

December 23, 2003

WHEN WORKERS DIE

California Leads in Making Employer Pay for Job Deaths

By DAVID BARSTOW

GUSTINE, Calif. — For decades, Portuguese dairy farmers have dominated this wisp of a town on the windswept edge of the San Joaquin Valley. Tough, stubborn and hard-working, their families have prospered in a dusty land where death and injury are as close as a falling hay bale or a thrashing bull.

It is accepted fact here that life is hard and cruel, that risk is everywhere, that death is as random as the summer lightning. When your time comes, words will be spoken over your coffin at Our Lady of Miracles, and then life will push on, as it always has. "We're a 'forgive and forget' community," is the way one town elder put it some years back.

This is the place that Roy J. Hubert Jr. has made his battleground.

A tall, bearded man with a taste for bow ties and pink dress shirts, Mr. Hubert is a prosecutor with a mission. He is part of a small team of circuit-riding prosecutors who are crusading to transform the Wild West mores of rural California, a culture they regard as far too tolerant of death on the job.

Their methods are simple, and controversial. With permission from local district attorneys, they bring high-profile criminal cases against employers who kill workers by violating workplace safety laws.

"We're trying to drive a behavioral change within business," Mr. Hubert said. "We're a negative reinforcer."

And so, from his office in Sacramento, 100 miles north of here, Mr. Hubert spends his days scouring reports of workplace deaths from all over California. Late last year, he found precisely what he was looking for on a Gustine dairy farm, a case he believed was outrageous enough to shock a powerful industry and challenge the unwritten moral code in a town named after a little girl who was thrown from her horse and killed.

It happened at the Aguiar-Faria & Sons dairy, a sprawling farm of some 1,700 cows operated by one of Gustine's leading families. Two dairy workers, illegal immigrants from Mexico, drowned in a deep, dark sump hole filled with manure and wastewater. The coroner's report succinctly cataloged their struggles in life and in death: Between them, they had eight pennies and one dime in their pockets; their lungs, however, were packed with bovine excrement.

The people of Gustine saw one more hard, cruel stroke of fate.

Roy Hubert saw a golden opportunity. In January, in a place where dairy is king, he methodically

assembled enough evidence to persuade a grand jury in nearby Merced to indict the farm's general manager and its herdsman for involuntary manslaughter and other felonies.

Just like that, both men were looking at nearly five years in prison.

"Stunned" barely begins to describe Gustine's collective response. If criminal prosecutions for worker deaths are rare in the rest of the country, they are unheard of here. And of all the people to charge.

The general manager and part owner, Patrick J. Faria, was chief of a local volunteer firefighting company. His family had long been a prominent sponsor of the annual Our Lady of Miracles festival. The Faria cows have led the festival parade.

"As respected as they come in this community," said William H. Mattos, publisher of The Gustine Press-Standard.

Many were baffled by what they saw as a ludicrous intrusion by the government. How could there be a crime in something like this, something that nobody ever meant to happen?

Especially when Pat Faria had not even been on the farm that day.

And when the herdsman, Alcino Nunes, a soft-spoken father of two who is known as Ralph, had wept openly as his men were fished from the sump hole.

"If they had a clue," said Tony Xavier, a friend of Mr. Faria, "they wouldn't prosecute this case."

Roy Hubert would have been amazed, and disappointed, by any other response.

"These are not evil people," he said. "They are not people who hurt for the sake of hurting. They are not bad people. This is good ol' Pat, good ol' volunteer fireman Pat. He feels terrible. He's devastated. I get a lot of that. Well, good. So are the widow and the mother and the father and sister and brother. Just imagine the incredible despair and anguish as you're drowning in manure."

California at the Vanguard

California stands alone in the United States in its willingness to prosecute employers who kill or harm their workers by violating safety laws.

Long before Congress created the federal Occupational Safety and Health Administration in 1970, California had its own workplace safety standards, and it is one of 21 states that run their own versions of OSHA. Its powerful labor leaders and big-city district attorneys have long been adept at using headline-grabbing workplace deaths to win ever-stronger enforcement powers for the state agency, known as Cal OSHA.

