *See* Press Release, N.Y. State Attorney General, Asbestos Company’s Accreditation Stripped by State (Dec. 5, 2002), available at http://www.oag.state.ny.us/press/2002/dec/dec05b_02.html.

226. *Id.*

227. *Id.*

228. *See* Press Release, N.Y. State Attorney General, Asbestos Contractors Plead Guilty to Fraud, (Feb. 25, 2004), available at http://www.oag.state.ny.us/press/2004/feb25b_04.html.

229. *See id.*

230. *See id.*

A clear pattern is apparent from these New York criminal enforcement actions. In each of the cases described, imposition of long prison sentences was not the primary goal of the state prosecutors. Instead, the prosecutors sought to resolve each case quickly through a plea that included the cessation of dangerous activity. Moreover, in almost all reported cases, the New York Attorney General did not file criminal charges against lower-level employees, and some of the cases were resolved by a corporate guilty plea.

This criminal enforcement model has several advantages over the practices of federal prosecutors. To begin with, New York prosecutors tend to resolve cases more quickly, thus shortening the window of opportunity in which the defendants might continue their hazardous activities. Additionally, criminal enforcement is used as a tool to ensure environmentally safe conduct and remove violators from the business rather than as an end in itself. In all instances thus far, New York State defendants were able to avoid prison terms by agreeing to cease their offending conduct and leave the business or improve their compliance practices. In other words, New York enforcement utilizes the *threat* of incarceration to ensure compliance rather than seeking the imposition of prison sentences on relatively minor actors. Therefore, New York prosecutors have created an enforcement regime which is equitable to defendants even while being strict in its enforcement of applicable safety regulations.

VI. REFORMING FEDERAL CRIMINAL LIABILITY FOR ASBESTOS VIOLATIONS

The Federal enforcement model contains several inherent disadvantages as compared to New York. Relatively low-level employees, as well as supervisors who are merely negligent, are subject to imprisonment at the discretion of overzealous prosecutors. Moreover, current federal enforcement policy deters economically useful conduct and good-faith efforts at compliance, because such efforts can often become the very evidence used to imprison the defendant.²³¹ Therefore, the criminal statutes that govern asbestos violations not only fail to achieve their deterrent purpose but actually undermine the goal of protecting the environment.²³²

231. See Olivera, *supra* note 8. See also notes 180-82 and accompanying text.

232. See Rosenzweig, *supra* note 5, at 29-31 (citing *United States v. Dotterweich*, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting)).

It would be desirable if federal authorities emulated the New York model, which avoids many of the pitfalls of overenforcement and emphasizes environmental safety over high-profile convictions. The difference between the two models is largely a matter of prosecutorial discretion. New York state and federal authorities have similar arrays of environmental and false-statement laws available to them, including statutes that carry the potential for long prison sentences. The fact that New York prosecutors have largely foregone these penalties in return for compliance-based plea agreements is a matter of choice. Without substantive change in either federal law or federal prosecutorial culture, it is unlikely that the New York model will be adopted by the Justice Department. Therefore, in order to accomplish this end, the federal environmental enforcement system must be reformed in such a way that federal authorities are induced to promote compliance rather than seeking excessive prison terms.

Any reform to the system of Federal environmental crimes must take several factors into account. First, the overriding purpose of the laws pertaining to hazardous waste is to protect the health of workers, prevent environmental pollution and ensure safe and professional handling. Additionally, employers, landowners and contractors should be encouraged to seek advice on complying with the law and assess their own procedures to ensure compliance. Finally, it should be recognized that under certain circumstances – particularly those involving intentional conduct or reckless endangerment of the public – penal sanctions are indeed warranted.

One road to reform is to limit criminal liability to precisely those cases - i.e., to require proof of either an intentional culpable mental state or a reckless mens rea coupled with danger to the lives and health of others.²³³ The *Thorn* case, in which the defendants deliberately flouted the regulations and deprived their workers of protec-

233. It is significant that cases involving deliberate and/or knowing safety violations are precisely those where civil sanctions are likely to be ineffective. This is because deliberate violations often involve a sort of cost-benefit analysis, under which employers “regard it as permissible to allow the employees to assume these risks to their health, rather than pay the costs necessary to do something to lower the risks and thereby lower profits.” Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOKLYN L. REV. 1121, 1140 (2003) (quoting JEAN HAMPTON, AN EXPRESSIVE THEORY OF RETRIBUTION, IN RETRIBUTIVISM & ITS CRITICS 8 (Wesley Cragg ed., 1992)). The availability of criminal sanctions in such cases discourages this sort of cost-benefit thinking by raising the prospect that deliberate violators will lose their freedom as well as their profits.

