#1 — Brief overview

All About OSHA

U.S. Department of Labor
Occupational Safety and Health Administration

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- inspection different than investigation → after accident
- OSHA then investigates after

Workplace Inspection

Authority to Inspect. To enforce its standards, OSHA is authorized under the Act to conduct workplace inspections.

Every establishment covered by the Act is subject to inspection by OSHA compliance safety and health officers, who are chosen for their knowledge and experience in the occupational safety and health field. Compliance officers are vigorously trained in OSHA standards and in recognition of safety and health hazards. Similarly, states with their own occupational safety and health programs conduct inspections using qualified compliance safety and health officers.

Under the Act, "upon presenting appropriate credentials to the owner, operator or agent in charge," an OSHA compliance officer is authorized to:

- "Enter without delay and at reasonable times any factory, plant, establishment, construction site or other areas, workplace, or environment where work is performed by an employee of an employer; and to
- "Inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and to question privately any such employer, owner, operator, agent or employee."

Inspections are conducted without advance notice. In fact, alerting an employer in advance of an OSHA inspection can bring a criminal fine of up to $1,000 and/or a six-month jail term.

There are, however, special circumstances under which OSHA may indeed give notice to the employer, but even then, such a notice will be less than 24 hours. These special circumstances include:

- Imminent danger situations which require correction as soon as possible;
- Inspections that must take place after regular business hours, or that require special preparation;
- Cases where notice is required to assure that the employer and employee representative or other personnel will be present; and or
- Situations in which the OSHA area director determines that advance notice would produce a more thorough or effective inspection.

Employers receiving advance notice of an inspection must inform their employees' representative or arrange for OSHA to do so.

If an employer refuses to admit an OSHA compliance officer, or if an employer attempts to interfere with the inspection, the Act permits appropriate legal action.

Based on a 1978 Supreme Court ruling (Marshall v. Barlow's, Inc.), OSHA may not conduct warrantless inspections without an employer's consent. It may, however, inspect after acquiring a judicially authorized search warrant based upon administrative probable cause or upon evidence of a violation.

Inspection Priorities

Obviously, not all 6 million workplaces covered by the Act can be inspected immediately. The worst situations need attention first. Therefore, OSHA has established a system of inspection priorities.

Imminent Danger

Imminent danger situations are given top priority. An imminent danger is any condition where there is reasonable certainty that a danger exists that can be expected to cause death or serious physical harm immediately, or before the danger can be eliminated through normal enforcement procedures.

Serious physical harm is any type of harm that could cause permanent or prolonged damage to the body or which, while not damaging the body on a prolonged basis, could cause such temporary disability as to require in-patient hospital treatment. OSHA considers that "permanent or prolonged damage" has occurred when, for example, a part of the body is crushed or severed; an arm, leg, or finger is amputated; or sight in one or both eyes is lost. This kind of damage also includes that which renders a part of the body either functionally useless or substantially reduced in efficiency on or off the job. An example: bones in a limb shattered so severely that mobility or dexterity will be permanently reduced.

Temporary disability requiring in-patient hospital treatment includes injuries such as simple fractures, concussions, burns, or wounds involving substantial loss of blood and requiring extensive suturing or other healing aids.

Injuries or illnesses that are difficult to observe are classified as serious if they inhibit a person in performing normal functions, cause reduction in physical or mental efficiency or shorten life.

Health hazards may constitute imminent danger situations when they present a serious and immediate threat to life or health.

For a health hazard to be considered an imminent danger, there must be a reasonable expectation (1) that toxic substances such as dangerous fumes, dusts or gases are present, and (2) that exposure to them will cause immediate and irreversible harm to such a degree as to shorten life or cause reduction in physical or mental efficiency, even though the resulting harm is not immediately apparent.

Employees should inform the supervisor or employer immediately if they detect or even suspect an imminent danger situation in the workplace. If the employer takes no action to eliminate the danger, an employee or the authorized employee representative may notify the nearest OSHA office and request an inspection. The request should identify the workplace location, detail the hazard or condition and include the employee's name, address and telephone number. Although the employer has the right to see a copy of the complaint if an inspection results, the name of the employee will be withheld if the employee so requests.

The OSHA area director reviews the information and immediately determines whether there is a reasonable basis for the allegation. If it is decided the case has merit, the area director will assign a compliance officer to conduct an immediate inspection of the workplace.

Upon inspection, if an imminent danger situation is found, the compliance officer will ask the employer to voluntarily abate the hazard and to remove endangered employees from exposure. Should the employer fail to do this, OSHA, through the regional solicitor, may apply to the nearest Federal District Court for appropriate legal action to correct the situation. Before the OSHA inspector leaves the workplace, he or she will advise all affected employees of the hazard and post an imminent danger notice. Such action can produce a temporary restraining order (immediate shutdown) of the operation or section of the workplace where the imminent danger exists. Should OSHA "arbitrarily or capriciously" decline to bring court action, the affected employees may sue the Secretary of Labor to compel the Secretary to do so.

Walking off the job because of potentially unsafe workplace conditions is not ordinarily an employee right. To do so may result in disciplinary action by the employer. However, an employee does have the right to refuse (in good faith) to be exposed to an imminent danger. OSHA rules protect employees from discrimination if:

- Where possible, he or she asked the employer to eliminate the danger, and the employer failed to do so; and
- The danger is so imminent that there is not sufficient time to have the danger eliminated through normal enforcement procedures; and
- The danger facing the employee is so grave that "a reasonable person" in the same situation would conclude there is a real danger of death or serious physical harm; and
- The employee has no reasonable alternative to refusing to work under these conditions (e.g., asking for reassignment to another area).

Catastrophes and Fatal Accidents

Second priority is given to investigation of fatalities and catastrophies resulting in hospitalization of five or more employees. Such situations must be reported to OSHA by the employer within 48 hours. Investigations are made to determine if OSHA standards were violated and to avoid recurrence of similar accidents.

Employee Complaints

Third priority is given to employee complaints of alleged violation of standards or of unsafe or unhealthful working conditions.

The Act gives each employee the right to request an OSHA inspection when the employee feels he or she is in imminent danger from a hazard or when he or she feels that there is a violation of an OSHA standard that threatens physical harm. OSHA will maintain confidentiality if requested, will inform the employee of any action it takes regarding the complaint and, if requested, will hold an informal review of any decision not to inspect. Just as in situations of imminent danger, the employee's name will be withheld from the employer, if the employee so requests.

Programmed High-Hazard Inspections

Next in priority are programmed, or planned, inspections aimed at specific high-hazard industries, occupations or health substances. Industries are selected for inspection on the basis of factors such as the death, injury and illness incidence rates, and employee exposure to toxic substances. Special emphasis may be regional or national in scope, depending on the distribution of the workplaces involved. States with their own occupational safety and health programs may use somewhat different systems to identify high-hazard industries for inspection.

Followup Inspections

A followup inspection determines whether previously cited violations have been corrected. If an employer has failed to abate a violation, the compliance officer informs the employer that he/she is subject to "Notification of Failure to Abate" alleged violations and may face additional proposed daily penalties while such failure or violation continues.

Inspection Process

Prior to inspection, the compliance officer becomes familiar with as many relevant facts as possible about the workplace, taking into account such

support base. When the community gets this information, they will see what is getting into the air and water. This data is quite impressive. There are computer programs that almost instantly take the EPA raw data and break it down into meaningful categories by states. Citizen Action Organization provides this service. This information creates more of a community health base for the workers inside the factory because it emphasizes that there are some occupational health problems that are seamless webs. They are occupational health problems but are also basically community and environmental problems.

The key behind all of these recommendations is not just to give you humanitarian impulses to generate a self interest for safety and health among workers. It imposes powers and tools to achieve a safer workplace and a more healthful workplace. Each of these recommendations also seeks to develop vested interest behind these goals. When people complain that tort reform issues and plaintiffs' trial lawyers are just vested interests, my answer is that I am glad that there is a vested interest behind wrongfully injured and sick people in this country. I doubt whether there would have been any cases brought that would have broken ground in the common law if there were not a vested interest, namely the contingent fee lawyers. So, the design of any social control system that has a high theoretical consensus among the population behind it should also include strategies to develop vested interests behind worker health and safety. Just as the contorted, and we hope not prolonged, existence of a vested interest in not investing in safety in the workplace that has been too long with us historically. I want to suggest that you ask yourselves constantly, "How do we get the electric connection between knowledge and action moving faster?"

FOREWARD

OCCUPATIONAL SAFETY AND HEALTH: POLICY OPTIONS AND POLITICAL REALITY

Sidney A. Shapiro[*]

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#2
Brief overview

Many workplaces are dangerous places. The Occupational Safety and Health Administration (OSHA) estimates that each day an average of seventeen persons are killed at work and another 16,000 persons are injured.[1] The estimated annual cost of occupational injuries and illnesses is in excess of $80 billion.[2] This Symposium considers regulations and other incentives for employers to protect employees in order to understand why workers[3] are not better protected.

Workers remain unprotected from workplace hazards for two reasons. First, the regulations requiring employers to protect workers are subject to significant constraints that weaken their impact.[4] Second, although these problems could be addressed by legislative reforms, workers lack the political influence to push effective solutions through Congress and state legislatures.[5] In other words, the lack of worker protection is due to both policy and political failures. Existing policies to protect workers are not strong enough and the political environment is not conducive to addressing the policy problems.

The goal of this Foreward is to review these policy failures and analyze the political hurdles to reform. Part I of this Foreward outlines the framework of incentives used to encourage employers to ensure worker health and safety and the policy flaws with this structure. The section also references several of the articles in this issue that discuss aspects of the framework. Part II of this Foreward examines why the current political environment is hostile to legislation in favor of workers, and Part III considers whether workers can change this environment for their own benefit.

This Foreward concludes that in order for workers to obtain significant reforms, they must redefine occupational safety and health in a manner that interests persons who are not directly at risk. Workers can broaden support for their cause if they appeal to the self-interest and altruism of other citizens. However, without strong presidential support, this strategy is

1. Dear Pledges 'Revitalized OSHA,' Greater Use of Egregious Case Penalties, 23 O.S.H. Rep. (BNA) No. 25, at 763 (Nov. 17, 1993) [hereinafter *Revitalized OSHA*].

2. *Id.*

3. For purpose of this Foreward, "workers" refers to persons employed in jobs that present safety and health risks.

4. *See* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 4 (1989) (noting the substantive, managerial, legal, and political constraints that adversely affect OSHA's productivity).

5. THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 3 (1993) (noting that workers lack sufficient political power to protect themselves).

unlikely to be successful in Congress.[6]

I. THE POLICY FRAMEWORK

Employers take steps to reduce workers' workplace accidents and illnesses because of economic and humanitarian incentives and in response to regulatory mandates,[7] but workplaces remain significantly dangerous despite these influences.[8] This section describes the current level of workplace accidents and illnesses, the constraints that limit employer incentives and regulatory requirements, and what reforms might increase occupational safety and health.

A. *Dangerous Workplaces*

An examination of the available evidence on workplace accidents and illnesses leads to three conclusions. First, there is no authoritative measurement of accidents and illnesses[9] and estimates vary by a considerable magnitude.[10] Second, the available data typically understate the number of occupational accidents and, to a greater degree, the number of occupational illnesses.[11] Finally, despite this consistent understatement of the problem, the evidence indicates that many workers face substantial risks at work.[12]

As noted earlier, OSHA estimates that an average of seventeen workers die each day.[13] This number is consistent with the estimate by Professor Spieler, in her article in this issue, that the number of occupational fatalities in 1989 ranged from 3600 to 10,400 persons,[14] or between ten and

6. *See* FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 241 (1993) (noting that the President can play a key role in pushing legislation through Congress).

7. Jordan H. Leibman & Terry M. Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS L.J. 287, 362 (1985) (noting that regulatory systems such as workers' compensation programs seek to balance both economic and humanitarian objectives).

8. Refer to notes 13-16 *infra* and accompanying text (summarizing estimates of workplace injuries and occupationally-related deaths).

9. *See* MCGARITY & SHAPIRO, *supra* note 5, at 5 (stating that reliable sources of data on occupational health and safety are difficult to locate).

10. *See id.* at 4 (giving, for example, the range of estimates from two million to eleven million nonfatal injuries suffered by American workers per year).

11. *Id.* at 6.

12. *See id.* at 4-5 (noting statistical evidence indicating the dangerousness of the American workplace).

13. *Revitalized OSHA*, *supra* note 1, at 763.

14. Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 114 (1994).

twenty-eight deaths each day. Estimates of injuries range from two to eleven million per year.[15] Assuming a total of only 2.5 million injuries per year, this conservative estimate translates into about 10,000 serious injuries each working day.[16]

A 1972 government report estimated that 390,000 new cases of disabling occupational disease occur each year, with as many as 100,000 fatalities a year.[17] Two recent studies estimate that the number of occupational disease-related deaths ranges from 50,000 to 95,000 deaths annually.[18] Other studies place the number of disease-related fatalities between 124,000 and 210,000 annually.[19] To put these estimates in perspective, occupational disease accounts for a larger percentage of cancer deaths than environmental pollution[20] and it kills more persons each year than such other preventable causes of death as motor vehicle accidents, diabetes, and homicides.[21]

These studies and comparisons indicate that many workplaces are unsafe. The following section summarizes the policy failures responsible for this unfortunate situation.

B. *The Policy Failures*

Employers take steps to reduce health risks and to increase workplace safety in response to economic, humanitarian,

15. McGARITY & SHAPIRO, *supra* note 5, at 4.
16. *Id.*
17. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH 111 (1972); *reprinted* in H.R. DOC. NO. 303, 92d Cong., 2d Sess. 111 (1972).
18. *See* Philip J. Landrigan & Dean B. Baker, *The Recognition and Control of Occupational Disease*, 266 JAMA 676, 676 (1991) (estimating that occupational diseases account for 50,000 to 70,000 deaths annually); National Safe Workplace Institute, *Beyond Neglect: The Problem of Occupational Disease in the U.S.—Labor Day '90 Report* 7 (1990) [hereinafter *Beyond Neglect*] (estimating cases of occupational disease in 1987 at 47,877 to 95,479 persons).
19. *See* PETER S. BARTH & H. ALLAN HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES 19 (1980) (citing John M. Peters, *Occupational Health: Working Yourself Sick*, in THE CHALLENGES OF COMMUNITY MEDICINE 262 (Robert L. Kane ed., 1974)) (reporting the conclusion of a researcher who had surveyed numerous studies and estimates on deaths due to occupationally related disease).
20. *See* Richard Doll & Richard Peto, *The Causes of Cancer: Quantitative Estimates of Avoidable Risks of Cancer in the United States Today*, 66 J. NAT'L CANCER INST. 1191, 1256-57 (1981) (estimating that occupational exposures account for approximately four percent of all cancer deaths, while environmental pollution accounts for approximately two percent of such deaths). Researchers have calculated the incidence of occupational disease-related cancers to be somewhere between 1 and 15% of all cancers, while government studies have found that the incidence is between 20 and 38%. *See* McGARITY & SHAPIRO, *supra* note 5, at 8.
21. *See Beyond Neglect*, *supra* note 18, at 12 (drawing this conclusion from estimates based on 1987 data indicating about 70,000 fatalities due to occupational disease).

and regulatory incentives.[22] Because of various real-world constraints, however, the impact of these influences is less than what economic and regulatory theory would predict.

1. Economic Incentives. The operation of labor markets creates economic incentives for employers to reduce employees' workplace accidents and illnesses.[23] Economic theory predicts that workers will bargain for wage premiums as compensation for exposure to workplace hazards and that employers will abate workplace risks to the extent it is less expensive than paying higher compensation.[24] In addition, employers have an incentive to protect existing workers whenever the cost of doing so is less than hiring and training their replacements.[25]

However, several factors limit the impact of these economic incentives in labor markets. Workers are not paid adequate wage premiums for more hazardous employment because they lack bargaining power[26] or are ignorant of workplace risks.[27] Moreover, many workers in especially dangerous occupations are easily replaced.[28]

Regulation in the form of workers' compensation and tort law creates similar incentives.[29] Employers have an incentive to abate occupational hazards to the extent that preventative action is less expensive than paying workers' compensation claims.[30] Professor Spieler's article in this issue discusses this

22. *See* Leibman & Dworkin, *supra* note 7, at 362 (noting that regulatory schemes such as workmen's compensation systems balance employers economic and humanitarian objectives).
23. *See* McGARITY & SHAPIRO, *supra* note 5, at 268 (noting that in an efficient labor market, employers will take steps to minimize hazards to the extent that prevention costs less than compensation).
24. *See id.* at 18.
25. *See* Elinor P. Schroeder & Sidney A. Shapiro, *Responses To Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1237 (1984) (noting that employers will take preventative actions when they cost less than the consequences of not taking such actions).
26. *See id.* at 1241.
27. *See id.* (citing W. KIP VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 41 (1983)) (suggesting that workers also fail to demand wage premiums because they lack the information about occupational risk necessary to take a bargaining position).
28. *See* JAMES C. ROBINSON, TOIL AND TOXICS: WORKPLACE STRUGGLES AND POLITICAL STRATEGIES FOR OCCUPATIONAL HEALTH 75-76 (1991) (noting employers' tendency to replace highly skilled workers in hazardous work environments with less skilled workers at lower wages and subject to increased supervision and control).
29. *See id.* at 1245, 1250 (noting that, under workers' compensation and tort law schemes, the costs of work-related injuries and illnesses of workers become costs for the employer).
30. *Id.* at 1245.

form of regulation.[31] However, as in the case of labor market incentives, real world constraints limit the effectiveness of these economic incentives in protecting workers. As Professor Spieler demonstrates, employers do not respond to increased workers' compensation costs by investing in accident and illness prevention because alternative responses are less expensive.[32] These responses include purchasing insurance, discouraging workers from seeking compensation, and lobbying legislatures to reduce eligibility requirements and the level of compensation.[33] Tort remedies do not make up for the inadequacies of workers compensation.[34] Such remedies are available only when the negligence of a third party other than the employer or the worker caused a worker's injury.[35]

2. Humanitarian Incentives. The previous section explained that economic theory assumes employers will reduce workplace hazards only if the cost of the investment is less than the consequences of not making the investment.[36] This dour picture of employer behavior fails to recognize that employers also make safety and health improvements out of humanitarian concerns.[37] However, this incentive is constrained in two important ways. First, not all employers are conscientious. The fatal result of a 1991 fire at the Imperial Food Products plant in Hamlet, North Carolina demonstrates this unfortunate conclusion. The plant owners had locked the fire doors to prevent theft and when a fire broke out, twenty-five

31. *See* Spieler, *supra* note 14, at Part III.
32. *Id.* at part III.D.
33. *Id.* at Part III.
34. Schroeder & Shapiro, *supra* note 25, at 1251. A key reason why tort law fails to supplement state workers' compensation schemes in a comprehensive way is that workers' compensation remedies are generally a worker's exclusive option. *See* Mary Becker, *Reproductive Hazards After* Johnson Controls, 31 HOUS. L. REV. 43, 91 (1994) (noting that the exclusive remedy provisions of state workers' compensation schemes preempt tort causes of action).
35. *See* Schroeder & Shapiro, *supra* note 25, at 1251 (stating that injured workers must find a third party with liability, such as a supplier or raw materials manufacturer, for pursuit in a tort action); ROBINSON, *supra* note 28, at 1251 (taking note that the exclusive remedy provisions of workers' compensation schemes reduces the effectiveness of tort liability as an incentive for employers to provide safe workplaces). Incidentally, many state workers' compensation schemes give an employer a right of subrogation in a worker's third party suit, so that it is reimbursed for the amount of workers' compensation benefits paid to the worker. Schroeder & Shapiro, *supra* note 25, at 1252. The result is even less of an incentive for an employer to reduce hazards present in the workplace. *Id.*
36. *See also* Spieler, *supra* note 14, at 181-85.
37. *See also* Becker, *supra* note 34, at 57-63 (discussing how employers' humanitarian concerns may sometimes be misdirected and result in policies that do more harm than good).