Under federal law, it is a misdemeanor to commit safety violations that kill workers. The maximum penalty is six months in jail and a \$500,000 fine. But after a deadly refinery explosion in 1999, California adopted one of the nation's first laws making that same offense a felony. In California, conviction carries a sentence of up to three years in prison and a \$1.5 million fine.

Every workplace death or serious injury in California is investigated with an eye to potential prosecution. That work is done by a special Cal OSHA unit, mostly former police officers, whose

members are required by law to refer every death to local prosecutors if there is credible evidence of a deliberate safety violation.

Federal law sets a far more exclusive standard: only the most egregious workplace deaths — those caused by an employer's "willful" safety violations — can be referred to the Justice Department. But as The New York Times found in an eight-month examination of workplace death in the United States, in even those worst cases, the federal OSHA only rarely seeks prosecution.

It is largely the same story in the other states that run their own workplace safety programs. California has prosecuted more employers for safety violations than all of those states combined, The Times found. At the same time, its workplace death rate is substantially lower than that of the rest of the nation.

Still, California's record can be misleading. Most of these prosecutions take place in Los Angeles, San Francisco and a handful of other large cities whose district attorneys have the resources and political will. In dozens of small rural counties, district attorneys have been just as reluctant as the rest of the country to pursue what are often technical, time-consuming and politically sensitive prosecutions.

Roy Hubert and his small band of roving prosecutors are trying to rectify this pattern of uneven enforcement. Called the Circuit Prosecutor Project, they work from the offices of the California District Attorneys Association in Sacramento, under the direction of Gale Filter, a man who combines a prosecutor's cold-eyed pragmatism with a reformer's messianic zeal.

Mr. Filter, a former deputy district attorney in Southern California, joined the project in 1999, soon after it was established to help district attorneys in 34 rural counties enforce environmental laws. He has since expanded to worker safety, and in an interview, he spoke of his desire to stand up for migrant workers, illegal immigrants and others who hold neither power nor influence.

"Who vindicates their rights?" he asked.

But he also described a larger ambition — nudging and shaping the legal values of communities that resist thinking of workplace deaths as potential crimes.

With help from Cal OSHA's criminal investigators, the Circuit Prosecutor Project has brought cases against a farmer whose employee was cut to pieces in a corn harvester, a gold miner in the Sierra Nevada whose employee's head was pinched off by an ore chute, and the general manager of a company responsible for a tank explosion in Northern California that killed one worker and left another with third-degree burns over most of his body.

"I like to think we're challenging the system, and I like to think that by doing that we're challenging the mores of society," Mr. Filter said. "I suppose you could say we're opportunists, but I don't mind."

In Roy Hubert, he found a kindred spirit.

Raised in Wisconsin, Mr. Hubert, 63, spent his early career as a labor organizer, a prosecutor and a criminal defense lawyer. He saw opportunity in the burgeoning world of workplace safety law. There were few lawyers in the field, and it matched his interests in law and science. But he also decided that he could not be effective without "really knowing what is going on."

So he earned a master's degree in safety at the University of Southern California, then took a huge pay

cut to become a safety manager for several Georgia Pacific millwork plants in Northern California. He described Georgia Pacific as a company that makes an "incredible effort" to protect workers. But he also recalled the feeling when a Georgia Pacific employee was killed at a nearby plant. "You feel like you've failed," he said. "What do you say to this man's widow?"

He later went to work for Littler Mendelson, a large California law firm with a reputation for the scorched-earth defense of major corporations charged with civil OSHA violations. Indeed, Cal OSHA inspectors have a nickname for Littler Mendelson; they call it Hitler Mussolini.

"They're tough, darn good lawyers," Mr. Hubert said, smiling and acknowledging that this entry looks more than a little jarring on his résumé.

Still, looking back at "this odyssey of mine," as he calls it, Mr. Hubert cannot help but observe how his past has perfectly prepared him for what he calls "the best job I've ever had in my life."

He has seen safety from all sides, he says. He knows the shortcuts, the ways employers cut corners, the tricks company lawyers use to poke holes in charges of safety violations, the excuses supervisors give for ignoring safety rules.

Yes, he knows he could make more money at Littler Mendelson. But it is more satisfying and fun, he said, "to drive change" in the fifth-largest economy in the world.

"Gale says we're doing God's work," he said. "I'm of a religious persuasion where this is something we probably don't say." But, he added, it comes awfully close.