tive gear in order to maximize their profit, is one example of conduct that meets Professor Smith's standard of blameworthiness and merits criminal liability.²³⁴ In contrast, conduct such as that at issue in *Rubinstein*, *Hanousek* or *Pearson* could be better deterred and punished through the use of administrative fines and recovery of cleanup costs. Another potential reform is to create a "safe harbor" for managers or supervisors who face criminal charges based on the conduct of others. Specifically, a supervisory employee who is given notice of such conduct should be given an opportunity to cure the violation and bring his subordinates into compliance with the law. If the defendant can prove that substantial steps were taken to correct the violation within a reasonable time, the charges should then be dismissed. This is possible through a number of procedures. One such procedure would be analogous to the "adjournment in contemplation of dismissal" permitted by New York law.²³⁵ An adjournment in contemplation of dismissal is a suspension of criminal charges for a certain period, usually six months.²³⁶ If the defendant does not reoffend during that period, the charges are automatically dismissed.²³⁷ However, if he does commit further crimes, he not only faces the new charges but the original charges, which are reinstated.²³⁸

In the federal environmental enforcement context, a similar procedure would involve the suspension of criminal charges for the duration of the defendant's corrective measures. Once the defendant has fully cured the violation or cleaned up the damage and his compliance is certified by the appropriate enforcement agency, the charges will be dismissed. On the other hand, if the defendant fails to achieve compliance within a specified time, or fails to make a diligent and good-faith effort to comply with the law, then he would be prosecuted on the original charges. This procedure has the advantage of keeping the charges in abeyance until the defendant achieves compliance, thus creating a powerful incentive for the defendant to comply promptly and diligently.

Another possibility would be to allow compliance to be an affirmative defense at trial. This would be analogous to another New York statute, Section 376-a of the Vehicle and Traffic Law, which permits the dismissal of certain "equipment violations" on motor vehicles if

234. See *supra* notes 84-93 and accompanying text.

235. See N.Y. CRIM. PROC. LAW § 170.55 (2006).

236. See *id.*

237. See *id.*

238. See *id.*

the defendant can prove at trial that he repaired the equipment within 24 hours.²³⁹ In the environmental context, a supervisor or manager charged with a criminal offense based on the conduct of others would likewise be able to establish an affirmative defense at trial by proving that he initiated compliance efforts within a certain statutory period.

An additional possibility for encouraging compliance and reducing the overenforcement of criminal sanctions is to create an evidentiary privilege for statements made in the course of self-auditing or seeking compliance advice. Persons who make good-faith attempts to comply with the environmental laws would be shielded from having those efforts held against them in criminal court. Such a privilege would comport with both the purpose of the environmental statutes and the purpose of privileges in general. In *Jaffee v. Redmond*,²⁴⁰ the United States Supreme Court stated that the recognition of privileges involved a balancing test of whether the privilege “promotes sufficiently important interests to outweigh the need for probative evidence.”²⁴¹ Voluntary compliance with environmental regulation and access to professional advice are important societal interests. Moreover, because there is no great need to prosecute those who make good-faith attempts to comply with the law, these interests outweigh the need to preserve evidence for criminal cases.

Furthermore, the risk that this privilege will be misused can be minimized by carving out an exception similar to the “crime-fraud” exception to the attorney-client privilege.²⁴² This exception applies when a client communicates with his attorney for the purpose of furthering a future crime or fraud.²⁴³ Such communications fall outside of the attorney-client privilege because they lie outside of the scope of the interest that the privilege is intended to protect: the client’s interest in obtaining good-faith legal advice.²⁴⁴

In a similar manner, defendants who seek environmental compliance advice or conduct self-audits in bad faith would be excluded from the privilege’s protection. For instance, those who approach

239. See N.Y. VEH. & TRAF. LAW § 376-a(4)-(5) (2005). (The specific equipment violations covered by this provision are those set forth in sections 375, 376 and 381 of the Vehicle and Traffic Law, with the exception of brake violations).

240. 518 U.S. 1 (1996).

241. *Id.* at 9-10.

242. See *United States v. Jacobs*, 117 F.3d 82, 87-88 (2d Cir. 1997).

243. See *id.*

244. See *id.*

federal agencies for compliance advice because they realize that their violations are about to be discovered would not be able to take advantage of the privilege. In this way, putative defendants who deliberately fail to comply with environmental regulations will not be able to use the proposed privilege as a shield to ward off criminal charges.

Finally, the scope of criminal liability in environmental cases would be mitigated by giving judges greater authority to dismiss inappropriate charges in the interest of justice. Judges may dismiss in the interest of justice in many state jurisdictions, including New York,²⁴⁵ but this practice is foreign to the Federal system.²⁴⁶ Given the relatively low blameworthiness of many regulatory offenses and the array of other sanctions available to enforcement agencies, such judicial discretion would help to ensure that criminal liability is imposed only where it is warranted.