workers were killed and fifty-four more were injured.[38] Second, as Ralph Nader points out in his address published in this issue,[39] the humanitarian impulse is weakened because corporate decisionmakers are remote from the persons affected by their decisions.[40] It is far easier to trade dollars for lives when employees are perceived as statistics and not as real people.[41]

3. Regulatory Incentives. OSHA regulation provides the final incentive for employers to protect workers' safety. Congress enacted the Occupational Safety and Health Act ("OSH Act") in 1970[42] because of the inadequacy of economic incentives to encourage employers to protect workers and because, unlike economic incentives, health and safety regulation is preventative.[43] To use Professor Spieler's apt phrase, economic incentives depend on a "feedback loop."[44] Employers will not take preventative actions until and unless workers obtain wage premiums or compensation.[45] On the other hand, OSHA regulation has the advantage of causing employers to take precautions before employee accidents or illnesses occur. Professor McGarity's article in this issue examines the regulatory approach to workplace health and safety.[46]

A thick web of administrative, legal, and political constraints limit OSHA regulation. Professor McGarity and I discussed the nature and impact of these constraints in a

38. *See Family of Worker Killed in Imperial Fire Sues Company, Manager for Gross Negligence*, 21 O.S.H. Rep. (BNA) No. 16, at 429 (Sept. 18, 1991).
39. Ralph Nader, Address, 31 HOUS. L. REV. 1 (1994).
40. *See id.* at 4-5.
41. *See generally* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17-28 (1978) (noting that employer trade-offs between the cost of hazard prevention and worker safety are easier when the employee victims of such decisions are not identifiable).
42. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (1988 & Supp. IV 1992)).
43. *See* MCGARITY & SHAPIRO, *supra* note 5, at 34 (noting that occupational safety had become a national problem when finally addressed by legislative action); Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale For Technology-Based Regulation*, 1991 DUKE L.J. 729, 739-40 (1991) [hereinafter *Rationale for Regulation*] (noting that economic incentives sometimes result in employers merely compensating victims after death or injury rather than spending money to avoid risks).
44. *See* Spieler, *supra* note 14, at 127.
45. *See id.* at 179-85.
46. *See generally* Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 HOUS. L. REV. 99 (1994).

previous publication.[47] We concluded that in light of the significant constraints OSHA faces, the surprise is not that OSHA has produced so little regulation but that it has produced any regulation at all.[48] Moreover, as Professor Becker's analysis in this issue of the *Johnson Controls* case indicates,[49] additional complications arise when companies attempt to meet regulatory obligations by discriminating against women.[50]

C. Reform Options

The previous policy framework indicates the opportunities for reform. If workers are to be better protected, there must be improved economic, humanitarian, and regulatory incentives for employers. As Mr. Nader and Professors McGarity and Spieler emphasize, reformers must identify the factors that have constrained the impact of job safety incentives and remove them.[51] The reforms most likely to accomplish this goal, however, are also the most drastic changes from the status quo.[52]

Workers would be in a better position to demand wage premiums if they had better information and more bargaining power and better information concerning the risks that they face.[53] Even if workers gain more information, however, their bargaining power will remain low as long as only twelve percent of the private workforce is unionized[54] and economic recovery is slow in coming. Rather than depending on the "feedback loop" of wage premiums to encourage employers to provide safe workplaces, a better alternative is to empower workers to protect themselves directly. Professor McGarity, for example, endorses the use of labor-management safety committees that would have the power to shut down operations that

47. *See* Shapiro & McGarity, *supra* note 4, at 4-14 (noting that substantive, managerial, legal, and political constraints have delayed OSHA's ability to fulfill its original goal of making every workplace safe).
48. *Id.* at 3.
49. Becker, *supra* note 34, at 63-71 (analyzing the decision and import of *International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991)).
50. *See id.* at 88-96.
51. *See generally* McGarity, *supra* note 46; Nader, *supra* note 39; Spieler, *supra* note 14.
52. Refer to notes 13-16 *supra* and accompanying text for a summary of evidence as to the prevalence of occupationally-related injury, illness, and death suffered by workers.
53. *See* Shroeder & Shapiro, *supra* note 25, at 1241 (concluding that workers currently fail to demand wage premiums for hazardous work because they lack these prerequisites).
54. *Nafta Gotcha*, NEW YORKER, Nov. 22, 1993, at 4, 6.

pose unreasonable health and safety risks.[55]

Workers would also obtain more protection if employers paid a greater share of the costs now borne by workers for accidents and illnesses.[56] Professor Spieler notes that states have rejected reforming workers compensation to take this approach; the states instead are using direct efforts to promote workplace safety, such as safety and health training and consulting programs.[57] She concludes that such programs are unlikely to work and that federal standards for compensation or federalization of workers compensation may be necessary.[58]

On another tack, Professor McGarity proposes three types of reforms concerning OSHA regulation. He advances a "patch and repair" reform of OSHA by delegating additional regulatory authority to the agency.[59] He also proposes other reforms to make it easier for workers to hold OSHA accountable when it fails to carry out its statutory responsibilities.[60] A final set of reforms would empower workers to protect themselves from workplace health and safety risks.[61] Professor McGarity maintains that fundamental changes are necessary to make OSHA effective, such as "burden-shifting" devices to reduce the evidentiary burden on OSHA to justify a regulation.[62]

Mr. Nader also emphasizes the need for fundamental change in the current approaches to workplace health and safety. He endorses ambitious concepts that would empower workers to protect themselves, such as the right to have governmental officials dismissed if they do not do their job.[63] More fundamentally, he predicts that a "major cultural jolt" will be necessary to create a public expectation that workers should be better protected.[64] He proposes several innovative responses, such as requiring top OSHA officials to spend time with workers and punishing employers by requiring them to work at the site of workplace accidents.[65]

The following section considers the potential fate of these and similar reform proposals in the political system. The

55. *See* McGarity, *supra* note 46, at 116.
56. *See* Spieler, *supra* note 14, at 187.
57. *See id.* at part IV.B.
58. *Id.* at 264.
59. *See* McGarity, *supra* note 46, at 111-13.
60. *Id.* at 103-06.
61. *See, e.g.*, *id.* at 113-17.
62. *Id.* at 106-09.
63. *See* Nader, *supra* note 39, at 10.
64. *Id.* at 8; *see id.* at 4 (attributing the current malaise to a "pitiless abstraction" that treats workers as dispensable).
65. *Id.* at 10-12.

problem for workers is that the most helpful proposals are the ones the business community is most likely to oppose.[66] Because employers have greater political influence than workers, the solutions that are the most protective of workers are not likely to be adopted.[67]

II. THE CURRENT POLITICAL ENVIRONMENT

Policy analysts have recommended various solutions to the problems of occupational accidents and disease. Whether Congress or a state legislature[68] will adopt any solution, or even consider it, depends on the political process. The following analysis offers a model that explains the impact of the political process on proposals for workplace health and safety reforms. This section then analyzes the greater political influence of employers than workers and assesses the likelihood of reform in light of this disparity.

A. *The Political Impact*

Congress is unlikely to legislate until an issue is perceived as a problem, for which solutions exist, under circumstances that generate the political will to act on one of those solutions.[69] The convergence of these elements is unpredictable because each is the product of an independent process.[70] The result is more often "organized anarchy" rather than a

66. *See, e.g.*, *AFL-CIO Urges Congress to Give Workers Same Protection as Environment, Wildlife*, 23 O.S.H. Rep. (BNA) No. 10, at 244 (Aug. 4, 1993) [hereinafter *AFL-CIO Urges Congress*] (stating that the current OSHA reform package proposed by the House of Representatives is opposed by business groups such as the National Association of Manufacturers, the Associated Builders and Contractors, and the American Iron and Steel Institute).

67. *See, e.g.*, *Labor Committee Approves OSHA Reform Measure; Construction Bill's Provisions Incorporated*, Daily Lab. Rep. (BNA) No. 181, at A5 (Sept. 17, 1992) [hereinafter *OSHA Reform*] (stating that OSHA reform faced presidential veto from the Bush Administration, which felt that reform would erode the competitiveness of American business).

68. The decisionmaking model discussed in the text does not distinguish between Congress and state legislatures. For the sake of brevity, the text only refers to Congress for the remainder of this Foreward, unless the situation in the states differs.

69. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 92-93 (1990) (postulating a three step process leading to legislation, involving (1) problem recognition, (2) the generation of proposals by policy specialists, and (3) assessment of the current political environment).

70. *See id.* at 93 (finding that the political "stream" or environment *is* an independent factor, responsive neither to the identification of problems or to policies proposed for their solution).

disciplined, rational process of problem solving.[71]

In the context of passing workplace health safety legislation, the first step—recognition of a problem—occurs when Congress elevates a problem to its legislative agenda.[72] This agenda is limited because, like other organizations, time and resource constraints restrict Congress' ability to consider and make decisions.[73] Interest groups, agencies, and other political actors compete to convince Congress to take up problems of interest to them, but Congress is unlikely to put a problem on its agenda absent sufficient political demand for action.[74]

Once Congress decides to act, interest groups and political actors then compete to influence what solutions will be adopted by advocating policies that serve their interests.[75] At this point the policy process and the political process join. Congress' decisions will depend on the relative merits of the proposals and on the political influence of the competing parties.[76] Thus, while it is important for an interest group to have a credible policy, it is also necessary to build political support in favor of that solution.[77] As one commentator on the political process has noted, "Reports to Congress suggesting controversial action, unaccompanied by political momentum, ordinarily move the Congress with all the force of a bulldozer with an

71. *See generally* Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1, 1, 3-4 (1972) (referring to complex yet disorganized decisionmaking systems as "organized anarchies," and dubbing the approach the "garbage can" method of processing and responding to information).

72. *See* KINGDON, *supra* note 69, at 3-4 (defining "agenda" as the subjects or problems to which government officials pay serious attention). Setting the agenda is the first step of public policy making. *Id.*

73. *See id.* at 193-95 (noting that the legislative system has a limited capacity to process agenda items).

74. *See id.* at 208 (noting that national mood and elected politicians are likely to prevail over organized interests in setting agendas).

75. *See id.* at 52 (observing that interest groups employ positive promotion to mobilize support for their solutions as well as blocking initiatives that would reduce their position); *id.* at 53 (noting that even if an interest group succeeds in placing an issue onto the agenda, it may lose control of the debate and enable another group's alternative to be implemented); *see also* BAUMGARTNER & JONES, *supra* note 6, at 29 (stating that policy entrepreneurs want to ensure that once a problem arrives on the national agenda their solutions are adopted to solve it).

76. KINGDON, *supra* note 69, at 151 (noting that surviving proposals include those that are technically feasible and incorporate acceptable values). Once acceptable proposals are elevated to the political agenda, the political stream, composed of the national mood and organized political forces, presses for adoption of a proposal. *Id.* at 170-71.

77. *Id.* at 52 (observing that interest groups gain the attention of government officials by mobilizing support, writing letters, sending delegations, and stimulating allies). One respondent in Kingdon's research concluded that "the louder the squawk, the higher [the issue] gets." *Id.*

empty gas tank."[78]

In summary, an interest group needs political influence in order to convince Congress to take up a problem and to adopt the solution that the group favors. As the following section discusses, the problem for workers is that employers have more political resources and thus more influence.

B. *Political Resources*

An interest group's political influence is a function of its political "resources," or in other words, its capacity to influence individual legislators.[79] A group gains influence if it has access to legislators, sufficient policy expertise to support its policy positions, or the ability to affect a legislator's chances for reelection.[80] Another important resource is having an ally in a political actor who occupies a central position in government such as the President.[81] The history of the politics of health and safety regulation reveals that business dominates, but does not monopolize, such resources.[82]

The history of the OSH Act supports Terry Moe's observation that "public agencies will tend to be structured in part by their enemies—who want them to fail."[83] Despite opposition from the business community, Congress passed the OSH Act because of the support of President Nixon, who wanted to wean blue color workers away from their traditional support of Democrats.[84] Nevertheless, workers had to accept procedural arrangements that made it difficult for OSHA to operate

78. MICHAEL PERTSCHUK, GIANT KILLERS 45 (1986) (describing the Federal Trade Commission's attempt to push cigarette labeling and advertising regulations through Congress).

79. *See* PHILIP B. HEYMANN, THE POLITICS OF PUBLIC MANAGEMENT 146 (1987) (defining "resources" as "whatever makes it possible to influence the response of other legislative or executive officials to a proposal").

80. *Id.* at 150-51.

81. *See id.* at 148 (identifying the authority of a superior as a central and powerful form of influence).

82. *See* DAVID R. MCCAFFREY, OSHA AND THE POLITICS OF HEALTH REGULATION 53 (1982).

83. Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 230 (1990); *see id.* (finding that because of the necessity of compromise, an agency's opponents inevitably influence its organizational structure and policy direction).

84. *See* MCGARITY & SHAPIRO, *supra* note 5, at 34 (noting that Nixon's somewhat reluctant occupational health and safety initiative capitalized on the activist climate of the late 1960s and the interest sparked by a mining disaster that killed 88 miners in West Virginia).

effectively.[85] An example is the split-enforcement arrangement between OSHA and the Occupational Safety and Health Review Commission (OSHRC).[86]

OSHA was unpopular in Congress almost immediately.[87] Graham Wilson explains, "Congress first created an agency with a mandate for a tough regulatory approach, and then, displeased with the results . . . [it] sniped at the agency, making piecemeal alterations in its policies and weakening further its tenuous authority."[88] In particular, Congress passed several budget amendments which restricted OSHA's jurisdiction.[89] However, Congress failed to pass any of the numerous proposals to amend the OSH Act, including proposals to abolish the agency.[90] OSHA avoided this fate largely because hostile bills were assigned to committees in the House and Senate that were packed with labor supporters. These committees blocked such legislation even though these proposals might well have commanded a simple majority of Congress.[91]

Some of the anti-OSHA feeling in Congress died down during the Carter administration after Eula Bingham, OSHA's administrator, eliminated some of the inspection practices and

85. *See id.* at 246 (noting that the Occupational Health and Safety Review Commission (OSHRC) disputed OSHA's interpretation of its own standards, resulting in delay of OSHA's efforts to protect workers). OSHRC's inability to keep up with a backlog of appeals has also resulted in further delays of corrective action by employers. *Id.* at 246-47.

86. *Id.* at 245. OSHA is responsible for issuing and enforcing health and safety standards through the Department of Labor. *Id.* OSHRC is an independent commission responsible for adjudicating health and safety complaints. *Id.*

87. *Id.* at 43. One Senator proposed an amendment to OSHA to exclude small businesses from safety inspections. *Id.* Several bills introduced in 1973 required OSHA to pay close attention to employer costs in setting safety standards. *Id.* Congress in fact limited OSHA's jurisdiction in 1976 by exempting small farms from enforcement. *Id.*

88. GRAHAM K. WILSON, THE POLITICS OF SAFETY AND HEALTH: OCCUPATIONAL SAFETY IN THE UNITED STATES AND BRITAIN 43 (1985).

89. *See* MCGARITY & SHAPIRO, *supra* note 5, at 43 (noting Congress' exemption of small farms, defined as those with ten or less employees, from OSHA's enforcement). A Senator introduced a bill reducing random safety inspections for workplaces with above-average safety records. *Id.* at 48. Although the bill was defeated, its goal was achieved through a 1979 appropriations rider, which restricted OSHA inspections of "safe" employers with ten or fewer employees. *Id.* at 49.

90. *See* WILSON, *supra* note 88, at 43 (noting that Northern Democrats and a significant number of Republicans support OSHA, thus warding off efforts to abolish the agency); Michael Levin, *Politics and Polarity: The Limits of OSHA Reform*, REGULATION, Nov.-Dec. 1979, at 33, 33 (noting that between 1973 and 1976 pro-OSHA forces repeatedly blocked attempts to restrict or abolish OSHA).

91. *See* WILSON, *supra* note 88, at 46-47 (observing the demise of bills to amend or repeal OSHA assigned to liberal, pro-union committees, such as the Senate Committee on Labor and Human Resources and the House Education and Labor Committee).

silly regulations that had angered the business community.[92] Bingham's success, however, did not translate into more political support for OSHA.[93] Labor union leaders did not press for legislative reforms at this time because they feared that once a bill moved out of the committees where labor unions had influence, legislators who supported employers would amend the bill to gut OSHA.[94]

Opposition by the Reagan and Bush administrations stymied legislative reform in the 1980s.[95] President Reagan vigorously criticized OSHA during his first presidential campaign,[96] and his first two OSHA administrators were extremely hostile to its mandate.[97] OSHA's subsequent leaders did not wear the same ideological blinders, but they still resisted legislative proposals for reform.[98]

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92. *See* McGarity & Shapiro, *supra* note 5, at 47 (noting that the Carter administration adopted a "low key approach to enforcement" and that Bingham quickly responded to business complaints about enforcement policies); Levin, *supra* note 90, at 33 (noting the deletion of approximately 1000 unnecessary regulations, such as requirements for split toilet seats, coat hooks on bathroom doors, and the maximum number of knotholes in wooden ladders). As a result of Bingham's efforts, the program became both more effective and less controversial. McGarity & Shapiro, *supra* note 5, at 47.

93. *See* McGarity & Shapiro, *supra* note 5, at 48-49 (noting that during Bingham's tenure, the agency's increased efficiency led to the discovery of more serious violations). OSHA began demanding stiffer penalties and recommending prosecution. *Id.* at 48. Business groups responded by mounting political challenges, and eventually limited OSHA's jurisdiction with an appropriations rider in 1979. *Id.* at 48-49.

94. *See* Wilson, *supra* note 88, at 49 (noting that the unions' strategy was to keep bills to amend OSHA off the floor and in committees).

95. *See Unions Applaud Election of Clinton; Business Braced for More Aggressive OSHA*, 22 O.S.H. Rep. (BNA) No. 24, at 1185 (Nov. 11, 1992) (predicting that employers' influence over the Clinton Administration will be less than during the Bush and Reagan years, thus diminishing the confrontational attitude organized labor faced on worker health and safety issues); *see also Greater Role Suggested for Workers to Improve Enforcement of Safety Rules*, 22 O.S.H. Rep. (BNA) No. 40, at 1699 (Mar. 10, 1993) [hereinafter *Greater Role Suggested for Workers*] (quoting Professor McGarity as stating that although OSHA has been on the "legislative agenda" for a decade, a "divided government" has precluded substantive amendment of the Act).

96. McGarity & Shapiro, *supra* note 5, at 61 (stating that Reagan "frequently invoked OSHA as a symbol of intrusive and inefficient bureaucracy").