Mr. Hubert started work at the Circuit Prosecutor Project in December 2002. One case immediately grabbed his attention: Gustine.

Drowned in a Rank Stew

It was not the most promising pickup line.

"I don't own a car, I'm not here legally and I don't earn much money," he said, flashing a smile. "It's up to you."

Angelica Acevedo Hernandez followed José Alatorre onto the dance floor.

He was tall, dark and dapper, a 19-year-old welder with a neat goatee and long sideburns who had crossed the border from Mexico in 1998. He sent love letters with uneven purple hearts, and he made her laugh. She was 21, a Gustine High graduate who worked the late shift sorting nuts at an almond factory. They were married at a chapel in Fresno, moved into a quiet apartment in Gustine and hung wedding photographs in their living room. A son followed.

In 2000, José Alatorre took a welding job at the Faria dairy, \$8.75 an hour and no benefits. It was his first time on a dairy, but he liked the work, liked repairing fences and corrals, liked mixing with the 30 or so other dairy hands. The one thing he did not like was the smell of manure, the way it hung on him after work. He became fanatical about showering as soon as he got home.

Feb. 22, 2001, was their first wedding anniversary.

Angelica Alatorre woke up early that morning and found her husband standing over their son's crib. "He gave me a really big hug, more than usual," she said. He told her he wanted to be this happy the rest of his life. He gave her an anniversary gift, a ring, and left for the farm.

She spent the morning making enchiladas for lunch. Enchiladas were his favorite meal. She set the table, and then stepped outside to get some air and wait for her husband. The dairy was only a few minutes away. It was cold, she remembered, and gray.

She looked to the sky.

In the distance, she saw a Medi-Flight helicopter.

It swept over Gustine, population 5,000; over Gustine High School, where a fine brown dust coats the bleachers at the football field; past the Pusateri Nut Company and the Manuel M. Lopes American Legion Hall, where men in white straw cowboy hats, pressed shirts and big gleaming belt buckles gather at the front door for wedding parties; past the Gustine Club, a dim bar in the center of town where Billie Jean Rocha serves up Portuguese beans, and the regulars play dice on a battered bar.

On the outskirts of town, the helicopter began its descent, passing over trailer homes and tiny bungalows where farmhands live, and over new developments for the commuters pouring over the coastal range from San Francisco, exurbia encroaching on the Old West.

It landed at the Aguiar-Faria dairy, established a half-century ago by the Farias, one of the earliest Portuguese families in Gustine. The first Portuguese arrived from the Azores, rocky islands off the Iberian Peninsula, and worked as farmhands for Dutch dairy producers. Over time, they pieced together their own herds, and then built their own dairies, 20 acres at a time. Families who once worked for the Dutch now employ mostly migrant workers from Mexico, and their farms cover hundreds of acres, with thousands of cows milling under long metal sheds. Some have automated milking pens and cows tagged with computer chips.

What has not changed is the problem of how to handle the huge quantities of manure and urine produced by large dairy operations. At the Aguiar-Faria dairy, the waste was pumped into a lagoon roughly the size of a football field. The manure would settle, and the remaining wastewater would be used to flush the cattle pens over and over.

That morning, though, the men were having difficulty draining the lagoon. They suspected a problem with a pump in a sump hole next to the lagoon. Perhaps it was clogged. A worker named Juan Caballero suggested climbing down inside to see. Ralph Nunes, the herdsman in charge of dairy operations, agreed but told him to take a rope and two more men in case of trouble.

The sump hole, a concrete shaft about four feet wide, was more than 30 feet deep. There was no ladder, just some bracing here and there. At the bottom was a stinking stew of manure, urine, afterbirth and other farm detritus.

Enrique Araisa, 29, clambered down first.

He came up after a few minutes and said he could not see anything wrong.

José Alatorre went down to take a look too. He complained that he was not getting enough air. Then he pitched head first into the dark green liquid.

Juan Caballero threw the rope down. He told investigators he could hear splashing and thrashing. He felt the rope tighten. Mr. Araisa scrambled back down to help his friend. But then he, too, collapsed and fell.

There was more thrashing, then nothing.