The discretion given to federal judges in such cases would be similar to that conferred on New York courts in cases of "enterprise corruption,"²⁴⁷ which is the state-law equivalent of RICO.²⁴⁸ Like RICO, the New York enterprise corruption statute was enacted for the purpose of combating organized crime.²⁴⁹ However, its provisions contain broad language that sometimes encompasses defendants who do not conform to traditional organized crime patterns.²⁵⁰ This is precisely the problem that exists with enforcement of federal environmental crimes: their language is so broad that it encompasses conduct that can be resolved more appropriately through other means.

The New York Legislature sought to prevent abuse of the enterprise corruption statute by conferring extraordinary discretion upon the courts to dismiss such charges prior to trial. Specifically, Section 460.00 of the New York Penal Law states in pertinent part:

245. See N.Y. CRIM. PROC. LAW § 210.40 (2006).

246. See *United States v. Carrier*, 672 F.2d 300, 303-04 (2d Cir. 1982) (stating that "where the indictment is legally sufficient, as it is here, the district court may not dismiss it simply because it deems the dismissal to be in the interests of justice").

247. See N.Y. PENAL LAW § 460.20 (2006).

248. See 18 U.S.C. §§ 1961-68 (2005).

249. See N.Y. PENAL LAW § 460.00 (2005).

250. See, e.g., *People v. D.H. Blair & Co.*, No. 00-3282, 2002 N.Y. Misc. LEXIS 317, *33 (Sup. Ct., N.Y. County 2002).

The balance intended to be struck by this act cannot readily be codified in the form of restrictive definitions or a categorical list of exceptions. General, yet carefully drawn definitions of the terms “pattern of criminal activity” and “criminal enterprise” have been employed. Notwithstanding the provisions of section 5.00 of this chapter these definitions should be given their plain meaning, and should not be construed either liberally or strictly, but in the context of the legislative purposes set forth in these findings. Within the confines of these and other applicable definitions, discretion ought still be exercised. Once the letter of the law is complied with, including the essential showing that there is a pattern of conduct which is criminal under existing statutes, the question whether to prosecute under those statutes or for the pattern itself is essentially one of fairness. The answer will depend on the particular situation, and is best addressed by those institutions of government which have traditionally exercised that function: the grand jury, the public prosecutor, and an independent judiciary.²⁵¹

Moreover, Section 210.40(2) of the Criminal Procedure Law specifically provides that, in addition to the grounds specified for other criminal offenses, a judge may dismiss a charge of enterprise corruption may “where prosecution of that count is inconsistent with the stated legislative findings in said article.”²⁵² The specific mention of “an independent judiciary” as one of the institutions charged with ensuring that the statute is applied fairly, combined with the provisions of CPL § 210.40(2), has been interpreted by New York courts as providing discretion to dismiss charges where, “analyzing the specific factual setting, prosecution of such count would be unfair.”²⁵³

A similar provision of federal law should be enacted to permit judges to weigh environmental prosecutions prior to trial and dismiss them where, in “the specific factual setting,” imposition of criminal sanction would be unfair. In such a circumstance, the court should also have the option of referring or recommending the case for non-

251. N.Y. PENAL LAW § 460.00 (2005).

252. N.Y. CRIM. PROC. LAW § 240.20(2) (2005).

253. *People v. D.H. Blair & Co.*, No. 00-3282, 2002 N.Y. Misc. LEXIS 317, *33 (Sup. Ct., N.Y. County 2002).

criminal enforcement measures. The facts of *Hanousek* and *Rubinstein* provide instances where a court might exercise this discretion to dismiss criminal charges in favor of other sanctions and methods of enforcement.²⁵⁴ Additionally, the court should consider a host of factors in determining whether to dismiss criminal charges, including the defendant's mental state, his degree of personal culpability, the extent of the damage and any good-faith efforts to comply with the law.

The common denominator in all these potential reforms is compliance. Specifically, such a reformed framework for asbestos enforcement would allow supervisors to win dismissal of criminal charges through compliance, ensure that good-faith efforts to comply cannot be turned against defendants in criminal court, and allow judges to consider the level of compliance in determining whether to grant a discretionary dismissal. Such a combination of reforms would preserve criminal liability for the cases that truly warrant it, while ensuring that the regulatory goals of environmental safety and compliance goals are fulfilled.

VII. CONCLUSION

The federal laws governing environmental crimes are often well-intentioned and sometimes necessary. However, they also encompass a great deal of conduct that is morally blameless and can be more effectively sanctioned by other means. Indeed, by providing sweeping managerial liability and allowing efforts at compliance to become the very basis of criminal charges, these statutes actively undermine environmental protection.

The courts and Congress should rectify this situation by implementing a comprehensive reform package, similar to the enforcement regime that currently exists in New York State, to reserve criminal sanction and imprisonment for deserving cases. In this way, the federal legal system can achieve a solution that is fair to business people while remaining pro-environment and pro-compliance.

254. See *supra* notes 94-101 and accompanying text.