97. *See id.* at 60 (stating that Reagan's first OSHA administrator, thirty-six year old Thorne Auchter, had practically no experience with worker health and safety issues and was "committed to 'stemming the flow' of health and safety standards"); *id.* at 98 (quoting Carter's OSHA Administrator Bingham as describing Reagan's second appointee, Robert Rowland, as "anti-worker and anti-people"); *see generally id.* 61-104 (describing the effect of the Reagan years on OSHA's goals and enforcement with chapter titles such as "Going Backward" and "Inching Forward").

98. *See, e.g., Agency Opposes Mandatory Safety Committees, Other Reform Provisions, OSHA Official Says*, 21 O.S.H. Rep. (BNA) No. 18, at 494-95 (Oct. 2, 1991) (reporting a Deputy OSHA Administer's criticism of a bill to amend OSHA to re-

In 1992, Senators Kennedy and Metzenbaum introduced the first comprehensive reform legislation since the creation of OSHA,[99] but the bill died in committee.[100] Realizing that a Republican administration made passage unlikely, the Democrats reported the bill to the entire Senate just prior to the 1992 election in an attempt to make occupational health and safety an election issue.[101]

The following year, comprehensive reform legislation was introduced in both the Senate and the House.[102] From the perspective of workers, the pending legislation is a strong effort to reform the regulatory approach to occupational health and safety.[103] It gives OSHA significant new powers, grants workers the ability to force the agency to take more action, and requires employers to use employee-employer safety committees.[104] Business groups[105] generally oppose the legis-

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quire employers with 11 or more workers to establish mandatory safety and health committees with equal employer and employee representation); *Labor IG Supports OSHA Penalty Bill; Scannell Opposes Expansion of Sanctions*, 20 O.S.H. Rep. (BNA) No. 39, at 1439 (Mar. 6, 1991) (noting OSHA Administrator Gerard F. Scannell's opposition to including new violations in the category of violations for which criminal sanctions are imposed, on the grounds that it would decrease voluntary compliance with new regulations).

99. S. 1622, 102d Cong., 1st Sess. (1991).

100. *Reform Bill Waiting in the Wings*, Occupational Hazards, Mar. 1993, at 17; *see Job Safety, GOP Boycotts Senate Committee Vote on Job Safety Bill Amid Partisan Dispute*, Daily Rep. Executives (BNA), at 157 (Aug. 13, 1992) (observing that Senate Republicans blocked a vote on Senate Bill 1622 when they boycotted a Labor and Human Resources Committee meeting, making it unlikely that the bill would make it to the Senate floor in the 102d Congress).

101. *See OSHA Reform*, *supra* note 67, at A5 (stating that proponents of Senate Bill 1622 hoped for the election of a Democratic President in 1993, knowing that the bill would face certain veto from the Bush Administration).

102. S. 575, 103d Cong., 1st Sess. (1993); H.R. 1280, 103d Cong., 1st Sess. (1993).

103. *See UAW Welcomes Formation of Coalition Supporting OSHA Reform*, PR Newswire, Feb. 9, 1994, *available in* Lexis, Nexis Library, PR Newswire File (reporting that the president of the United Auto Workers endorsed the proposed OSHA reform which gives workers an active role in decisions that affect their health and safety).

104. The Senate bill provides for implementation of safety and health committees composed of employer and employee representatives. S. 575, § 201(a)-(d). The Senate Bill also provides that "interested persons" may by petition recommend that OSHA promulgate, modify, or revoke health and safety standards, and that they may press the Secretary of Health and Human Services to issue prompt responses in the Federal Register. *Id.* § 401(a). The Secretary's failure or refusal to issue rules is reviewable by a United States Court of Appeals. *Id.* § 401(d). An action for review may be brought by any person adversely affected by the Secretary's determination or delay. *Id.* The House Bill also requires employers to set up committees to review workplace health and safety programs. H.R. 1280, § 201(a). It alternatively provides that an employer may employ mechanisms other than the safety and health committees, provided that employees can participate meaningfully in the safety and health activities that an employer chooses. *Id.*

lation, although some business spokespeople have endorsed some aspects of the bills.[106]

At the time this Foreward was written, both bills were still in the committee process. The next section examines the prospects for reform in light of workers' political resources.

C. *Prospects For Reform*

President Clinton's election has created a "policy window,"[107] or a change in the political environment, allowing occupational health and safety to return to Congress' agenda.[108] Congress was reluctant to take up OSHA reform during the last twelve years because of the likelihood of a presidential veto.[109] The possibility of such a veto meant that unless workers had the support of two-thirds of the members of Congress, they could not obtain reforms that the President opposed. In effect, this hurdle eliminated the possibility of meaningful reform.

The policy window opened by President Clinton's election will close once Congress adopts a legislative response, even if

105. *See, e.g.*, *House Republicans Unveil Legislation, Stressing Incentives, New Role for OSHA*, 23 O.S.H. Rep. (BNA) No. 11, at 275 (Aug. 11, 1993) (stating that Republican members of the Labor Committee and the business community charge that the Democratic bill contains overly rigid requirements for OSHA enforcement and in its mandates for employee participation); *More Funding for OSHA, NIOSH Required to Fulfill Mandate, Witnesses Tell Congress*, 23 O.S.H. Rep. (BNA) No. 9, at 213 (July 28, 1993) (repeating a comment by a former top OSHA official during the Reagan Administration to the effect that there is no proof that OSHA needs reform, despite the Democrats' proposal); *AFL-CIO Urges Congress*, *supra* note 66, at 244 (reporting that a spokesperson for the National Association of Manufacturers reasoned that because OSHA has not been previously amended, it does not need to be amended now.

106. *See* Timothy A. Jemal, *Reforming OSHA Becomes Exercise in Partisan Politics; Occupational Safety and Health Act of 1970*, 95 Concrete Prods. (Maclean Hunter) No. 6, at 12 (June 1992) (stating that the NRMCA supports many of the concepts proposed by the pending OSHA legislation).

107. KINGDON, *supra* note 69, at 173-74 (defining a "policy window" as a brief opportunity presented within policy systems when (defining advocates of proposals can "push their pet solutions," others can seek action on particular initiatives, and yet others can focus attention to special problems). A change in administrations will often open a policy window. *Id.* at 176.

108. *See Health Care Battle Likely to Unite Industry for Battle Over Comprehensive Job Safety Bill*, Daily Lab. Rep. (BNA) No. 29, at 29 (Feb. 14, 1994) (noting that the Clinton Administration has endorsed OSHA reform as a concession to organized labor over the North American Free Trade Agreement, which was opposed by organized labor).

109. *See OSHA Reform*, *supra* note 67 (noting that reform bill proponents knew that Bush would veto measures which now enjoy a reasonable chance of success at the Democratic White House).

the response is one that workers regard as inadequate.[110] The policy window will also close if workers lack the political resources to get any reform adopted and legislators move on to other matters.[111] The history recounted in the previous section suggests that unions and their allies will have difficulty passing those reforms that the business community most strongly opposes, such as employer-employee health and safety committees.[112]

Other evidence also suggests that workers lack the political resources to prevail over significant employer opposition. Organized labor, often the only representative of workers in the political process, is considerably weaker today than it was in 1971 when OSHA was established. Whereas 27.3 percent of the total workforce was unionized in 1970, just prior to OSHA's establishment, only 15.8 percent was unionized in 1992.[113] Union representation in the private workforce is even less. As noted earlier, only twelve percent of the private workforce is organized.[114] Moreover, union membership in the states varies considerably.[115] Although unions are strong in about twenty states, they are considerably weaker in the rest.[116] Finally, the least skilled and least organized workers

110. KINGDON, *supra* note 69, at 177 (stating that a policy window closes once participants have acted in some way, regardless of whether they have fully addressed the problem).

111. *See id.* (finding that political actors are often unwilling to expend additional time or political capital in support of an action that does not get passed.

112. Refer to notes 63-65 *supra* and accompanying text.

113. THE WORLD ALMANAC AND BOOK OF FACTS 141 (1994).

114. *See NAFTA Gotcha*, *supra* note 54, at 4, 6.

115. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 421 (1992) (Table No. 671) [hereinafter STATISTICAL ABSTRACT] (listing percentage of unionized employees by state for the period 1984 to 1989). South Carolina, a right-to-work state, had the lowest percentage of union membership with 2.4% of its workers unionized, while Michigan, with 51.6%, had the highest percentage. *Id.*

116. In 1989, union membership as a percentage of workers employed in manufacturing was as follows:

Number of States	Percentage of Unionized Employers
6	30 or more
12	20 - 30
18	10 - 20
14	0 - 10

Id.

are often in the most dangerous jobs.[117]

As further evidence that workers are politically weak, many reforms that would significantly enhance protection for workers have not even been proposed in Congress. For example, workers can help OSHA by reporting violations, but OSHA's ability to respond is constrained by its limited resources.[118] Congress could solve this problem by authorizing private citizen suits, as it has done in the environmental area. But Congress has not considered authorizing workers to sue employers to enforce OSHA regulations.[119] Other reforms that could have a significant impact, like an injury tax,[120] are likewise not on the horizon for purposes of this round of reform.[121]

According to Mr. Nader, workers are further hampered because some unions are unwilling to fight for worker safety, as they have for issues such as the North American Free Trade Agreement (NAFTA), which more directly affect wages and benefits.[122] He notes the AFL-CIO has only one full-time staff person assigned to occupational safety and health issues.[123] Another view is that because of unions' lack of resources, they have no choice but to emphasize protection of wages and jobs.[124] A recent article concludes that "with unions fading fast, and their limited resources focused on simply

117. *See* ROBINSON, *supra* note 28, at 75-76 (noting that once employers succeed in reducing union representation in hazardous jobs by reducing the need for highly skilled workers with more organized processes of production, presumably they bring in non-unionized, low-skilled workers); *see also* Carol Kleiman, *Projecting Ahead; Who will be Doing What for the Next 12 Years*, CHI. TRIB., Feb. 6, 1994, at C1 (noting one researcher's concern that unless low skilled workers organize, they will have little chance for better wages).

118. *See* MCGARITY & SHAPIRO, *supra* note 5, at 324 (conceding that the number of OSHA inspectors is woefully inadequate when compared with the task of inspecting all of the work places subject to OSHA's jurisdiction).

119. *See Greater Role Suggested for Workers*, *supra* note 95, at 1699 (reporting Professor McGarity's proposal for citizen suits regarding OSHA enforcement).

120. *See* Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 640 (suggesting as a market-based incentive for workplace safety reform a tax on employers that maintain unsafe working conditions). Other prospective reforms could include greater reliance on workers' compensation, disclosure of risks to workers, more active bargaining, and employee involvement in monitoring workplace safety. *Id.*

121. *See Study Finds Plants Inspected and Fined by OSHA Have 22 Percent Drop in Injury Rate*, 21 O.S.H. Rep. (BNA) No. 12, at 355 (Aug. 21, 1991) (suggesting an injury tax as an alternative to increased OSHA enforcement to reduce workplace injuries).

122. Nader, *supra* note 39, at 6-8.

123. *Id.* at 7.

124. *See* Allan Freedman, *Workers Stiffed*, WASH. MONTHLY, Nov. 1992, at 27 (suggesting that the combination of organized labor's inability and OSHA's unwillingness has left many reforms to "gather dust on the shelf").

protecting wages, the days are gone when they could also battle management to make mines safe and close down sweatshops—let alone push weighty legislation through an ambivalent administration and Congress."[125]

While the political influence of organized labor has declined, the business community has become politically stronger. Employers were politically unprepared for the citizen activism of the 1960s and early 1970s, which included passage of the OSH Act, but they are now more powerful than before.[126] One important reason is that companies' political action committees (PACs) no longer limit their support to Republicans, but they also support key Democrats, such as committee chairpersons,[127] which enhances employer access to these Democrats.[128] For this reason and others, the voting patterns of key Democrats has become more closely aligned these legislators with business preferences.[129]

These trends reflect what political scholars have known for a long time. Because health and safety legislation produces widely diffuse benefits and concentrated costs, those who pay (employers) are more likely to lobby Congress than those who benefit (workers).[130] This imbalance is the result of two factors. First, the likelihood of collective action is greater among employers than among the much more numerous group of

125. *Id.*

126. *See generally* DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 193-239 (1989) (documenting the political resurgence of business due to the efforts of employers to influence the prevailing political and intellectual climate and to the shift in public attitudes toward business and government).

127. *See id.* at 209-10 (noting that a major share of business PACs' money went to liberal Democrats who chaired House and Senate committees in 1976); HAROLD W. STANLEY & RICHARD B. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 182-83 (1992) (indicating an increase in corporate PAC contributions to Democrats). In 1989 and 1990, corporate PACs gave $19.1 million to Democrats in the House compared to $17.1 million contributed to Republicans. *Id.* at 183.

128. Richard L. Hall & Frank W. Wayman, *Buying Time: Monied Interests and the Mobilization of Bias In Congressional Committees*, 84 J. AM. POLI. SCI. REV. 797 (1990).

129. STANLEY & NIEMI, *supra* note 127, at 214 (indicating that the percentage of conservative coalition victories has increased since the 1960s and early 1970s).

130. *See* James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 370 (James Q. Wilson ed., 1980). Wilson defines "entrepreneurial politics" as the situation in which an interest group proposes a policy that confers general but small benefits on a large group with costs borne by a small segment of society. *Id.* Incentive is strong for the cost-bearing segment of society to oppose the policy but weak for the beneficiaries. *Id.*

workers.[131] Moreover, twelve years of hostile rulings by the National Labor Relations Board (NLRB) during the Reagan and Bush administrations have significantly raised the cost of union organizing.[132] Second, unions are subject to "free-rider" behavior, which occurs because workers obtain the benefits of any legislation even if they do not support union lobbying efforts.[133]

Because employers have more political resources, White House support will be important in determining the extent to which labor will have to compromise to get new legislation. Although the Department of Labor has endorsed the comprehensive reform legislation now before Congress,[134] the White House might not be able to tip the battle in favor of workers. The President, who was elected by the smallest plurality of any president this century, has had difficulty in getting Congress to pass other legislation that he has favored. Concerning the OSHA legislation, an official of the National Association of Manufacturers has warned, "If the administration chooses to go with [the proposed legislation] it will be a fight with lots of

131. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 44-45 (1971) (hypothesizing that, in a large group, it is unlikely that the contribution of any one individual will be perceptible, so that any one individual lacks inducement to contribute to the common good). Olson concludes that the number of individuals in a group is determinative of its ability to achieve the collective good. *Id.* at 45.

132. *See* David L. Gregory, *Working for a Living*, 58 BROOK. L. REV. 1355, 1367 (1993) (reviewing THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?—TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK (1991)) (noting that due to the pro-employer ideology of the NLRB during the Reagan-Bush era, employers found it cost-efficient to simply terminate workers who were attempting to organize); Richard B. Freeman & Joel Rogers, *A New New Deal for Labor*, N.Y. TIMES, Mar. 10, 1993, at A19 (observing that "toothless sanctions on unfair labor practices have proved no match for employer resistance to unions."). *See generally* Paul Weiler, *Promises To Keep: Securing Workers' Rights To Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-1805 (1983) (describing how the NLRB's remedies of reinstatement and back pay are inadequate to forestall employers from discharging union activist employees, and that this inadequacy of remedies combined with a significant delay in issuing remedial orders does not deter employers from taking steps to stop the momentum of a union's organizing campaign).

133. David G. Sumner, Note, Plumbers and Pipefitters: *The Need to Reinterpret the Scope of Compulsory Unionism*, 33 AM. U. L. REV. 493, 497 (defining "free riders" as nonunion employees who benefit from collective bargaining by union co-workers without contributing to the costs borne by the union). Business organizations are less subject to this behavior because they have far fewer members and are in a better position to offer incentives to join. *See* OLSON, *supra* note 131, at 62 (noting that in a small group members know each other, judge others' contributions, and can control membership, while in contrast, in a large group members do not know each other).

134. *Reich Outlines Support For Democratic Bill, Terming It "Investment" In Hazard Prevention*, 23 O.S.H. Rep. (BNA) No. 37, at 1212 (Feb. 16, 1994).

resources used up, and I think that it will not prevail."[135]

III. RESHAPING THE POLITICAL ENVIRONMENT

Employers have traditionally had the upper hand in the political process concerning workplace safety and health. After workers compromised to get the OSH Act, employers were able to keep occupational health and safety reform off Congress' agenda for the next twenty years. Nevertheless, predicting what Congress might do in the current political environment is difficult because legislative decisions are the product of unpredictable elements.[136] One of the few certainties is that workers will be more successful if they can gain additional political resources. This section explains how an interest group can alter a political environment by redefining a policy issue in a manner that attracts additional support for its legislative goals, and it then considers whether workers can successfully follow this strategy in support of workplace health and safety reforms.

A. Issue Redefinition

Legislative politics is characterized by long periods of relative stability, in which one group of players dominate, punctuated by abrupt changes in political outcomes, when another group of interests becomes dominant or at least gains significant political power.[137] This pattern is related to the interaction of policy and politics in influencing Congress' legislative agenda.[138] A group can dominate the legislative process concerning a policy issue if it can define the issue in a manner that makes it of little or no interest to the public.[139] Challengers can threaten this dominance if they can redefine the

135. *Employers Meet with Reich, Dear to Discuss Concerns over Democratic Bill*, 23 O.S.H. Rep. (BNA) No. 6, at 132-33 (July 7, 1993).

136. Refer to notes 69-84 *supra* and accompanying text for a discussion of the factors at play in legislative action.

137. *See* BAUMGARTNER & JONES, *supra* note 6, at 3 (developing a model to account for both the long periods of stability when the elites control policy, and the periods of rapid change during which they find themselves losing in policy arenas).

138. Authors Baumgartner and Jones employ empirical evidence and historical comparisons to illustrate that the agenda-setting process influences policy, policy problems are the fodder for the process of setting political agenda, and stability and rapid change are both vital for a functioning equilibrium. *Id.* at 4.

139. *See* CHRISTOPHER J. BOSSO, PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 22 (1987) (stating that dominant political institutions can keep issues off the political agenda by preserving a lack of public interest and encouraging the view that the issue does not merit attention).

issue to attract more public attention.[140] Agricultural interests, for example, dominated the politics of pesticide use when the prevailing view focused on the economic importance of eradicating pests.[141] These interests lost control after environmentalists redefined the issue to include not only economics, but also the health and environmental damage stemming from pesticide use.[142]

Redefinition changes the political environment by altering the political incentives of legislators. Legislators' perceptions of voter preferences influence their position on an issue.[143] When legislators anticipate how a roll-call vote might be used against them by future opponents, they adjust their votes to forestall such challenges.[144] Therefore, when reformers gain public attention by redefining an issue, legislators must consider the possibility that a vote in support of a special interest can be used against them in a future election.[145] An opponent can capitalize on the public's new attention to a redefined issue by pointing out that the legislator voted against the public's policy preference.[146]

However, redefining an issue is not easy. Cooperation of the media is essential to getting the attention of the public.[147] Moreover, those who benefit from the political status quo will resist attempts at redefinition. One common ploy to

140. *See id.*; BAUMGARTNER & JONES, *supra* note 6, at 35-36 (noting that "losers in a policy debate" can improve their position by increasing the number of participants that take their view on the issue).

141. *See* BOSSO, *supra* note 139, at 32 (explaining how the technology of pesticides, their economic necessity and convenience for use by the individual farmer "powerfully sculpted" the agricultural community's attitudes, and led to agricultural interests dominating the debates over pesticide regulation).

142. *See id.* at 144, (explaining how the dramatic emergence of an "environmental public" refocused an issue on the political agenda).

143. JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 60-88 (1969) [hereinafter CONGRESSMAN'S VOTING DECISIONS] (discussing the decisionmaking processes that precede congressional voting and the factors which influence that process).

144. *See* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 8-13 (1990) (describing the effect citizens' influence has on policy judgments and politicians' voting).

145. *See* CONGRESSMAN'S VOTING DECISIONS, *supra* note 143, at 60 (quoting a Congressman who described how a vote on a controversial issue may pass unnoticed, but will certainly be brought to voters' attention by an opponent during the next bid for reelection).

146. *See* ARNOLD, *supra* note 144, at 9 (describing how legislators try to anticipate how roll-call votes might be used against them when an issue shifts at election time to the forefront of the public's concerns).

147. *See* BAUMGARTNER & JONES, *supra* note 6, at 103 (stating that the media's role is essential to the agenda-setting process because the media directs attention to rent parts of an issue and shifts the public's attention from one issue to another).

preserve the status quo is to exploit the public's general distrust of government and opposition to its expansion.[148] OSHA's critics have consistently used this approach.[149] To overcome the stasis of the political agenda, those seeking reform must engage in "entrepreneurial" behavior. A successful policy entrepreneur becomes the vicarious representative of groups or the public at large not generally represented in the legislative process.[150] The entrepreneur builds political support for unrepresented interests by mobilizing latent public sentiment, putting opponents of reform on the defensive, and linking the proposed legislation to values widely shared by the public.[151]

If workers are to succeed politically in implementing workplace health and safety reforms, they must redefine the issue of occupational health and safety[152] and find allies with a shared interest in the redefined issue.[153] One approach to redefining workplace safety is to educate the public that it is in their self-interest to reduce workplace risks. Another approach is to argue that reducing occupational injuries and disease would make our society more fair. The following two sections consider the likelihood that such redefinitions of the issue would be successful.

B. *Self-Interest*

The problem for reformers is that most Americans are not

148. *See* BOSSO, *supra* note 139, at 22 (noting that problems remain non-issues because they are "screened out of the political arena by social norms, traditions, and commonly held notions about the government's role"); Mark A. Peterson, *Political Influence in the 1990s: From Iron Triangles to Policy Networks*, 18 J. HEALTH POL., POL'Y & L. 395, 406 (1993) (discussing the American public's traditional distrust of government and how the American Medical Association has used that attitude to mold public policy in the health care field).

149. *See, e.g.*, *OSHA Tagged With 'Red Tape Award' By Six Republican 'Vigilante Senators'*, 22 O.S.H. Rep. (BNA) No. 19, at 1036 (Oct. 7, 1992) (describing how OSHA critics awarded the first "red tape award" to OSHA to demonstrate their opinion that agency regulations strangle American businesses).

150. *See* WILSON, *supra* note 88, at 370. For example, Mr. Nader became a policy entrepreneur, in essence the driving public's vicarious representative, in seeking improved auto safety design. *Id.* Likewise, Howard Jarvis was a policy entrepreneur with respect to Proposition 13 in California, and Senator Joseph McCarthy when he galvanized the public with his anti-communist crusade. *Id.*

151. *See id.* (noting that such efforts require tremendous skill by the policy entrepreneur).

152. *Refer to* notes 137-46 *supra* and accompanying text for a discussion of why issue redefinition is necessary to overcome the political agenda's status quo.

153. *Refer to* notes 75-77 & 150-51 *supra* and accompanying text (describing how those seeking to influence the agenda-setting process increase their chances of success with a greater number of powerful allies).

directly impacted by workplace health issues, or at least perceive that they are not.[154] Only a minority of employees work with or near dangerous machinery or are exposed to toxic substances, while others are not even acquainted with anyone who works in such jobs.[155] Although those who work in offices are not free from workplace risks such as ergonomic injuries,[156] employees perceive this work as safe and healthy.[157]

Yet occupational injuries and disease impact nearly everyone. As Cass Sanstein reminds us, "In a world with Medicare and Medicaid . . . the illness of any one of us is a bill for many or even most of us."[158] Although there are no precise statistics concerning what these social costs might be, the evidence suggests that they are staggering. OSHA estimates that this cost is $80 billion a year,[159] while another recent estimate puts the cost at $200 billion a year.[160]

The argument that the public will gain by a reduction in occupational injuries and disease is especially timely now that Congress is debating national health care reform. Because the burden that workplace accidents and illnesses place on our health care system is significant, the savings available from a reduction in these risks must likewise be significant. For example, occupational disease accounts for a larger percentage of cancer deaths than environmental pollution, and kills more persons each year than such other preventable causes of death

154. *See* WILSON, *supra* note 88, at viii (noting that OSHA's attempts to deregulate worker safety and health have received little public attention, especially compared to EPA scandals).

155. *Compare, e.g.*, Ilise L. Feitshans, *Hazardous Substances in the Workplace: How Much Does the Employee Have the "Right to Know"?* 1985 DET. C.L. REV. 697, 699 (citing a 1983 National Occupational Hazards Survey that put the number of workers exposed to chemical source hazards at 25 million, and the number exposed to OSHA-regulated chemicals at 40 to 50 million) *with* STATISTICAL ABSTRACT, *supra* note 115, at 381 (indicating that the total number of non-institutionalized employed workers in 1991 was more than 118 million).

156. *See, e.g.*, Harold J. Engel et al., *OSHA Crackdown—With More to Come*, C732 ALI-ABA 483, 494 (1992) (reporting three significant fines, ranging from $243,000 to $990,000, that OSHA imposed on employers for ergonomics related violations).

157. *Cf.* Gerger v. Campbell, 297 N.W.2d 183, 186 n.2 (Wis. 1980) (noting that although the law requires employers to provide safe workplaces, legislatures' enactment of workers' compensation statutes focus primarily on the safety of equipment and machinery as opposed to office environments).

158. Cass R. Sunstein, *Valuing Life*, NEW REPUBLIC, Feb. 15, 1993, at 36, 38 (reviewing W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK (1993)).

159. *Revitalized OSHA*, *supra* note 1, at 763.

160. NATIONAL SAFE WORKPLACE INSTITUTE, BASIC INFORMATION ON WORKPLACE SAFETY AND HEALTH IN THE UNITED STATES 2 (1992).

as motor vehicle accidents, diabetes, and homicides.[161] Preventing workplace accidents and disease would therefore substantially reduce the demand for health care.

The recent effort to redefine gun control and the reduction of violence in our society as a public health issue[162] suggests the saliency of this approach. It is also salient because the linkage between occupational health and safety and health care reform is obvious and should therefore be understandable to the public.[163]

Nevertheless, workers may have difficulty in redefining occupational health and safety as a matter of public concern because substantial public education is needed. Less than one half of the public currently believes that it is personally important that the government increase its regulation of workplace health and safety.[164] This statistic shows that "commitment to job safety and health does not run deep or wide enough to make the subject a top national priority."[165] Moreover, attempts to educate the public might get lost in the complex policy debate that surrounds health care reform. Finally, the public is most likely to notice an issue when it is socially significant, apparently nontechnical, broadly defined, and above all, emotional.[166] The argument that occupational injuries and diseases tax the public's health care resources may be too technical and so lacking in emotional appeal that it will not be effective in increasing public support for legislative reform.

C. Fairness

The strategy of appealing to the public's self-interest faces significant obstacles. An attempt to redefine occupational

161. Refer to notes 20-21 *supra* and accompanying text.

162. *See A Balancing Act on Crime Control*, U.S. NEWS & WORLD REP., Feb. 28, 1994, at 8, 6 (stating that there is a fervor to attack crime and, although the sides are divided, all of Congress wants a crime bill).

163. *See* Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989) (stating that political actors redefine issues by establishing a new explanation of causality).

164. Levin, *supra* note 90, at 39.

> While recent polls show the public continues to favor government regulation of job safety by a majority of 52 percent to 12 percent, they also show that only 35 percent of workers think such regulation important to *them*. For environmental protection the figures are 70 percent and 70 percent. Other polls show citizens willing to spend over $100 more per capita for air and water cleanups, but less than $10 more for job safety and health.

Id.

165. *Id.*

166. ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 112-24 (1972).

health as a matter of distributive justice, or fairness, may therefore be more productive for workers.

The public's traditional opposition to government programs is not simply a matter of distrust, it is also the product of how citizens think about social responsibility. The strong tradition of economic and political individualism in this country puts the burden on those who would regulate health and safety matters to justify governmental action.[167] Moreover, because this ideology makes the individual the basic unit of analysis, it supports "a politically conservative predisposition" that avoids questioning the basic structure of society and its distributions of wealth and power and concentrates instead on questions about the behavior of individuals within that structure.[168] In other words, individualism influences how Americans think about "what ties them together and to whom they have ties."[169] The individualist ideology leads to the sense that no one has an obligation to pay for the risks of workers who incur injuries and diseases doing dangerous work.[170]

Another American political tradition, often described as "communitarianism," emphasizes that individuals share a community or a common culture, and a way of perpetuating it.[171] As Professor Glendon has recognized, "Buried deep in our rights dialogue is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligation towards others except to avoid the active infliction of harm."[172] But this individualistic assumption "fits poorly with the American tradition of generosity toward the stranger, as well as the trend in our history to expand the concept of community for which we have common responsibility."[173]

The key elements of communitarianism are the concept of mutual aid and the conviction that "a willingness to help each

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167. SYLVIA N. TESH, HIDDEN ARGUMENTS: POLITICAL IDEOLOGY AND DISEASE PREVENTION POLICY 160-61 (1988) (hypothesizing that many citizens oppose health and safety intervention by government because it violates the individualistic ideology that each worker is the best judge of his or her interests).

168. *Id.* at 161.

169. Deborah A. Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL., POL'Y & L. 287, 289 (1993).

170. *See id.* at 290 (discussing how the insurance industry, for example, fosters fragmentation of society so that the perception of commonalities is lost). The result is that the public becomes convinced that "each person should pay for his own risk." *Id.*

171. *See id.* at 289 (describing communitarianism as what binds communities together, particularly the sense of shared interests and culture).

172. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 77 (1991).

173. *Id.*

other is the glue that holds people together as a society."[174] The corollary is that letting workers fend for themselves fragments society by emphasizing individual differences. Workers, rather than their communities, are left solely responsible for occupational health and safety.

Professor McGarity and I have suggested that the protection of workers can and should be defined as a matter of distributive justice, or in Professor Stone's terms, as a matter of "mutual aid." We contend that decisions about workplace health and safety, unlike the individualistic decisions that consumers make when purchasing goods and services, define the nature of our society or community. The reason is that such decisions require citizens to define what level of workplace health and safety is "fair" and "just."[175]

Worker advocates, such as the National Safe Workplace Institute (NSWI), are attempting to draw on the communitarian tradition to redefine the issue of workplace health and safety. For example, NSWI emphasizes that other countries do a better job of protecting their workers.[176] Moreover, NSWI's director bluntly summarizes that OSHA sanctions reflect an accommodation with "human expendability" where "blue-collar blood pours too easily."[177] He concludes that fairness demands that workers have legislative reform.[178]

Another way to emphasize that workers merely seek fairness is to point out that the United States has not made the same commitment to protecting workers that it has made to protecting the environment. For example, the government spends eleven times more on environmental protection than on workplace health.[179] Furthermore, EPA regulations are stricter

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174. Stone, *supra* note 169, at 289; *see id.* (describing mutual aid among a group of individuals as "the essence of community").

175. MCGARITY & SHAPIRO, *supra* note 5, at 296. McGarity and Shapiro explain that because health and safety decisions involve distributional issues, such

> social policy choices provide an opportunity for citizens to value certain things more highly than they do when they go to the store . . . . As consumers, we may dislike paying more for manufactured products because of the costs of protecting workers, but as citizens we can rationally vote for extremely costly . . . goals. We vote in favor of such costly goals because they permit us to reaffirm to ourselves that occupational disease is not merely inefficient—it kills people.

Id.

176. *See* Joseph A. Kinney, *Why Did Paul Die?*, NEWSWEEK, Sept. 10, 1990, at 11, 11 (stating that a United States worker is five times more likely to die than a Swedish worker, and three times more likely to die than a Japanese worker).

177. *Id.*

178. *Id.*

179. *Beyond Neglect*, *supra* note 18, at 16-18, 38.

than OSHA standards for the same chemicals[180] and criminal penalties for violation of environmental statutes are significantly greater than for violations of the OSH Act.[181] A union president recently observed concerning the criminal penalties, "[I]n the twenty-three years [since] the OSHA law was passed, only one employer has gone to jail for willfully violating OSHA law and killing a worker. In the last ten years, seven people have gone to jail for harassing wild burros on federal land."[182]

Although these differences reflect the greater political support for environmental law enforcement, they are not defensible either as a matter of public policy or of human decency. After all, the "workers who build our homes, provide our food, assemble our appliances, nurse our illness, and dig our graves are part of our shared environment and are deserving of protection."[183] Something is very wrong in this country "when the quality of life of a jackass is valued more than the life of a worker."[184]

However, workers' appeals to fairness are not likely to be noticed unless they are widely publicized by the media.[185] Media attention to workplace safety is most likely if reformers link their message with a scandal or tragedy that can symbolize the need for legislation,[186] such as the fatal 1991 fire at the Imperial Food Products chicken processing plant.[187] As Mr. Nader cogently notes, however, the media has only a sporadic interest in occupational safety and health, usually tied to some tragedy like the North Carolina fire.[188] Moreover, workplace accidents do not directly dramatize the issue of occupational diseases because these diseases occur in scattered

180. *Id.*

181. *See* McGARITY & SHAPIRO, *supra* note 5, at 220 (comparing OSHA's six month maximum penalty for a willful endangerment of an employee to the penalty for willful endangerment of a fish, a violation of the Clean Water Act which carries a maximum penalty of fifteen years).

182. *AFL-CIO Delegates Urge Congress to Act on Legislation to Award Workplace Safety Law*, 23 O.S.H. Rep. (BNA) No. 20, at 527 (Oct. 13, 1993) [hereinafter *AFL-CIO Delegates*] (quoting John Sweeny, President of Services Employees International Union).

183. McGARITY & SHAPIRO, *supra* note 5, at viii.

184. *AFL-CIO Delegates*, *supra* note 182, at 527.

185. *See* BAUMGARTNER & JONES, *supra* note 6, at 106 (noting that the media is a key factor in determining which issues receive public attention).

186. KINGDON, *supra* note 69, at 99-100 (stating that such an event focuses the attention of the public and government).

187. Refer to note 38 *supra* and accompanying text for a description of the fire.

188. Nader, *supra* note 39, at 6.

individuals years after exposure.[189] Better media coverage is necessary to publicize the plight of workers ravaged by occupationally-related disease. Without it, reformers cannot make their case to the public.[190]

Workers face additional problems in redefining the issue of workplace health and safety in a way to capture public attention. An important source of altruism is an "emphatic link" with those being assisted.[191] Yet, many members of the public perceive unions as a classic example of a "special interest." For example, the public perception concerning issues such as NAFTA, is that organized labor seeks to protect the wages of their members, regardless of the impact on the country as a whole.[192] Other members of the public regard union arguments about fairness as hypocritical. This position stems from the view that, concerning environmental issues, organized labor has sided with business and sought to protect jobs instead of cleaning up the environment.[193] It is unclear whether organized labor can overcome the lack of empathy for its concerns prevalent among the general public.

In light of the foregoing problems, reformers will need presidential assistance in order to redefine the occupational safety issue.[194] No other political actor "can focus attention as clearly, or change the motivations of such a great number of other actors."[195] The President must use his "bully pulpit"

189. Schroeder & Shapiro, *supra* note 25, at 1234 (noting that the period before the onset of illness ranges between 4 and 40 years).

190. *See* GLENDON, *supra* note 172, at 178 (noting a profound lack of coverage by the mass media of workers' health and safety issues).

191. Mark Schlesinger & Tae-ku Lee, *Is Health Care Different?: Popular Support of Federal Health and Social Policies*, 18 J. HEALTH POL., POL'Y. & L. 551, 594 (1993).

192. *Cf.* William Cunningham & Segundo Mercado-Llorens, *The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder*, 10 HOFSTRA LAB. L.J. 413, 414 (stating that organized labor opposes NAFTA because it "is not in the best interests of the United States and its labor force"); *see id.* at 428-31 (finding that despite optimistic predictions to the contrary, NAFTA will force American workers to compete with cheap Mexican labor that works under substandard conditions and will ultimately produce a contracted domestic workforce).

193. Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 956 (1992) (stating that labor unions oppose stricter environmental regulation because workers perceive such regulations as a threat to job security and wages). *See generally* James C. Oldham, *Organized Labor, The Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935, 939-80 (1973) (examining worker attitudes to out-plant pollution and other industrial pollution, and unions' response).

194. *See* BAUMGARTNER & JONES, *supra* note 6, at 241 (drawing on studies of legislative action with regard to drugs and urban affairs to conclude that a President's role is essential to getting an issue on the national agenda).

195. *Id.*

if reformers are to have any chance of focusing the debate on the fairness of the status quo.

IV. CONCLUSION

This Symposium focuses on why so many workers are injured by and die from work-related causes, and on what change in policies will be most effective at stemming the tide of occupational accidents and diseases. Identifying effective responses, however, is only part of the workers' battle. They must also have sufficient political resources to influence Congress and state legislatures to pass the reforms that are needed. As the political science literature makes clear, the policies preferred by workers may not be obtainable as a political matter.

The problem for workers has been, and continues to be, too little political influence. This situation is not likely to change unless the President strongly intervenes on their behalf. Even his support, however, may not be enough to push effective reforms through Congress unless legislators perceive that the public supports strong action. Workers must therefore redefine the issue of occupational safety and health in a manner that galvanizes the public's interest.

If assisted by the President, workers can redefine the workplace safety issue by appealing both to the self-interest and to the altruistic communitarian impulses of the public. Such a redefinition will not be easy. It will require changing strongly-held ideologies and attitudes concerning the role of government in workplace health and safety. Whether the effort is successful will have significant ramifications. For workers, it will determine the level of workplace health and safety. For the rest of us, it will decide the type of society that we wish to have.

ARTICLE

REPRODUCTIVE HAZARDS AFTER *JOHNSON CONTROLS*

Mary Becker[*]

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ARTICLE

REFORMING OSHA: SOME THOUGHTS FOR THE CURRENT LEGISLATIVE AGENDA

Thomas O. McGarity[*]

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One of the stains on the history of the highly productive American free-market economy is its persistent legacy of occupational injury and disease. Although the cornucopia of goods and services that the American economy has made available to American consumers would have been impossible without exposing American workers to some degree of health and safety risk, too many workers have suffered injury, disease, and

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#3
Good overview
possible points to take into
consideration

death in the pursuit of an attractive return on investor capital.[1]

We could conclude that current rates of occupational injury and disease are acceptable because workers voluntarily assume the risks of unsafe workplaces by bargaining individually with their employers over wages and workplace conditions. Under this theory, workers will demand higher wages to work under risky conditions and employers will have a natural incentive to install risk-reduction technologies in dangerous workplaces.[2] Over the long haul, the economy should reach an equilibrium in which workers who consent to working under risky conditions perform the dangerous jobs and employers install the optimum amount of risk reduction technology.