According to the autopsy reports, hydrogen sulfide and other gases from the waste most likely overcame both men, causing them to fall and drown. They were both long dead by the time the helicopter landed.

Fifteen minutes later, the phone rang at Angelica Alatorre's apartment.

Fate vs. Accountability

Gustine mourned in the traditional way.

Patrick Faria visited the families and paid his condolences.

"He told me he was so sorry," Angelica Alatorre recalled.

He offered to pay for the funerals, including the costs of shipping the bodies back to Mexico. A memorial Mass was held for the two men at Our Lady of Miracles, and then life pushed on.

On a recent night, Pat Faria could be found at the Stevinson Bar and Grill, buying dinner and drinks for a dozen or so friends who had spent the day helping him brand and castrate 150 cattle. It was a festive, relaxed, close-knit group.

"You try to find a bad word about Pat Faria," his friend Tony Xavier said. "Try to find a person that he hasn't done something for."

Mr. Faria is a big man with a bushy head of hair. He sat quietly, his dirt-stained shirt unbuttoned, a great hairy belly poking out unceremoniously. On a small stage, a band called the Neon Knights was setting up.

Mr. Faria, 52, apologized that he could not say much because of the charges against him, but he seemed eager to explain himself. He told of a childhood spent waking at 3 a.m. each day to milk cows. ("You work. Then you go to school. And then you work again.") And he spoke of a deep and abiding ethic at once communal and fiercely independent. When someone needs your help, you give it, he said. If you promise to do something, you do it.

"Your blood," he said, "runs in the veins that your parents give you."

Mr. Xavier and his wife, Diana, jumped into the conversation. Mr. Xavier, lean and handsome, "starts colts" — settles them enough so they can be ridden. Mrs. Xavier, blond and striking, is a "cutter" — expert at maneuvering cattle with her horse. Both said that they accepted without complaint the possibility that they could be bucked off at any time, or kicked in the head. Death was that close.

"It's just life," Mr. Xavier said.

Dairy farmers are no different. "This is a hazardous job," said Mr. Xavier, who has worked on the Faria

dairy. "Nobody told them, 'Stick them down a hole. They're going to die.' What those guys did, I've done 10 times. If I had been there that day, I'd have gone down in that hole."

A few years ago, Mr. Xavier's father was killed on another Gustine dairy farm, crushed under a bale of hay. "It was a freak stupid accident," he said. "It's just one of these things. It's like being in the Twin Towers the day those planes hit. Hey, it was his day. That's just how life is."

When Pat Faria spoke of the deaths on his dairy farm, he used similar words.

"This was just one of those bad deals," he said, his voice low and gravelly. "It's a bad deal, any way you look."

The Politics of Prosecution

Roy Hubert and the Circuit Prosecutor Project cannot go forward with a case without the permission of the local district attorney, who is an elected official. The question, then, was whether they could get the go-ahead from Gordon Spencer, a popular and moderate Republican in his fifth term as the district attorney of Merced County, which includes Gustine.

"There's absolutely no way that you keep politics out of these situations," Gale Filter explained.

Mr. Spencer was hardly blind to the political sensitivities of prosecuting a popular dairy farmer from Gustine, especially in a county where dairy farmers as a group exert such influence. During his 27 years as a prosecutor in Merced County, he could recall just one case where an employer had been prosecuted for safety violations that resulted in a worker's death, and that involved a collapsed construction trench, not the county's leading industry.

Still, Mr. Spencer was also past president of the California District Attorneys Association, and he had strongly supported the Circuit Prosecutor Project. As it is, he said in an interview, his 21 prosecutors can barely keep up with 4,300 felony cases each year, and none possess the specialized knowledge needed for complex environmental or workplace safety cases.

"We knew there was kind of a vacuum," he said.

As for the Faria case, he added, choosing his words with care: "I recognize the value of this industry and the importance of it in our community. But it just seemed like there were facts here that made the prosecution warranted."

As if to underscore the urgency of the safety situation, in August 2002 another man died at another Gustine dairy farm under similar circumstances. He was overcome by hydrogen sulfide and drowned while working in a sump pit of a manure lagoon. And there had been other such deaths, in California and in other dairy states, like Michigan, where five dairy workers died in one manure pit in 1989. As Roy Hubert saw it, it was high time that the dairy industry stopped using "fate" as a way of avoiding a problem.