Although this callous view of the employment relationship is a fairly accurate characterization of the state of American law at the end of the nineteenth century, it clashed so radically with the reality of the turn-of-the-century workplace that state legislatures enacted workers' compensation regimes to provide some compensation to diseased and injured workers beyond that afforded by the "wage premiums" that they had theoretically extracted from their employers.[3] Compensation was, however, a poor substitute for prevention, and it became even less satisfying as inflation and legislative inattention eroded the value of the awards and reduced the incentives for employers to keep workplaces safe.[4] By the late 1960s, the plight of American workers finally made its way onto the federal legislative agenda, and on December 29, 1970, President Richard Nixon, with much fanfare, signed the Occupational Safety and Health Act of 1970 ("OSH Act").[5]

The statute created a new bureaucracy in the Department

1. *See, e.g.*, Cristine N. O'Brien & Margo E.K. Reder, *Strategies for Implementing Workplace Reproductive and Health Programs*, 19 J. LEGIS. 97, 97-98 (1993) (estimating that "20 million jobs in the United States expose workers to chemicals, metals and other products suspected of causing reproductive injury" at a cost of "$83 billion for medical expenses and lost work-time costs").

2. *See* W. Kip Viscusi, *Structuring an Effective Occupational Disease Policy: Victim Compensation and Risk Regulation*, 2 YALE J. ON REG. 53, 56-57 (1984) (noting that the theory would only be valid "[u]nder ideal conditions of full information and voluntary job choice").

3. *See* THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 21-28 (1993) (outlining the history of workers' compensation laws).

4. *See id.* at 21-23.

5. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-78 (1988 & Supp. IV 1992)); *see also* BUREAU OF NATIONAL AFFAIRS, INC., THE JOB SAFETY AND HEALTH ACT OF 1970, at 13 (1971) (quoting Senator Jacob K. Javits as stating that passage of the OSH Act was preceded by "the most bitter labor-management political fight in years").

of Labor called the Occupational Safety and Health Administration (OSHA) and empowered it to write occupational safety and health standards "reasonably necessary and appropriate" for providing workers with a safe working environment.[6] To the extent that it relied on economic inducements, the OSH Act primarily held out the direct incentive of avoiding heavy fines or jail.[7] OSHA inspectors could issue citations for violations of OSHA-promulgated standards or for conduct that breached the employers' "general duty" to provide safe and healthful places of employment.[8] By creating a full-fledged regulatory regime administered by a powerful regulatory agency, the OSH Act offered the promise of greatly reduced injury and disease rates in the American workplace.

Unfortunately, the statute has not lived up to its promise. Although the tortuous and frustrating history of the Occupational Safety and Health Administration is too lengthy to tell in these pages,[9] a consensus is rapidly emerging that the regulatory regime created by the OSH Act is broken and badly in need of repair. The roots of OSHA's failure lie in the complex institutional web in which OSHA has always been enmeshed, in a lack of forceful leadership through nearly all of its existence, in a chronic shortage of resources, and, ultimately, in the statute itself. During the last twelve years OSHA has promulgated a pitifully small number of occupational health standards and not a significantly larger number of occupational safety standards.[10] Although OSHA will never have enough inspectors, its enforcement efforts during the 1980s dwindled to virtual nothingness,[11] and rose

6. 29 U.S.C. §§ 652(8), 656 (1988).

7. *See* 29 U.S.C. § 666 (1988 & Supp. IV 1992). Willful or repeated violations are punishable by a civil penalty of up to $70,000 per violation but not less than $5000 for each willful violation. *Id.* § 666(a). Willful violations which cause an employee death may result in a fine of up to $10,000 or imprisonment for up to six months. *Id.* § 666(e). Violations determined not to be of a serious nature may result in a civil penalty up to $7000. *Id.* § 666(c). The failure to remedy the violation after receipt of a citation may result in a civil penalty of up to $7000 per day while the violation continues. *Id.* § 666(d).

8. *Id.* § 658(a) (1988).

9. For a reasonably thorough account of the history of OSHA, see MCGARITY & SHAPIRO, *supra* note 3, at 33-177.

10. *See* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 2 (1989) [hereinafter *Reorienting OSHA*] (noting that as of 1989 the Agency had completed only 24 substance-specific health regulations during its 17 year history).

11. MCGARITY & SHAPIRO, *supra* note 3, at 139-53 (recognizing the weakening enforcement during the Reagan years).

to pre-1980 levels only during the Bush administration.[12] As a consequence, workers continue to be injured and contract diseases at an alarming rate.[13]

This sad record can be changed, but it will require a commitment by the Clinton Administration to making American workplaces safe for American workers and a determination by all of us not to be dissuaded by threats that companies will move their operations overseas.[14] Reviewing institutions, such as the Office of Management and Budget and the courts, must acknowledge that occupational safety and health standard-setting is an exceedingly complex task that will not survive fly specking review and that they must afford OSHA a considerable range of discretion. This is particularly true with respect to techniques for regulating, such as generic standard-setting.

No real change is likely, however, until Congress amends the statute in a way that frankly acknowledges the failures of the past and firmly sets the agency on the road to a new beginning. For the first time in its twenty-three year history, serious proposals for reforming the OSH Act are currently pending in Congress,[15] and their sponsors have a reasonable expectation that some form of OSHA reform legislation will be enacted in the near future. This Article will examine some of the more important aspects of the pending reform proposals and suggest some additional proposals that could help send OSHA on the way toward a more successful second quarter century.

The current statutory regime has failed for three fundamental reasons. First, legislative compromises that facilitated the enactment of the original statute left the agency in a weak position to protect workers.[16] The statute must therefore be amended to provide OSHA with "new powers" to protect workers. Second, the original statute optimistically

12. *See id.* at 158-77.

13. *See id.* at 3-14 (indicating that American workers are still plagued by inadequate protection).

14. *See OSHA Outlook: Tougher Enforcement, New Legislation Seen in Coming Year*, O.S.H. Daily (BNA), at D4 (Jan. 12, 1994) [hereinafter *OSHA Outlook*] (stating that new OSHA Administrator Joseph A. Dear promises that the Agency "will use the stick of enforcement action when needed to prod an employer to provide a safe workplace"). It also appears that the Clinton Administration intends to support the Democratic-sponsored Comprehensive Occupational Safety Reform Act. *Id.*; refer to note 15 *infra*.

15. *See* H.R. 1280, 103d Cong., 1st Sess. (1993); S. 575, 103d Cong., 1st Sess. (1993).

16. *See* McGarity & Shapiro, *supra* note 3, at 34-36 (discussing OSHA's legislative history).

assumed that OSHA administrators and staff would forcefully implement their statutory duties out of a common desire to protect workers.[17] Sadly, this has not always been the case. New legislation must therefore contain "bureaucracy forcing" provisions that enable outsiders to hold OSHA accountable for failures to perform its statutory obligations. Third, the original statute greatly underestimated the capacity for an underfunded OSHA inspectorate to detect and correct violations of OSHA standards.[18] Because a huge OSHA inspectorate is neither politically feasible nor desirable, Congress should amend the statute to empower workers to protect themselves from unsafe workplace conditions.

I. Greater Authority for OSHA

A. *Generic Standards*

Generic standard-setting is a much more efficient approach to rulemaking than the case-by-case approach that OSHA has typically adopted in the past.[19] Rather than attempt to regulate each of the hundreds of toxic chemicals that are found in workplaces, OSHA could adopt a generic approach to regulate chemical risks on an industry-by-industry[20] basis or promulgate broad multi-chemical standards applicable to all workplaces in which workers are exposed to any of the chemicals.[21]

For two decades it appeared that OSHA had sufficient authority to promulgate generic standards, and indeed in its early years OSHA wrote several important generic regulations.[22] The recent decision of the Eleventh Circuit Court of Appeals in *AFL-CIO v. OSHA*,[23] however, suggests that the power to set standards generically on the basis of broad information, rather than chemical-specific information about toxicity and feasibility, may need to be explicit in the statute. *AFL-CIO* involved OSHA's massive "PEL Update" rulemaking

17. *See id.*

18. Refer to notes 66-67 *infra* and accompanying text.

19. McGarity & Shapiro, *supra* note 3, at 200-02.

20. *See id.* at 202-03 (discussing the advantages and disadvantages of industry-wide standards).

21. *See id.* at 203 (noting that OSHA might promulgate standards which regulate more than one chemical and noting the limits of this approach).

22. *See* U.S. Office of Technology Assessment, Preventing Illnesses and Injury in the Workplace 363-64 (1985) (listing early OSHA regulations); *see also* McGarity & Shapiro, *supra* note 3, at 52-53, 201-02 (discussing OSHA's apparent authority to promulgate generic regulations and the generic regulations promulgated).

23. 965 F.2d 962 (11th Cir. 1992).

involving 428 air contaminants for which OSHA had previously promulgated "consensus standards" pursuant to an explicit congressional directive.[24] OSHA had based the earlier permissible exposure limits (PELs) on recommendations of private standard-setting organizations such as the American Conference of Governmental Industrial Hygienists (ACGIH) and the American Standards Association.[25] Over the years, however, these private entities and the newly created National Institute for Occupational Safety and Health (NIOSH) had continued to study the health effects of the contaminants that were the subject of consensus PELs, and the legally enforceable PEL became outdated.[26] The PEL Update rulemaking represented OSHA's attempt to promulgate a single generic standard updating the PELs to reflect more recent ACGIH and NIOSH recommendations.[27] OSHA believed that it could accomplish this relatively uncontroversial generic update without making individual findings of significant risk and feasibility for each of the 428 contaminants.[28] The Court of Appeals for the Eleventh Circuit thought otherwise.[29]

The court held that although the statute allowed OSHA to engage in generic rulemaking, "the PEL for each substance must be able to stand independently, i.e., that each PEL must be supported by substantial evidence in the record considered as a whole and accompanied by adequate explanation."[30] As a practical matter, this meant that OSHA was obliged to support findings that each of the substances posed a significant risk and that controls sufficient to achieve each of the PELs were feasible.[31] Although OSHA had taken great pains to summarize the evidence for each of the 428 substances, it did not prepare individual risk assessments for each of the chemicals—an exercise that would have involved determining the

24. *Id.* at 968-69. The "consensus standards" were the "start-up" standards that Congress, under § 6(a) of the Occupational Safety and Health Act of 1970, required OSHA to promulgate on an expedited basis without public hearing or comment in order to improve employee health or safety. *Id.* at 968. The PELs were the limits that OSHA promulgated in 1971 pursuant to that authority. *Id.*

25. *Id.* nn.5 & 6.

26. *Id.* at 974 (noting the arguments made by OSHA to support the new standards).

27. *Id.*

28. *Id.* at 971.

29. *Id.* at 972.

30. *Id.*

31. *Id.* at 973-80. The court held that "OSHA must provide at least an estimate of the actual risk associated with a particular toxic substance and explain in an understandable way why that risk is significant." *Id.* at 973 (citations omitted).

degree of exposure to each of the substances in all, or some representative sample, of the thousands of workplaces in which employees were exposed to those substances.[32] The court held that OSHA's generic determination that the overall standard would prevent 55,000 occupational illnesses and 683 deaths annually was not sufficient.[33] The court likewise rejected OSHA's generic determination that compliance with the PELs was feasible, noting that "OSHA made no attempt to show the ability of technology to meet specific exposure standards in specific industries."[34]

Although OSHA pressed the Justice Department to appeal the Eleventh Circuit ruling to the Supreme Court, the Solicitor General declined to do so.[35] The Eleventh Circuit's exceedingly narrow interpretation of OSHA's authority to write generic standards therefore stands as a barrier to future generic rulemaking initiatives. Unless OSHA is prepared to support individualized significant risk and feasibility determinations, it should not adopt a generic approach to health or safety risks. Given the massive resources required to make such individualized determinations and the tiny size of OSHA's rulemaking staff, the agency will be forced to return to the ponderous chemical-by-chemical approach that it has traditionally adopted.[36] Congress could easily prevent this foreseeable abandonment of generic rulemaking by amending the OSH Act to clarify OSHA's authority to engage in generic rulemaking without making individualized significant risk and

32. *Id.* at 975. OSHA had in fact made individual risk estimates for the chemicals that it found to be carcinogens, but the court found this to be an exception to OSHA's general method of risk assessment. *Id.* at 975 & n.18.

33. *Id.* at 975-76 (stating that "'[w]hile our deference to the agency is at a peak for its choices among scientific predictions, we must still look for *some* articulation of reasons for those choices.'" (quoting International Union, UAW v. Pendergrass, 878 F.2d 389, 392 (D.C. Cir. 1989)). The court apparently thought it appropriate to pick and choose from OSHA's rationales for the 428 substances that the court found to be least plausible, even though no one had challenged the PELs for those substances. *See id.* at 976 (giving examples of the insufficient reasoning used by OSHA in establishing certain PELs); *see also* Marshall J. Breger, *Defending Defenders: Remark on Nichol and Pierce*, 42 DUKE L.J. 1202, 1207 (1993) (noting that although only 23 PELs were challenged, "the Eleventh Circuit, *sua sponte*, vacated all 428 [PEL's]"). Understandably, OSHA had put fewer resources into standards that it knew were not likely to be challenged, thus it was unfair for the court to seize on those rationales as examples of poor OSHA reasoning.

34. 965 F.2d at 981.

35. *See Clinton Administration Will Not Seek Supreme Court Review on OSHA Exposure Limits*, 54 Daily Lab. Rep. (BNA), at A-7 (Mar. 23, 1993).

36. *See Health Hazards: Clinton Administration Will Not Seek High Court Review on OSHA Exposure Limits*, 16 Chem. Reg. Rep. (BNA), at 2435 (Mar. 26, 1993) (noting that OSHA argued in support of generic rulemaking because of the slowpace of its traditional method of setting exposure limits one chemical at a time).

feasibility determinations.

Both of the existing prominent OSHA Reform bills would explicitly overturn the Eleventh Circuit holding by directing OSHA to promulgate the same generic PEL Update as an interim final rule and providing that the rule shall take effect immediately upon its promulgation.[37] In addition, both bills would direct OSHA and NIOSH to "modify and establish exposure limits for toxic materials and harmful physical agents" on a regular three-year basis.[38] Although the bills would subject OSHA to tight deadlines, they would still require the agency to explain any modifications.[39] The bills also provide that the generic standard shall be "in accordance with the requirements of subsection (b)(5),"[40] a curious reference to the current statutory language that may be interpreted to mean that the required explanation must include individualized determinations of significant risk and feasibility.[41] If so, enactment of either of the bills will do very little to facilitate generic rulemaking, even in the limited area of PEL updates. Neither of the bills address OSHA's authority to promulgate generic standards in other contexts. Therefore, no real change is likely unless Congress amends the Act to provide that OSHA may address multiple chemicals or multiple hazards in a single rulemaking proceeding without making detailed findings of significant risk and feasibility on a chemical-by-chemical or hazard-by-hazard basis.

B. *Shifting the Burden of Proof*

Congress could bring about a more fundamental change in the rulemaking process if it draws upon the Environmental

37. H.R. 1280, 103d Cong., 1st Sess. § 409 (1993); S. 575, 103d Cong., 1st Sess. § 409 (1993).

38. H.R. 1280, § 405; S. 575, § 405.

39. H.R. 1280, § 405(2); S. 575, § 405(2). Both proposals require that the recommendations include a suggested exposure limit and the basis for the suggested limit. H.R. 1280, § 405(2); S. 575, § 405(2).

40. H.R. 1280, § 405; S. 575, § 405.

41. *See* 29 U.S.C. § 655(b)(5) (1988). The statute states that

> [d]evelopment of standards . . . shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health safety laws. Whenever practical, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Id.

Protection Agency's (EPA) experience with complex scientific rulemaking. After EPA's rulemaking process became bogged down in the mid-1970s, Congress amended the Clean Air Act[42] and the Clean Water Act[43] to provide several "burden shifting" devices under which EPA could put the burden of justification on the regulated industry.[44] Professor Sidney Shapiro and I have proposed a burden shifting regime for OSHA that could similarly relieve OSHA of some of the burden of justifying standards aimed at protecting workers.[45] Under this approach, OSHA, or perhaps NIOSH, would promulgate a list of chemicals and other harmful physical agents that "could reasonably be anticipated to cause a material impairment of health or functional capacity."[46]

The proposed statute would create three broad categories of industrial hazards.[47] Any industrial category in which an employee was exposed to a substance on the list would fall initially into Class II and would retain that classification until redesignated by OSHA.[48] All industrial categories in Class II would have to install "best available workplace risk reduction technology" (BAT) by a specified deadline.[49] OSHA would promulgate generic standards defining BAT on an industry-wide basis prior to some statutory deadline designed to give regulatees sufficient time to install the required technologies.[50] Personal protective devices could not be considered BAT, but variances would be available on a case-by-case basis to individual companies upon a demonstration that meeting the standard was technologically infeasible or that the cost per worker of meeting the standard greatly exceeded the per worker cost of other companies in the industry.[51]

OSHA would redesignate an industrial hazard to Class I if regulation under Class II would leave workers exposed to a

42. 42 U.S.C. §§ 7401-7671q (1988 & Supp. III 1991).

43. 33 U.S.C. §§ 1251-1376 (1988 & Supp. IV 1992).

44. *See* MCGARITY & SHAPIRO, *supra* note 3, at 297-99 (discussing the EPA's burden shifting reforms).

45. *Reorienting OSHA*, *supra* note 10, at 45-50; *see also* MCGARITY & SHAPIRO, *supra* note 3, at 299-304.

46. *Reorienting OSHA*, *supra* note 10, at 47. This test would require much less justification than "the significant risk" threshold for current OSHA rulemaking. *See id.* at 47 n.265. OSHA could add substances to the list based upon their chemical properties without regard to the degree of worker exposure.

47. *See id.* at 47-48. For a more detailed discussion of this proposal, see to MCGARITY & SHAPIRO, *supra* note 3, at 299-303.

48. *Reorienting OSHA*, *supra* note 10, at 47.

49. *Id.*

50. *Id.* at 47 n.266.

51. MCGARITY & SHAPIRO, *supra* note 3, at 300-01.

"significant risk of material impairment to health or functional capacity."[52] For Class I hazards, OSHA would require employers to reduce exposure to the extent "feasible."[53] This would require more expensive risk reduction technologies than BAT. The regulation would allow personal protective devices to the extent necessary to reduce risk to a level of insignificance, but they would be phased out as companies installed engineering controls.[54] So long as personal protective devices were necessary to reduce risk, the companies would have to engage in engineering research relevant to the risk at issue with the goal of developing additional engineering controls.[55] OSHA would be empowered to identify high-risk operations in Class I industries for which a permit would be required. To secure a permit, a company would be required to submit a health protection plan showing how they would enforce personal protective device requirements, how they would implement medical monitoring and hazard removal, and specifying the additional efforts that the company was undertaking to identify and implement new engineering controls.[56] The permit would have to be renewed on a yearly basis. Variances would be available from Class I standards, but not from other Class I requirements, and only on the ground of technological infeasibility.[57]

A regulated entity or trade association could petition OSHA to redesignate an industry to the least stringently regulated Class III upon a demonstration that employees in the industry could not reasonably be anticipated to suffer "material impairment of health or functional capacity" under any realistic exposure scenarios.[58] The industry would thus bear the burden of demonstrating that employee exposure to the listed substance was so trivial as to reduce the risk of harm to acceptable levels. Industries in Class III would be required to reduce employee exposure to levels permitted by

52. *Reorienting OSHA*, *supra* note 10, at 47. This test would be equivalent to the current significant risk threshold.

53. *Id.* at 47.