Last January, he presented the Faria case to a Merced County grand jury.

"If you know anything about the agricultural industry, it's that, particularly on dairy operations, cattle manure produces certain lethal gases," he said in his opening statement, according to a transcript. "It produces ammonia. It produces hydrogen sulfide. It produces methane, among other gases. And when

you put those gases inside a confined space, it becomes particularly lethal."

California's safety laws, he told the 18 jurors, require employers to take several precautions before allowing workers to enter a confined space like a deep and narrow sump hole with no easy way in or out.

"In order for anyone to even think about going into a confined space," he said, "they need special training and equipment."

What is more, Mr. Hubert said, he had evidence that Pat Faria knew all about those dangers and safety laws. For one thing, he had been taught them as part of his volunteer-firefighter training. Mr. Hubert subpoenaed the man who had trained Mr. Faria in "Confined Space Awareness" in a four-hour class for firefighters in 1999.

The trainer explained how he had taught Mr. Faria the dangers of gases in confined spaces, including how hydrogen sulfide is common in spaces where there is wastewater. The trainer said he also taught Mr. Faria about how no one should enter a confined space without an air test, safety harnesses and respirators.

Mr. Faria had been tested on the class material. In fact, his answer sheet was given to the grand jurors.

He passed, the trainer said.

There was more. Pat Faria's farm had a written safety plan, just as California law required.

"Our safety and health program," the plan stated, "will include all necessary mechanical and physical safeguards, inspections to find and eliminate unsafe working conditions or practices, training for all employees in good safety and health practices, use of personal protective equipment wherever necessary."

The plan named Pat Faria as the farm's "safety coordinator" and made him responsible for training and equipping his employees against safety hazards. It also contained an explicit warning about manure pits: "CAUTION! Beware of dangerous gases and oxygen depletion within these structures," it stated, specifically describing the dangers of hydrogen sulfide.

This, too, went to the grand jury.

In his closing argument, Gale Filter ticked off all the safety procedures that had been ignored. No training. No air testing. No harnesses. Not even a ladder.

"Probably the thing that's most disturbing in all of this," he said, "it's like the MasterCard commercial — \$10 for a sign; \$60 for a harness; couple hundred dollars for a monitoring device. Two men's lives: priceless. It could have all been avoided for a minimum expenditure of money in a business that at times was estimated to be bringing in \$85,000 a month."

For José Alatorre's widow, the indictment was a balm after months of hurt, a promise of sorts that her husband's death would at least stand as a warning to other dairy farmers.

"What were they thinking?" she asked. "They didn't give anything at all to protect them — nothing."

She saw it, too, as a way of evening accounts.

"They say that Faria is going to lose everything. But it is money. How about me? I lost my husband. He lost money. I lost my husband. How do you think I feel when Guillermo asks me about his dad, 'Where's Daddy at?' When I say he's not here, he asks can we go to him. I just go into my bedroom, and he watches cartoons with my brother and I go into my bedroom and cry, alone."

Enrique Araisa's mother dissolved into heaving sobs when asked about the son who had died helping José Alatorre. But his father, Aberlardo, eyes downcast under the brim of his Oakland Raiders cap, hands worn from picking tomatoes, spoke for them both.

"It still doesn't bring my son back," he said.

Resentment, Then Results

It was not long before Gordon Spencer heard rumblings from powerful dairymen, including some who have been among his political supporters. "They just say, 'Well, what's going on with that case?'"

Mr. Spencer said he sought to reassure them that "their D.A. hasn't lost their mind," that this was one of the rare cases that merited prosecution. "We've had phone conversations and we've had meetings to explain the facts," he said. "I don't know that we sold our cases in the end."

Roy Hubert has felt some of the backlash, too. He attends a synagogue in Modesto, 30 miles from Gustine. More than one member, he said, has approached him at services. One asked, "What is wrong with you?" Another, he said, asked why he was "picking on dairy people."

Mr. Spencer had tried to defuse the backlash with some quiet diplomacy. Before the charges were announced, he called Michael L. H. Marsh, chief executive of Western United Dairymen, the largest dairy association in the state.