54. Such a requirement would require employers to install the best technology foreseeable on the horizon, including technology not yet approved in this country. *Id.*

55. *Id.* Reducing the risk to an insignificant level would be the ultimate goal. *Id.*

56. MCGARITY & SHAPIRO, *supra* note 3, at 302.

57. *Id.*

58. *Reorienting OSHA*, *supra* note 10, at 48.

privately established "consensus standards."[59]

Although the above proposal is certainly not the only possible burden shifting device, some kind of procedural vehicle to shift the burden of justification is necessary if OSHA is to have any hope of accelerating the ponderous pace of its standard-setting efforts. It is therefore disappointing that neither of the currently proposed bills attempts to adapt the burden shifting idea to the OSHA rulemaking context.

C. *Scope of Judicial Review*

The Eleventh Circuit's remand of the PEL Update standard is just one of many instances of overly aggressive judicial review of OSHA standard-setting. On numerous occasions, reviewing courts have imposed additional analytical requirements on OSHA and have insisted that OSHA explain every subtle nuance of every challenged aspect of its regulatory rationale.[60] Even though OSHA often prevails in the end, stringent judicial review has had a dramatic impact on OSHA's standard-setting pace.[61] The prospect of judicial review by a judge who demands that every fine nuance of the agency's decision be explained to that judge's satisfaction requires delays for additional studies, more detailed explanations, and thorough responses to each of the arguments that regulatees raise in their blunderbuss attacks on the proposed rules.[62] If

59. *Id.* Private "consensus standards" would connote OSHA's original consensus test. *Id.*; refer to note 24 *supra* (explaining "consensus standards" promulgated by OSHA).

60. MCGARITY & SHAPIRO, *supra* note 3, at 254-64 (discussing the problems created by "hard look" review and the "substantial evidence" test, and advocating greater deference to agency rulemaking efforts); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410-26 (1992) (discussing the courts' lack of deference to agency rules and arguing that "judicial review under hard look doctrine has contributed to rulemaking classification").

61. MCGARITY & SHAPIRO, *supra* note 3, at 258.

> Sixty percent of the agency's health standards have taken three years or longer; 48 percent have taken four years or longer; and 40 percent have taken five years or longer. OSHA has been working three or more years on 70 percent of its pending health standards and five years or more on 40 percent of its pending health standards. [OSHA] has acted somewhat more quickly on its safety standards—only 30 percent have taken three or more years—but it has been working four or more years on 57 percent of its pending safety standards.

Id.

62. *Id.* at 257-58 (outlining the effect of an overzealous review); *cf.* International Union, UAW v. Donovan, 590 F. Supp. 747, 751-56 (D.C. Cir. 1984) (remanding for agency reconsideration of its denial to issue emergency formaldehyde standard in light of current developments presented to the court), *order adopted*, 756 F.2d 162

the rationale for every rule must be capable of surviving flyspecking judicial review, OSHA will be able to promulgate very few rules.

One reason for the stringency with which some reviewing courts review OSHA standards is the anomalous prescription for the scope of review in OSHA's current statute. Whereas the Administrative Procedure Act (APA) subjects informal rulemaking to the "arbitrary and capricious" review standard,[63] the OSH Act requires the courts of appeals to review OSHA standards under the "substantial evidence" test reserved for agency adjudications under the APA.[64] The Fifth and Eleventh Circuits have read this anomaly as a conscious signal by Congress to the judiciary to review OSHA rules more stringently than they would otherwise review agency rulemaking.[65] Congress could require that the federal judiciary adopt a less intrusive approach to its review of OSHA standards by amending the OSH Act to provide for "arbitrary and capricious" review of OSHA health and safety standards. This would comport with the standard of review for most other agency rules, and would signal to OSHA that it need not be so concerned with loading up the record and the rulemaking preambles with responses to every conceivable argument that affected parties might level against its rules. Neither of the current reform bills, however, addresses the scope of judicial review of OSHA standards.

D. *Enforcement*

One of OSHA's greatest frustrations is the disparity between its very limited enforcement staff of about 1000 employees and its responsibility for the safety of workers in millions of workplaces. The approximately 60,000 inspections that OSHA has conducted annually represents a mere drop in the bucket of inspections that should be made.[66] Only about one of every twenty-five job sites has ever been visited by an

(D.C. Cir. 1985).

63. 5 U.S.C. § 706(2)(a) (1988).

64. 29 U.S.C. § 655(f) (1988).

65. AFL-CIO v. OSHA, 965 F.2d 962, 970 (11th Cir. 1992); National Grain & Feed Ass'n v. OSHA, 866 F.2d 717, 728 (5th Cir. 1988), *enforcement denied and stay lifted by* 903 F.2d 308 (5th Cir. 1990); *see also* McGARITY & SHAPIRO, *supra* note 3, at 256-57 (discussing the application of the "substantial evidence" test under the OSH Act).

66. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF THE PRESIDENT TO THE CONGRESS ON OCCUPATIONAL SAFETY AND HEALTH FOR CALENDAR YEAR 1987, at 44 (1988) (using 1987 statistics).

OSHA inspector.[67] OSHA clearly needs more enforcement resources, but an infusion of personnel is highly unlikely in the foreseeable future. Although the Reagan Administration went to great lengths to squeeze the fat out of the federal bureaucracies, the Clinton Administration is apparently committed to "reinventing government" by cutting still further the resources available to federal agencies.[68] Although both the House and the Senate OSHA Reform bills substantially stiffen the sanctions available to OSHA once it detects a violation, neither bill demonstrates a commitment toward making greater resources available to OSHA.[69] Enforcement of OSHA standards and the general duty clause[70] will obviously have to come from other institutions. Part III of this Article will examine some suggestions for "reinventing government" by empowering workers.

II. BUREAUCRACY FORCING

It is a sad commentary on OSHA's recent history that nearly all of the occupational health standards it has promulgated in the last twelve years have come in response to "bureaucracy forcing" lawsuits filed by unions or other employee representatives.[71] To some extent this passivity on OSHA's part is attributable to the Office of Management and

67. *Bill on Sanctions Should Bar Pre-emption of State Actions by Federal law, Panel Told*, 17 O.S.H. Rep. (BNA) No. 26, at 979 (Nov. 25, 1987).

68. *See generally* AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, at iii (1993) (stating that the Clinton Administration is recommending changes to several governmental agencies which would reduce spending by $108 billion over a five year period).

69. H.R. 1280, 103d Cong., 1st Sess. § 512 (1993); S. 575, 103d Cong., 1st Sess. § 512 (1993).

70. *See* 29 U.S.C. § 654 (1988). Section 654 places general duties on both the employer and the employee. *Id.* The employer must furnish a safe work environment and comply with all standards promulgated under the Act. *Id.* Likewise, the employee must comply with all standards, rules, and regulations issued pursuant to the Act. *Id.*

71. *See, e.g.*, United Steelworkers of America v. Rubber Mfr. Ass'n, 783 F.2d 1117, 1119 (D.C. Cir. 1986) (unions filed a writ of mandamus to compel OSHA to expedite rulemaking on benzene); International Union, UAW v. Donovan, 756 F.2d 162, 163 (D.C. Cir. 1985) (labor organizations sought an order directing OSHA to regulate exposure to formaldehyde in the workplace); Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1153 (D.C. Cir. 1983) (non-profit organization sought an order compelling OSHA to issue an emergency standard regulating workplace exposure to ethylene oxide). A "bureaucracy forcing" lawsuit is an action brought by an "interested person," whereby a court finds that an agency has been too slow in responding to a petition and issues a writ of mandamus, thereby requiring the agency to make a decision within a specified time period. *See* McGARITY & SHAPIRO, *supra* note 3, at 310.

Budget's adamant resistance to OSHA regulations during the Reagan and Bush Administrations.[72] Yet even during the Carter Administration, outsiders resorted to judicial remedies to nudge the agency along, and they are likely to continue that pressure during the Clinton Administration.[73]

Although the bureaucracy forcing lawsuit is one of the few effective tools that workers have to induce OSHA to do its job, the procedure is very convoluted.[74] The statute presently requires the outsider to file a petition for a temporary emergency standard and then convince a reviewing court that the agency unreasonably delayed in promulgating the emergency temporary standard.[75] The statute does not clearly provide for judicial review of OSHA's negative response to a petition to promulgate an ordinary occupational safety or health standard.

In the context of the EPA, Congress has prescribed dozens of statutory deadlines within which that agency must promulgate rules.[76] If the EPA fails to meet a deadline, outsiders may sue to force the agency to adhere to a judicially monitored timetable.[77] The fact that OSHA is not subject to similar statutory deadlines may help to explain why it promulgates so few rules. Statutory deadlines, however, pose huge implementation problems and can divest the agency of control over its own agenda.[78] Yet without deadlines, a lethargic agency or one not committed to worker safety can very easily justify doing nothing.[79]

Both of the OSH Act reform bills require OSHA to publish, in the *Federal Register*, a response to any standard-setting petition within ninety days of its receipt.[80] If OSHA refuses to publish the rule, it must provide reasons for its decision.[81] If the response is in the affirmative, OSHA must publish a proposed rule within twelve months of the decision.[82] Within eighteen months of the publication of the

72. McGARITY & SHAPIRO, *supra* note 3, at 310.
73. *See id.*
74. *Id.*
75. *Id.* at 310-11.
76. *Id.* at 312.
77. *Id.*
78. *Id.* at 312-13 (noting that the existence of deadlines forces an agency to promulgate rules too quickly).
79. *See id.* at 313.
80. H.R. 1280, 103d Cong., 1st Sess. § 401(a) (1993); S. 575, 103d Cong., 1st Sess. § 401(a) (1993).
81. H.R. 1280, § 401(a); S. 575, § 401(a).
82. H.R. 1280, § 401(e); S. 575, § 401(a).

proposed rule, the agency must promulgate a final rule.[83] The bills would allow adversely affected persons to challenge in court a decision not to promulgate a rule.[84] Affected persons would also be allowed to challenge OSHA's failure to adhere to the statutory deadlines.[85] Thus, the current reform bills adopt the rather hard line approach that Congress has used to stimulate the EPA.[86] Despite its generally greater commitment to worker safety than its predecessors, the Clinton Administration will no doubt vigorously oppose these constraints on its rulemaking discretion.[87]

Some system of enforceable deadlines, like those established in the proposed bills, is essential to improving OSHA's rulemaking productivity.[88] A suitable middle-ground solution may be to amend the OSH Act to require OSHA to set its own deadlines and then adhere to them.[89] Congress could place a cap, perhaps three years, on those deadlines and allow agency-set deadlines to be extended only for good cause. Congress could then give the courts explicit authority to enforce the OSHA-set deadlines. This approach would allow the agency to set its own agenda while at the same time providing a vehicle for the beneficiaries of OSHA regulations to hold the agency to its own schedule.[90]

III. EMPOWERING WORKERS

Even more fundamental changes in occupational safety and health could result from changing the law to empower workers to protect themselves.[91] Under the current statute, workers play only a very modest role in enforcing OSHA standards and the general duty clause. For example, although the OSH Act allows employees to accompany OSHA inspectors on their rounds,[92] they rarely participate in the settlement

83. H.R. 1280, § 401(e); S. 575, § 401(e).
84. H.R. 1280, § 401(d); S. 575, § 401(d). The same procedure applies to recommendations from NIOSH, EPA, and OSHA advisory committees.
85. H.R. 1280, § 401(a); S. 575, § 401(d).
86. *See* McGARITY & SHAPIRO, *supra* note 3, at 312-14 (comparing the EPA's statutory framework with OSHA's).
87. *See generally OSHA Outlook*, *supra* note 14 (reporting that the new OSHA Administrator, Joseph Dear, has pledged to increase enforcement efforts and improve standard setting).
88. Refer to notes 87-89 *supra* and accompanying text.
89. McGARITY & SHAPIRO, *supra* note 3, at 313.
90. *Id.* at 314.
91. *See generally id.* at 321-29 (examining how Congress might enable greater employee participation in OSHA enforcement).
92. *Id.* at 322.

negotiations between the employers and OSHA officials that invariably precede the final assessment of civil penalties.[93] In the past, these informal settlement conferences, which do not always include the inspector who issued the citation, have resulted in dramatic reductions in penalties.[94] In addition, although employers are entitled to contest OSHA citations, workers and their representatives have no right to challenge a penalty on the ground that it was not sufficiently harsh to send the appropriate message to the employer.[95] Employees may only challenge a citation on the ground that "the period of time fixed in the citation for the abatement of the violation is unreasonable."[96]

Employees may reasonably wonder whether OSHA and the employers are attempting to hide something by engaging in closed-door settlement negotiations, and employees may legitimately fear that the agency officials may "give away the store." On the assumption that sunlight is the best of disinfectants,[97] Congress could amend the OSH Act to give employees and their representatives the unqualified right to observe settlement negotiations.[98] In addition, Congress could give employees the power to persuade an administrative law judge that particular settlement terms were too lenient and provide the ability to secure an order to continue the enforcement proceedings.[99] Given OSHA's extremely limited resources, the threat of an employee challenge is a necessary counterweight to the employer's ever present threat to litigate the assessed penalty.[100] Both of the reform bills achieve this

93. HOUSE COMM. ON EDUC. & LABOR, 100TH CONG., 2D SESS., OSHA OVERSIGHT: HEARINGS ON FIRE BRIGADE STANDARD AND EMPLOYER/EMPLOYEE ROLES IN SETTLEMENT CONFERENCES 208 (Comm. Print 1988) (testimony of John Pendergrass, Assistant Secretary for Occupational Safety and Health) (noting that the conducting OSHA official has discretion regarding whether an employee or an employee's representative shall be allowed to participate); *see* 29 C.F.R. § 1903.19 (1993) (providing for informal conferences with employees to discuss issues raised by an "inspection, citation, notice of proposed penalty, or notice of intention to contest").

94. *See* MCGARITY & SHAPIRO, *supra* note 3, at 217 (noting that in 1988 OSHA reduced fines by 71% in settlement negotiations).

95. *Id.* at 323.

96. 29 U.S.C. § 659(c) (1988).

97. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 62 (1933) (stating that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman").

98. *See* Sy Holzman, *The Occupational Safety & Health Act: Is It Time for Change?*, 17 N.K. L. REV. 177, 186 (1989) (discussing a number of proposals to allow employees "a more defined role" in settling cases where their employer has been cited for violations).

99. MCGARITY & SHAPIRO, *supra* note 3, at 324.

100. *Id.*

result by empowering employees or their representatives to object to any modification of a citation issued by OSHA and to secure a hearing before the Occupational Safety and Health Review Commission to challenge the validity of the citation.[101]

Congress could, however, go further and empower employees to file citizen enforcement actions against their employers, much like the citizen enforcement actions that environmental groups may file under the pollution control statutes.[102] In an age of reduced governmental enforcement resources, one way to "reinvent government" is to deputize workers as private attorneys general to enforce OSHA standards.[103] There is a risk, however, that employees or their representatives would abuse this power to secure other concessions in labor negotiations.[104] This potential for abuse could be reduced to some extent by limiting worker enforcement actions to standards that OSHA had promulgated through full notice and comment procedures.[105] This would prevent workers from seizing upon trivial consensus standards in enforcement actions to extract other concessions. If this limitation proved insufficient, Congress could address the problem directly by providing for sanctions that could be levied in the event an employee threatens a worker enforcement action for purposes unrelated to worker health and safety.[106]

Empowering workers to take action to protect themselves presumes that they are likewise protected from retaliation by the employer. The current statute contains anti-retaliation provisions, but in the past OSHA has not been a diligent protector of employee whistle-blowers.[107] Under Section 11(c) of the OSH Act, only OSHA may challenge adverse action taken in retaliation for the exercise of employee rights.[108] To

101. H.R. 1280, 103d Cong., 1st Sess. § 509 (1993); S. 575, 103d Cong., 1st Sess. § 509 (1993).

102. *See, e.g.*, Clean Air Act Amendments of 1977, 42 U.S.C. § 7604(a) (1988) (allowing any person to commence a civil action to enforce emission standards); Water Quality Act of 1967, 33 U.S.C. § 1365(a) (1988) (allowing any citizen to commence a civil action to enforce effluent standards).

103. MCGARITY & SHAPIRO, *supra* note 3, at 324-29 (discussing the possibility of "deputizing" employees).

104. *Id.* at 308.

105. *Id.* at 327.

106. *Id.* at 329.

107. *Id.* at 337 (referring to OSHA's inaction during the Reagan years).

108. 29 U.S.C. § 660(c)(2) (1988); *see* MCGARITY & SHAPIRO, *supra* note 3, at 337 (discussing this as § 11(c)'s "most serious drawback"); *see also* 29 C.F.R. § 1977.15(d) (1993) (stating that "Section 11(c)(2) provides that an employee who believes that he has been discriminated against in violation of Section 11(c)(1) 'may, within 30 days

the extent that OSHA is not willing to take up an employee's cause, the retaliation goes unpunished.[109]

The proposed legislation would change this situation by extending Section 11(c) to cover employee reporting of injuries and unsafe conditions, and employee refusals to perform duties if the employee has a "reasonable apprehension that performing such duties would result in serious injury to the employee or other employees."[110] The new bills would empower employees to seek relief on their own if the secretary does not act within ninety days after finding reasonable grounds to believe that an unlawful retaliation has occurred.[111] The bills would provide that a violation is established if an employee shows that the exercise of a protected right is a contributing factor to the action.[112] However, if the employer can show by clear and convincing evidence that it would have taken the same action in the absence of the employee's exercise of the protected right then no relief can be ordered.[113]

Finally, numerous labor leaders and employers have suggested that employees be empowered to operate cooperatively with employers in labor-management safety committees, which have the power to shut down operations that pose unreasonable health and safety risks to employees.[114] The reform legislation adopts this idea and requires employers to establish safety and health committees that would have the power to review the employer's health and safety plan, incidents resulting in accidents or illness, and

after such violation occurs,' file a complaint with the Secretary of Labor").

109. *See* McGarity & Shapiro, *supra* note 3, at 337 (noting that if OSHA decides not to act on the employee's behalf, there is no remedy for the employee and that some courts even find the employee's common law remedy is preempted). *See, e.g.*, Platt v. Jack Cooper Transp. Co., 959 F.2d 91, 95 (8th Cir. 1992) (holding that the employee's wrongful discharge suit is preempted and noting the "obvious and substantial" risk of interfering with the jurisdiction of the National Labor Relations Board); Washington v. Union Carbide Corp., 870 F.2d 957, 962 (4th Cir. 1989) (noting that discharged employees in West Virginia typically do not have an action in tort unless the discharge contravenes a substantial public policy); Hines v. Elf Atochem N. Am., Inc., 813 F. Supp. 550, 552 (W.D. Ky. 1993) (stating that both the federal and Kentucky OSHA statutes preempt wrongful discharge claims due to these statutes' imposed structure for pursuing such claims); Braun v. Kelsey-Hayes Co., 635 F. Supp. 75, 80 (E.D. Pa. 1986) (holding that the OSHA statutory remedy for pursuing wrongful discharge claims is exclusive and preemptive of any state tort action); King v. Fox Grocery Co., 642 F. Supp. 288, 290 (W.D. Pa. 1986) (concluding that the courts of appeals have not found a private right of action under OSHA).

110. H.R. 1280, 103d Cong., 1st Sess. § 601(b)(2) (1993); S. 575, 103d Cong., 1st Sess. § 601(b)(2) (1993).

111. H.R. 1280, § 601(b)(4); S. 575, § 601(b)(4).

112. H.R. 1280, § 601(b)(6)(A); S. 575, § 601(b)(6)(A).

113. H.R. 1280, § 601(b)(6)(B); S. 575, § 601(b)(6)(B).

114. *See* McGarity & Shapiro, *supra* note 3, at 340-45.

injury and illness records, as well as conduct inspections in response to employee complaints.[115] The committees could also make recommendations to the employer for health and safety improvements.[116] Once again, however, it is important that employees serving on these committees be protected against retaliation.

IV. Conclusion

The average American workplace is a much safer and more humane place than it was a century ago. Yet, even at the threshold of the twenty-first century, American workers still suffer needlessly from workplace-related injuries and diseases. The fire that killed twenty-five poorly paid workers on September 3, 1991 in a Hamlet, North Carolina chicken processing plant focused the nation's attention on the plight of American workers like few other events since the famous Triangle Shirtwaist Company fire of March 25, 1911.[117] The plant, which was in flagrant violation of numerous OSHA safety standards, had never, in its eleven year history, been inspected by state or federal officials.[118] The law has a limited capacity to modify human conduct, and no statute can prevent all workplace injuries and diseases. Yet the law is the vehicle through which society channels many of its aspirations. The Occupational Safety and Health Act of 1970 was in many ways a good starting point, but American workers can rightly aspire to more. The Hamlet tragedy should serve as a wake-up call, announcing that the time has come to amend the OSH Act to guarantee more effective health and safety protections for American workers.

115. H.R. 1280, § 201; S. 575, § 201.

116. H.R. 1280, § 201; S. 575, § 201.

117. *See* Daniel M. Berman, Death on the Job: Occupational Health and Safety Struggles in the United States 9 (1978); *Family of Worker Killed in Imperial Five Sues Company, Manager for Gross Negligence*, 21 O.S.H. Rep. (BNA) No. 16, at 429 (Sept. 18, 1991).

118. *AFL-CIO Petitions OSHA to Withdraw State Plan Status For North Carolina*, 21 O.S.H. Rep. (BNA) No. 16, at 428 (Sept. 18, 1991).

#4 See comments below.

ARTICLE

PERPETUATING RISK? WORKERS' COMPENSATION AND THE PERSISTENCE OF OCCUPATIONAL INJURIES

Emily A. Spieler[*]

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I. INTRODUCTION

In 1992, state and federal workers' compensation programs[1] consumed over sixty-two billion dollars.[2] This figure dwarfs, by a factor of over 100, the combined budgets of the three federal agencies whose primary focus is on the

1. These include state workers' compensation programs which provide wage replacement (temporary total and permanent disability benefits), permanent partial disability benefits, and medical and rehabilitation treatment related to occupational injuries or illnesses arising out of employment, as well as equivalent federal programs such as those under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1988) (providing compensation to federal government employees), the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988) (providing compensation for lung diseases associated with coal mining), and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988) (providing compensation for ship, harbor, shipyard, railroad, river, and other workers).

2. John F. Burton, Jr., *Workers' Compensation Costs, 1960-1992: The Increases, The Causes, and The Consequences*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Mar.-Apr. 1993, at 1, 1 [hereinafter Burton (1993)]. This 1992 figure is an estimate; final data were not yet available. *Id.* Other sources put the figure higher. *E.g.*, Richard W. Palczynski, *Coping with the Crisis*, BEST'S REV., Nov. 1992, at 69, 69 (stating that the amount was $65 billion in 1992 and that it grows by 10% each year); Cecily Raiborn & Dinah Payne, *The Big Dark Cloud of Workers' Compensation: Does It Have A Silver Lining?*, 44 LAB. L.J. 554, 554 (1993) (setting the amount in 1991 at $70 billion, or double the cost in 1985).

occupational safety and health of American workers.[3] In fact, workers' compensation, designed to compensate victims of work-related injuries, illnesses, and fatalities, represents our primary allocation of publicly mandated funds to safety and health in the workplace. Not surprisingly, the dramatic and persistent increases in these costs in recent years[4] have not been welcomed by employers (who must pay them), by politicians (who must confront the political pressure which accompanies them), or by workers and labor unions (who must defend benefit levels in the political arena).

At the same time, available data appear to indicate that injury rates, and in particular injuries which result in lost work time, have not declined during this period of exploding costs.[5] We are thus confronted with two inescapable and obvious facts: the persistence of occupationally-induced morbidity and mortality continues to prevent substantial

3. In 1992, the budgets for key federal occupational safety and health agencies were: Occupational Safety and Health Administration (OSHA), $297.08 million; Mine Safety and Health Administration (MSHA), $182.04 million; and National Institute for Occupational Safety and Health (NIOSH), $103.45 million; for a total of $582.57 million. BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1993, apps. One-691 to One-694; NIOSH budget information provided by Jennifer Ballew, Acting Principal Management Official, NIOSH, October 18, 1993. The Congressionally approved budget for NIOSH is reduced to an allocation of $99.259 million within the Centers for Disease Control and Prevention (CDC). Ballew, *supra*. OSHA, MSHA, and NIOSH are the only agencies whose exclusive jurisdiction relates to occupational safety and health; this does not, however, represent the total outlay for health and safety nationally. Twenty-three states have approved state plans and therefore enforce the general occupational safety and health standards; state allocations to these agencies' budgets are not tallied anywhere. In addition, numerous federal agencies are charged by other laws with specific occupational health and safety enforcement and related activities. For example, the Environmental Protection Agency (EPA) prescribes regulations to protect workers engaged in hand labor operations in fields treated with pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, 7 U.S.C. § 136w (1988). The EPA is also directed to manage asbestos contractor accreditation and testing pursuant to the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§ 2646(b)-2655 (1988). The Occupational Safety and Health Administration (OSHA) and the EPA regulate conditions for workers engaged in hazardous waste and emergency response operations under the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9651(f) (1988). The Nuclear Regulatory Commission (NRC) is responsible for safety and regulation involving all facilities and materials associated with the processing, transport, and handling of nuclear materials pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. § 5844 (1988). The Department of Transportation enforces occupational standards under the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 (1988). The Department of Transportation now enforces the Motor Carrier Safety Act of 1990, 49 U.S.C. §§ 2501-2521 (1992), which covers commercial motor vehicle safety vehicle operators. No federal office maintains a total record of the relevant budget allocations.

4. Refer to part II.A *infra*.

5. Refer to part II.B *infra*.

reduction in aggregate workers' compensation costs; and the high cost of this social insurance program expends resources which might better be applied elsewhere. American workers and enterprises are therefore paying a price for both the persistent levels of injury and disease and the growing costs of workers' compensation.

It would seem reasonable to expect that rising compensation costs would stimulate employers to engage in efforts to prevent occupational injury and disease. There is no persuasive evidence that this is so, however. Neither aggregate safety data nor more focused empirical studies give strong support to the notion that the high costs of workers' compensation in the aggregate, or enterprise-specific costs, have motivated large numbers of employers to take injury prevention activities seriously.[6] This is remarkable, in view of the fact that empirical studies do show that enterprises with aggressive safety programs often exhibit lower, sometimes substantially lower, workers' compensation costs, and that the reduction in these costs more than offsets the cost of safety initiatives.[7]

There is no consensus with regard to defining the socially optimal level of safety in the workplace.[8] Public health

6. Refer to notes 136-41 *infra* and accompanying text.

7. *See* ROCHELLE V. HABECK ET AL., DISABILITY PREVENTION AND MANAGEMENT AND WORKERS' COMPENSATION CLAIMS, at V-15 (1988) [hereinafter Upjohn Report]; CYNTHIA ROBINSON, OFFICE OF POLICY RESEARCH, CALIFORNIA DEPARTMENT OF INSURANCE, LOWERING WORKERS' COMPENSATION INSURANCE COSTS BY REDUCING INJURIES AND ILLNESSES AT WORK 11 (1993) [hereinafter California Insurance Study]. WORKERS COMPENSATION: STRATEGIES FOR LOWERING COSTS AND REDUCING WORKERS' SUFFERING (Edward M. Welch ed., 1989) [hereinafter Welch]. It is thus not at all surprising that the failure of deterrence in this field has been previously noted. *See, e.g.*, FELICE MORGENSTERN, DETERRENCE AND COMPENSATION: LEGAL LIABILITY IN OCCUPATIONAL SAFETY AND HEALTH 65, 66 (1982); Robert S. Smith, *Have OSHA and Workers' Compensation Made the Workplace Safer?*, *in* RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 557, 571-72 (David Lewin et al. eds., 1992); Geoffrey C. Beckwith, *The Myth of Incentives in Workers' Compensation Insurance*, 2 NEW SOLUTIONS 52, 52 (1992); Burton (1993), *supra* note 2, at 1. These prior analyses have not fully explored the particular impact of the workers' compensation liability paradigm on employer behavior. They have also not recognized the importance of the attributes of the employment relationship and the resulting effects on the behavior of both employers and employees within this compensation system.

8. "A thing is safe if its risks are judged to be acceptable . . . . Safety is obviously a highly relative attribute that can change from time to time and be judged differently in different contexts. Knowledge of risks evolves, and so do our personal social standards of acceptability." WILLIAM W. LOWRANCE, OF ACCEPTABLE RISK: SCIENCE AND THE DETERMINATION OF SAFETY 8-9 (1976). While risk is assessed through empirical, scientific activity and is a measure of the probability and severity of harm, safety involves judging the acceptability of risks, a "normative, political activity." *Id.* at 75-76. "Equity of distribution of risks, benefits, and costs is a judgment of fairness and social justice." *Id.* at 95 (emphasis omitted).

advocates maintain that no worker should be seriously impaired or killed by a controllable hazard[9] and that risks are best controlled, to the extent possible, through application of engineering principles which eliminate the possibility of individual human error.[10] Congress echoed this view in 1970 in the Occupational Safety and Health Act.[11] At the other end

9. "[P]reventing *all* preventable accidents may not be economically efficient, but may be justified on equity grounds." NICHOLAS A. ASHFORD, CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY, A REPORT TO THE FORD FOUNDATION 390 (1976). The slogan of the National Safety Workplace Institute is "'Job safety for everyone, with no one left out.'" William J. Maakestad & Charles Helm, *Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives that Influence Employer Decisions to Control Occupational Hazards*, 17 N. KY. L. REV. 9, 15 n.29 (1989); *see also* Centers for Disease Control & Prevention, Occupational Injury Panel, *Occupational Injury Prevention*, *in* INJURY CONTROL IN THE 1990S: A NATIONAL PLAN FOR ACTION 329 (1992) [hereinafter CDC Injury Report] ("[O]ccupational injuries should not be regarded as inherent in the workplace, nor should they be acceptable. Occupational injury is an enormous and costly problem. Most incidents resulting in worker injuries are preventable and could be averted if known prevention strategies were more widely implemented."); Edward L. Baker & J. Donald Millar, *Foreword* to AMERICAN PUBLIC HEALTH ASSOCIATION, PREVENTING OCCUPATIONAL DISEASE AND INJURY xi (James L. Weeks et al. eds., 1991) [hereinafter PREVENTING OCCUPATIONAL DISEASE AND INJURY] (stating: "The mission of public health is to 'fulfill society's interest in assuring conditions in which people can be healthy.' In the workplace, the mission of occupational health can be viewed similarly") (citation omitted). For books which espouse public health as the primary concern in health and safety, see generally DANIEL M. BERMAN, DEATH ON THE JOB: OCCUPATIONAL HEALTH AND SAFETY STRUGGLES IN THE UNITED STATES (1978); JOSEPH A. PAGE & MARY-WIN O'BRIEN, BITTER WAGES (1973); LAWRENCE WHITE, HUMAN DEBRIS: THE INJURED WORKER IN AMERICA (1983).

10. "The most effective intervention to date for reducing injuries have been those involving engineering, biomechanics, and environmental designs, the mainstays of the safety science approach to injury prevention." CDC Injury Report, *supra* note 9, at 330; *see also* PREVENTING OCCUPATIONAL DISEASE AND INJURY, *supra* note 9, at 55.

> There is a hierarchy of technical controls derived from a conceptual model that consists of a hazard source, an environment into which the hazard may be released, and the worker. From most to least effective, technical controls include positive engineering that prevents generation of the hazard at its source, environmental controls that are implemented in the work environment, and personal protective devices that individual workers can wear or use . . . Personal protective devices are less effective than the other two kinds of controls and should be used only as temporary measures or when positive engineering or environmental controls are not feasible.

Id. at 8-9. OSHA has generally adhered to this approach. MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 74 (3d ed. 1990).

11. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988). In its legislative findings, Congress stated that its purpose was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *Id.* § 651(b). The Act further imposes a general duty on an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a). The courts have been somewhat less aggressive, however, when reviewing OSHA's standards than this statutory language would appear to imply. The plurality

of the debate on risk and safety, economists argue that optimal conditions are achieved when the marginal benefit of providing safety is equal to its marginal cost.[12] These different paradigms reflect fundamentally different views regarding the value of worker health.

This argument over optimization should not, however, be controlling when discussing the current status of workers' compensation and occupational risk: Both public health advocates and industry representatives agree not only that injuries at work are largely preventable but that enterprise-specific activities can substantially reduce an employer's workers' compensation liability, often with a net economic gain to the enterprise.[13] Although this may not be universally true for all risks or all employers,[14] it is true for a sufficient number of these risks to raise substantial questions about this apparent market failure. It in fact appears that we have failed to

opinion in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 639 (1980) held that the promulgation of a new standard must be based on findings that the standard is reasonably necessary and appropriate to remedy a significant risk of material health impairment. *But see* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 512 (1981) (holding that the Act does not require OSHA to demonstrate that its standard reflects a reasonable relationship between the costs and benefits associated with the standard).

12. *See* John D. Worrall & Richard J. Butler, *Experience Rating Matters*, *in* WORKERS' COMPENSATION INSURANCE PRICING: CURRENT PROGRAMS AND PROPOSED REFORMS 81, 82 (Philip S. Borba & David Appel eds., 1988) [hereinafter Worrall & Butler, *Experience Rating Matters*] (noting that firms in perfectly competitive worlds provide safety to the point where the marginal benefit of such provision is equal to its marginal cost). For a discussion of marginal benefits and costs, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 163-64 (4th ed. 1992) (explaining that "expected accident costs and accident costs must be compared at the margin, by measuring the costs and benefits of small increments in safety and stopping investing in more safety at the point where another dollar spent would yield a dollar or less in added safety"); *see also* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1537 (1987) (discussing general tort liability and insurance models and noting "[r]egardless of context, the accident prevention question is whether it was cost-effective for the provider or for the consumer to have made greater investments to prevent the loss").

13. Refer to notes 7-9 *supra*; *see also* William D. Hager, *Loss Costs and Beyond*, BEST'S REV., Nov. 1990, at 44, 48 (focusing on Texas, the author, who was president of the National Council on Compensation Insurance, noted: "When things go wrong, we have the spectacle of Texans arguing about the fine points of their workers' compensation law as a cure for rising costs even as industry engineers try to confront what the *Wall Street Journal* described as 'a recent rash of petrochemical and oil refinery blasts that has prompted closer scrutiny of plant operations by government, industry and union officials and tough enforcement of safety rules.' It's true that the Texas workers' compensation law could use improvement . . . [but] [t]he Phillips and ARCO disasters are man-made catastrophes, and some of the fault lies not in our laws but in ourselves. After all, no matter how generous the benefit levels or absurd the jury verdicts, if fewer people get injured or killed, costs will contain themselves. As every public health official knows, prevention is always cheaper than the cure.").

14. Refer to part III.B.1 *infra* (discussing insurance rating schemes).

achieve an optimal solution from the standpoint of public health advocacy *and* economic efficiency *and* social utility.

By preventing workplace morbidity and mortality, we would avoid more than the individual suffering of injured workers or the costs paid by employers. We would also escape the rancorous and unending political debates regarding distribution of costs and adequacy of compensation, and we would minimize the tensions between employees and employers which accompany both the occurrence of injury and the filing of compensation claims. The superior value of prevention—over compensation—is obvious.

Why then have these costs not motivated more employers to implement aggressive safety practices? This article attempts to explore this apparent paradox. In Part II, I review the current costs of workers' compensation, trends in injury data, and the relationship between injuries and costs. To what extent are costs, in the aggregate, the result of increasing incidence of injury and disease? To what extent are these costs a reflection of expanding definitions of compensable injury and disease, increases in benefit levels, or medical price inflation? Are injured workers reaping the benefit of the increasing resources poured into workers' compensation programs and simply pursuing more claims?[15] Can management practices at the enterprise level actually impact compensation costs—or are the costs a reflection of conditions which are not within management control? Although the data are faulty, available information appears to suggest that the level of occupational risk present in modern workplaces remains high and is a substantial, although not the sole, cause of the current explosion of costs.

Part III explores the possible explanations for the failure of these rising costs to promote primary prevention of

15. The availability of insurance may lessen the incentive of an insured person to take precautions. As the individual's incentive to avoid losses declines, the size of the losses will increase. For example, if someone with theft insurance leaves a valuable possession in plain view on the seat of an unlocked parked car, the likelihood that the possession will be stolen increases; absent insurance, the individual would (presumably) have locked the object in the trunk. This phenomenon is referred to in the economics and insurance literature as "moral hazard." A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 56 (2d ed. 1989). In workers' compensation, the term is applied most commonly in studies showing that workers appear to file more claims for compensation as the level of benefits rises. *E.g.*, Richard J. Butler & John D. Worrall, *Claims Reporting and Risk Bearing Moral Hazard in Workers Compensation*, 53 J. RISK & INS. 191, 192 (1991) [hereinafter Butler & Worrall, *Moral Hazard*]. It can also be used to describe the failure of the insured employer, who is immunized by workers' compensation from common-law liability, to take adequate precautions to prevent injuries and illnesses.

workplace morbidity.[16] To what extent is it reasonable to expect a system of no-fault compensation to have serious deterrent effects? What are the particular attributes of the workers' compensation model, and the friction and transactional costs inherent in it, which diminish deterrence? This discussion is drawn from existing empirical studies, historical sources, legal developments, and personal observations. Despite occasional lip service to the safety objective, there is a serious question as to whether workers' compensation was ever designed in a manner likely to promote prevention. The particular history and design of the program must be examined in light of other factors: remarkable ignorance, political hysteria, a view of workers as opportunistic or fraudulent abusers, and the inequality of the underlying employment relationship. Moreover, the design of the program encourages motivated employers to attempt to prevent workers' compensation costs by reducing the filing of claims instead of the occurrence of injuries. Together, these factors create a system in which the "feedback loop," which should alert employers to the financial and labor-management advantages of aggressive primary prevention, fails.

Part IV looks to the future. The consequence of the failure of this feedback loop to change the underlying health and safety conditions in workplaces has been to focus much of the current political debate regarding workers' compensation on ways to reduce costs by limiting benefit levels or eligibility: that is, to make injured workers pay for our failure to reduce injuries. But recently prevention and safety rhetoric has reemerged within the context of workers' compensation political debates. State legislatures in at least thirteen states have passed amendments to their workers' compensation or state safety and health laws expanding the direct and indirect connections between compensation and deterrence.[17] Given

16. Primary prevention is the prevention of the occurrence of a disease or injury. Immunizations are a method of primary prevention of infectious disease. According to one public health source, "primary prevention is the preferred means of disease control. In the workplace, this is largely an engineering activity." PREVENTING OCCUPATIONAL DISEASE AND INJURY, *supra* note 9, at 8.