"I was really shocked," Mr. Marsh said. "I indicated to him that we were of course disappointed because it just sort of compounds the tragedy — wham, here's another shoe to drop."

The association convened an emergency board meeting, consulted with lawyers and called other dairy trade groups. "We hadn't heard of anything like this ever in the United States," he said. "The precedent that it would set — it's just so extraordinary."

One evening, with the sun setting over the coastal range, an elderly woman emerged from a ranch house wearing a housecoat and pink slippers. It was Madeline Faria, the mother of Pat Faria and the matriarch of the Faria clan. Her house overlooks the lagoon and the sump hole.

"You can't get it out of your mind," she said, squinting into the sun. "I can't even look out there without thinking about those two men drowning."

Nor can she get her mind around the image of her son in a courtroom, facing a possible prison sentence. Her son, she said, is a good and conscientious man. He worked alongside many of his employees, she pointed out. Some of their families lived on their farm. Yet now the Aguiar-Faria dairy has ceased operations, its employees let go and the land leased to another dairy operator.

"I really don't know why he wants to go after us, of all people," Ms. Faria said, referring to Roy Hubert.

But one of her other sons, clearly furious at the attention the indictments have brought to their family, shared one theory.

"He's trying to make a name for himself," he said contemptuously.

It is a widely held sentiment. At the Gustine Club, it is near impossible to find any printable comments about Roy Hubert and his crusade.

But on closer inspection, there are clear indications that something important and rare has occurred here. For all the resentment stirred by the prosecutor with the bow tie, the old moral lines have begun to shift.

On dairy farms across the valley floor, there has been a broad reassessment of safety. Farmers are hiring safety consultants, putting their workers through safety training, installing first aid kits and posting signs.

"It makes you concerned because you think, 'Heck, he's a dairyman and I'm a dairyman, too,'" said Mark Ahlem, a young farmer in the valley.

Before the indictment, Mr. Ahlem said, "We were taking some baby steps toward setting up some regular safety meetings."

Since the indictment, though, he has hired a part-time safety director, insisted on frequent safety meetings and established a disciplinary system for safety violations.

Another dairy farmer, Frank Faria — no relation to Pat Faria — said the indictment was an "unfortunate wake-up call." He has since hired a safety consultant for his dairy operation, and feels much better for it.

The changes are not entirely the doing of this one indictment. Cal OSHA levied \$166,650 in civil fines against the Faria dairy for the two deaths, a substantial penalty for almost any farmer. The agency also conducted a sweep of the valley's dairy industry, inspecting more than 160 farms, levying nearly \$500,000 in fines and offering free consultations. The Western United Dairymen held several crowded training sessions about the dangers of confined space.

But in conversations with farmers here, it is clear that the prosecution made the deepest impression. When the Cal OSHA inspectors swept into the valley, faxes and phone calls raised the alarm from farm to farm. Some of the farmers "were kind of ornery," said William J. Krycia, the regional Cal OSHA manager. An indictment was not so easy to sidestep.

Perhaps most telling of all, even the Farias and their friends acknowledge that dairy farms have become more conscious of safety as a result of this case.

"Nobody will go down there again in this valley without a spacesuit on," Tony Xavier said of the sump holes.

Mr. Hubert said there was no question that the prosecution had a "profound effect" on Gustine and the rest of the dairy industry in the Central Valley.

"The important thing is the message — that when the rules are broken in an egregious manner, we're

gonna come calling, 'Hello, call your bondsman,' " he said. "This is the deterrent effect."

A Widow Apart

Angelica Alatorre cannot bring herself to wear the ring her husband gave her that anniversary morning. Every so often, though, she drives out to the Faria dairy. She walks across the flat, hard fields to the sump hole by the manure lagoon. A wooden cross stands there now, etched with his name.

She likes to leave sunflowers.

Ms. Alatorre says she feels increasingly isolated in Gustine. The Farias are a popular and important family here. She worries that she is somehow being blamed for the layoffs that have hit the dairy since her husband's death.

"People who know Pat Faria, I think they're mad at me," she said.

She has followed the criminal proceedings, but only from a distance and with great ambivalence. The trial date is in the spring, and she hopes this prosecution scares other dairy farmers enough that no one else has to die the way her husband died. And sh

Robin Stein contributed additional reporting for this article.