17. *See, e.g.*, ALASKA STAT. §§ 18.60.010 to 18.60.105 (1991); CAL. LAB. CODE § 6401.7 (West Supp. 1994); 1993 Conn. Acts 228, § 28 (Reg. Sess.); MINN. STAT. ANN. § 182.653 (West 1993); MONT. CODE ANN. §§ 39-71-1501 to 39-71-1504 (1993); NEB. REV. STAT. § 48-443 (Supp. 1993); NEV. REV. STAT. ANN. § 618.383 (Michie 1992); N.C. GEN. STAT. § 95-251 (1993); OR. REV. STAT. §§ 654.097, 654.182 (Supp. 1992); PA. STAT. ANN. tit. 77, §§ 1038.1-.2 (Supp. 1994); TEX. LAB. CODE ANN. §§ 411.001-.092 (Vernon Supp. 1994); WASH. REV. CODE ANN. § 49.17.060 (West 1990); W. VA. CODE §§ 23-2B-1 to 23-2B-3 (Supp. 1993).

what we know about the failure of workers' compensation to affect employers' aggregate behavior in the past, can these new efforts be expected to have significant impact? More importantly, what is the best way to design these safety initiatives in order to achieve decreased occupational mortality and morbidity and, therefore, decreased workers' compensation costs?

Raising questions regarding the deterrent value of workers' compensation should not be interpreted as an argument against continuing to provide adequate compensation to injured workers. Sometimes those who have argued in favor of deterrence, upon finding that the system does not effectively encourage prevention, have thence been driven to argue that workers' compensation has failed: that increasing the adequacy of benefits primarily results in socially sub-optimal behavior.[18]

18. In particular, studies have noted a correlation between increasing benefits and increasing numbers of claims filed. *See* Ronald G. Ehrenberg, *Workers' Compensation, Wages, and the Risk of Injury*, in NEW PERSPECTIVES IN WORKERS' COMPENSATION 71, 81-86 (John F. Burton, Jr. ed., 1988) (summarizing nine prior studies which conclude that higher workers' compensation benefits are associated with higher frequency of claims' filing); *see also* Butler & Worrall, *Moral Hazard*, *supra* note 15, at 191; Richard J. Butler & John D. Worrall, *Work Injury Compensation and the Duration of Nonwork Spells*, 95 ECON. J. 714, 722-23 (1985); Richard J. Butler, *Wage and Injury Rate Response to Shifting Levels of Workers Compensation*, in SAFETY AND THE WORKFORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION, *supra*, at 61; Richard J. Butler & John D. Worrall, *Workers' Compensation: Benefits and Injury Claims Rates in the Seventies*, 65 REV. ECON. & STAT. 580 (1983); James R. Chelius, *The Incentive to Prevent Injuries*, in SAFETY AND THE WORKFORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION, *supra*, at 154, 160 [hereinafter Chelius, *Incentive to Prevent Injuries*]; James R. Chelius, *The Influence of Workers' Compensation on Safety Incentives*, 35 IND. & LAW REL. REV. 241 (1982) [hereinafter Chelius, *Influence of Workers' Compensation*] (suggesting that one way to manage the apparent conflict between prevention and benefits is to raise injury taxes on employers but not to make the whole tax payable to employees); James R. Chelius, *The Control of Industrial Accidents: Economic Theory and Empirical Evidence*, 38 LAW & CONTEMP. PROBS. 700 (1974) [hereinafter Chelius, *Control of Industrial Accidents*]; Georges Dionne & Pierre St-Michel, *Workers' Compensation and Moral Hazard*, LXXIII REV. ECON. & STAT. 236 (1991); John D. Worrall, *Compensation Costs, Injury Rates, and the Labor Market*, in SAFETY AND THE WORKFORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION 1 (John D. Worrall ed., 1983); *Digests of Important Publications*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Sept.-Oct. 1992, at 14-16 (summarizing JOHN A. GARDNER, BENEFIT INCREASES AND SYSTEM UTILIZATION: THE CONNECTICUT EXPERIENCE (1991)) (finding longer duration and higher numbers of claims filed in Connecticut after a statutory benefit increase in 1987). As a result of this observed phenomenon, some have argued that benefits should not be increased. *See, e.g.*, Ehrenberg, *supra*, at 95 (concluding that the "trick, then, is to alter existing policy to increase employers' incentives to improve safety without altering employees' incentives. One possibility is to hold benefit levels at their current real levels but to increase the extent of experience rating. . . . An alternative is to increase the payroll tax but *not* the level of benefits . . . ."); ECONOMIC REPORT OF THE PRESIDENT 197 (1987). *But c.f.* Edward Yelin, *The Myth of Malingering: Why Individuals Withdraw from Work in the Presence of Illness*, 64 MILBANK Q. 622, 637 (1986) (concluding, in a study of workers who applied for Social Security Disability Insurance, that wage replacement rates do not correlate with withdrawal from work and that "even extreme replacement rates do not appear to suppress the will to work.") This issue is discussed at greater length in part II.C *infra*.

I therefore feel compelled to make what appears to be an obvious point: The primary purpose of workers' compensation is distribution of social insurance benefits, not deterrence of injuries.[19] Failure in deterrence does not argue in favor of program failure; it merely tells us that alternative approaches to deterrence may be preferable if we believe that adequate compensation of victims of workplace injuries and illnesses is essential and that injuries in the workplace are preventable and should be prevented.[20]

While the country gears up to expand the rights of disabled workers *to* work under the Americans with Disabilities Act,[21] we appear to have been unable to achieve an optimal level of prevention of disability caused *by* work. This article is an attempt to contribute to a discussion which will hopefully yield cost-effective means to achieve the goal of "lowering costs *and* reducing workers' suffering."[22]

II. THE PARADOX

There are three essential conclusions which can be drawn from the available data regarding workers' compensation costs and injuries. First, the aggregate cost of workers' compensation programs is rising rapidly.[23] Second, frequency of injuries, particularly those which involve lost work time, is not declining.[24] Third, despite a variety of other factors that contribute to the increasing costs of workers' compensation, the frequency

19. Stephen Sugarman characterizes social insurance as an "extreme distributional" type of liability system and argues for disengaging compensation and deterrence: "Society should promote safety with different instruments from those used to pay compensation." Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 658 (1985); *see also* OFFICE OF TECHNOLOGY ASSESSMENT, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 12 (1985) [hereinafter OFFICE OF TECHNOLOGY ASSESSMENT].

20. Terence Ison argues even more broadly that the result of any attempt to promote deterrence through more clear cost incentives in workers' compensation, such as experience rating, will primarily have the unintended consequences of repressing claims, not injuries, and should be avoided. Terence G. Ison, *The Significance of Experience Rating*, 24 OSGOODE HALL L.J. 723, 725-26 (1986).

21. 42 U.S.C. §§ 12101-12113 (Supp. IV 1992).

22. This is the subtitle to Welch, *supra* note 7 (emphasis added).

23. Refer to part II.A *infra*.

24. It is lost time claims which are most likely to result in claims for workers' compensation benefits. Refer to part II.B *infra*.

of reported injuries and the cost of injuries can be substantially affected by managerial decision-making within enterprises.[25]

It appears paradoxical that despite increasing costs, injury rates have not declined significantly. The following discussion summarizes the existing literature and data which substantiate these three points. The implications of these conclusions are discussed more fully in Part III of this Article.

A. *Costs*

The announcement in 1993 that the national cost of workers' compensation had reached sixty-two billion dollars[26] reflects a continuation of the workers' compensation "crisis" in cost escalation. Compensation programs cost $2.1 billion in 1960, $5.2 billion in 1971, $20.3 billion in 1979, $53.1 billion in 1990, and $57 billion in 1991.[27] Expressed as an average cost per $100 of payroll, and thereby adjusting for aggregate payroll increases, costs rose from $1.11 per $100 in 1970 to $2.27 per $100 in 1989.[28] The rate of increase of costs in other social insurance programs, albeit significant, has been far less than these increases in workers' compensation.[29]

Prior to 1970, workers' compensation attracted little attention: relatively steady and low costs for employers meant that insuring against workers' injuries, diseases, or death was a stable proposition for both the property/casualty insurance industry and employers.[30] Employers benefitted greatly from this arrangement; workers' compensation insurance provided them with broad immunity from tort liability for workplace injuries and illnesses.[31] Workers received benefits that might otherwise not have been available. Despite the evident inadequacy of the benefit structure,[32] workers and their

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25. As discussed in part III.C. *infra*, the reduction of costs may not always be associated with an actual reduction in the rate of illness and injury; it may simply be associated with different claims filing behavior by workers or changed management practices which affect claims costs.

26. Refer to note 2 *supra*.

27. Burton (1993), *supra* note 2, at 1. These figures are not adjusted for inflation.

28. 1992 SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 313 tbl. 9.B1 [hereinafter 1992 STATISTICAL SUPP.]; *see also* John F. Burton, Jr. & Timothy P. Schmidle, *Workers' Compensation Insurance Rates: National Averages Up, Interstate Difference Widen*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Jan.-Feb. 1992, at 1 (estimating the rate in 1989 at 2.225% of payroll utilizing adjusted rates based on 44 selected industrial classifications). It should be remembered that this is an average; the percent of payroll paid for workers' compensation varies enormously from one industrial group to another, ranging from over $40 per $100 of payroll for loggers in the timbering industry in many jurisdictions to under $1 per $100 for employees in finance and insurance. The spreading of risks and costs among different employer groups is discussed more fully below, Part III *infra*. Note that the number expressed as a percent of payroll is more useful than the aggregate costs of the total programs. Both the number of workers and the percent of the covered workforce has grown in recent years: The number of workers covered by workers' compensation programs rose from 45 million in 1960, representing 80% of the workforce, to 94 million in 1989, or 87% of the workforce. John F. Burton, Jr., *Workers' Compensation Coverage: National Trends, State Differences*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, July-Aug. 1992, at 1. Obviously, the aggregate cost figures, unadjusted for workforce growth or for inflation, can be misleading.

29. Edward D. Berkowitz & Monroe Berkowitz, *Challenges to Workers' Compensation: An Historical Analysis*, *in* WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY 158, 172 (John D. Worrall & David Appel eds., 1985) [hereinafter Berkowitz & Berkowitz (1985)]. The rate of increase in workers' compensation from 1950 to 1980 was, however, consistent with the growth in the total public and private cash benefits for disability. Robert J. Lampman & Robert M. Hutchens, *The Future of Workers' Compensation*, in NEW PERSPECTIVES IN WORKERS' COMPENSATION 113, 119 (John F. Burton, Jr. ed., 1988).

30. For example, from 1953 to 1972 workers' compensation costs rose from 0.94 to 1.14 per $100 of payroll, a 21% increase in a twenty year period; in contrast, from 1973 to 1980, costs rose from 1.17 to 1.94 per $100 of payroll, a 66% increase in seven years. Worrall, *Compensation Costs, Injury Rates, and the Labor Market*, *supra* note 18, at 9. John Burton, using his own data, showed an increase from 0.586% of payroll in 1958 to 0.772% in 1972. Burton & Schmidle, *supra* note 28, at 1, 9-12 & tbl. 8.

31. For a more extensive discussion of the issues related to this extensive immunity, refer to notes 216 & 247 *infra*.

32. Benefit levels were, by modern standards, remarkably low. *See* THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 13-14 (1972) [hereinafter COMMISSION REPORT] (stating that Congress declared in the Occupational Safety and Health Act of 1970 that serious questions had been raised about the adequacy of workers' compensation laws). This may well explain both the low frequency of claims and the politically acceptable low level of cost of the program in the pre-World War II years. Compensation systems generally excluded claims from eligibility which involved injuries which were the result of expected events; accidents were narrowly defined to include only the unexpected. For example, "[i]f a man strained his back while doing regular work in the usual fashion, it was to be expected." *Id.* at 45. In addition, most occupational disease and injury claims unrelated to observable single traumatic events were excluded from coverage. *See id.* at 50. Diseases of everyday life, which could have been the result of non-occupational exposures, were generally not compensable. *Id.* Statutes of limitation excluded other claims because they began to run within a short time of the worker's last exposure to the disease-causing agent, rather than when a disability developed or a diagnosis was made. *See* W.W. Allen, Annotation, *When Limitation Period Begins to Run Against Cause of Action or Claim for Contracting of Disease*, 11 A.L.R.2D 277, 283-89 (1950).

On those claims which were approved, the amount that was paid was quite low. In many states, statutes contained no automatic escalation of the maximum weekly benefit payments. COMMISSION REPORT, *supra*, at 60. Maximum weekly benefit levels therefore did not rise in the absence of direct legislative intervention. As a result, in some states the maximum weekly benefit amount remained static for years. *Id.* Most states initially set a limit on weekly benefits of 60% of lost wages.

representatives accepted this system; low expectations in general with regard to rights at work may have contributed to this acquiescence. Employers' costs did increase prior to 1970, but at a relatively slow rate, despite a substantial increase in reported injury rates during the 1960s.[33]

In the 1960s, public criticism began to focus on these programs and particularly on the inadequate level of benefits offered to injured workers by most states.[34] This criticism was voiced in a political environment in which Congress was taking aggressive steps to address excessive workplace injury and illness rates by regulating workplace hazards.[35] Responding to the criticisms regarding compensation programs, Congress created the National Commission on State Workmen's Compensation Programs as part of the Occupational Safety and Health Act in 1970.[36] The Commission's purpose was to investigate alleged inadequacies in the state compensation systems and to address calls to federalize workers' compensation programs.[37] The members of the Commission, drawn

Id. In 1972, a majority of claimants still received less than two-thirds of their lost wages and, on average, maximum weekly benefits were capped at 55% of the state's average weekly wage. John F. Burton, Jr., *The Twentieth Anniversary of the National Commission on State Workmen's Compensation Laws: A Symposium: Observations of John F. Burton, Jr.*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Nov.-Dec. 1992, at 1, 5 [hereinafter Burton, *Twentieth Anniversary*]. In a majority of states in 1972, the maximum weekly benefit was equal to or less than the poverty level for a family of four. COMMISSION REPORT, *supra*, at 56. No state allowed more than ten years of recovery for a permanent total disability; most set the limit at below six years. *See id.* at 65. In 1972, in eleven states the maximum permanent total disability award was less than $25,000, an amount less than the average American worker earned in four years. *Id.* Medical benefits for injuries were often limited and did not provide for the full cost of care for serious injuries; initially, no program provided for more than 90 days of medical benefits for an injury. ASHFORD, *supra* note 9, at 389. Furthermore, most states endorsed a system of settlement of claims which allowed insurance carriers to settle a claim with an injured worker (or his or her attorney) for amounts less than the full statutory benefit.

33. Worrall, *Compensation Costs, Injury Rates, and the Labor Market*, *supra* note 18, at 7-9.

34. Major concerns about benefit levels and eligibility criteria, particularly for occupational diseases, had been raised in well documented monographs in the 1940s and 1950s. *See generally* ARTHUR H. REEDE, ADEQUACY OF WORKMEN'S COMPENSATION (1947); HERMAN M. SOMERS & ANNE R. SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY (1954). These concerns did not hit public attention, however, until the renewed movement for workplace health and safety also focused on the issue of compensation.

35. In 1969, Congress passed the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969) (superseded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1988), which expanded regulation to all metal and non-metal mining). In 1970, Congress passed the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988).

36. COMMISSION REPORT, *supra* note 32, at 13-14.

37. *Id.*

from industry, labor, universities, state compensation programs, and the insurance industry, reached consensus that the state programs were seriously deficient.[38] In its 1972 report, the Commission set five general objectives: broad coverage of employees and work-related injuries and diseases, substantial protection against interruption of income, sufficient medical care and rehabilitation services, encouragement of safety,[39] and effective delivery of services.[40]

Rather than endorsing federalization of the program or advocating that remedies for work injuries be sought outside the compensation system, the Commission recommended retaining the boundaries of the program.[41] While acknowledging the need to improve workplace safety, the Commission did not address this goal in its nineteen "essential" recommendations, which were all directed to the expansion of benefits and eligibility and improvement of the administrative design of the program.[42]

In the event that these recommendations were not adopted by 1975, the Commission suggested that Congress enact legislation which would "guarantee compliance."[43] The goal was to increase the level of compensation protection offered to injured workers in all states and to decrease the level of variation among state programs.[44] The resulting public debate and improvements in mandated benefit levels, which were enacted in many states,[45] contributed to substantial and rapid increases in total program cost as both worker awareness of

38. *Id.* at 24-25.

39. The report stated, rather emphatically, that "[t]he encouragement of safety is one of the basic objectives of a modern worker's compensation program." *Id.* at 87.

40. *Id.* at 35-40.

41. *Id.* at 25.

42. *Id.* at 126-27.

43. *Id.* at 127.

44. This focus on interstate variability was fueled both by concerns about inequities between jurisdictions and the resulting political concerns which are fed by the knowledge that employers can (or think that they can) attain lower workers' compensation costs in other states. This is a concern which is often voiced by employers' organizations during political debates regarding changes in state workers' compensation programs. Despite this attempt by the National Commission, interstate variability in insurance rates continues to plague workers' compensation programs. *See* Burton & Schmidle, *supra* note 28, at 6-9.

45. The average state compliance with the nineteen essential recommendations of the Commission increased from 6.8 in 1972, when the Report was issued, to 12.0 in 1980. Burton, *Twentieth Anniversary*, *supra* note 32, at 5. Compliance with the recommendations then slowed as costs escalated and states realized that no action would be taken to federalize the program. *Id.* The average compliance reached only 12.7 (out of the possible 19.0) by 1992. *Id.*

benefit eligibility and actual benefit levels rose.[46] Thus, the National Commission, the most concerted attempt to reform workers' compensation since its inception, was at least partially successful in its own terms: it contributed to increases in the adequacy and availability of benefits. As costs increased, however, the primary focus of political activism shifted from the inadequacy of benefits to the impact of continued interstate variations in cost on each state's economic development and the overall cost of the program to employers, which some viewed as excessive.

Nevertheless, employers' costs did *not* rise steadily after 1978. A rapid plunge in insurance prices (and therefore employer costs) from 1980 to 1984 reflected the condition of the financial market: high interest rates led to aggressive price cutting by insurance carriers.[47] After 1984, however, the rapid upward climb in employers' costs resumed, causing the average percent of payroll paid for workers' compensation to climb by 13.3 percent per year from 1984 to 1990.[48] Needless to say, this growth rate outdistanced both the rate of growth of the civilian payroll[49] and the rate of inflation for this period.[50]

The aggregate cost of the program and its rate of increase have met with rising hysteria. Insurance trade articles carry titles such as "Workers' Comp: 24 Months to Meltdown"[51] and

46. The national cost of workers' compensation doubled from 1970 to 1978. Martin W. Elson & John F. Burton, Jr., *Workers' Compensation Insurance: Recent Trends in Employer Costs*, MONTHLY LAB. REV., Mar. 1981, at 45-47.

47. John F. Burton, Jr., *Workers' Compensation Benefits and Costs: New Records*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Mar.-Apr. 1992, at 1, 2 [hereinafter Burton (1992)].

48. Burton (1993), *supra* note 2, at 2. The specific figures for workers' compensation cost as a percent of payroll vary somewhat from one source to another. Burton estimated the 1984 rate at $1.66 per $100 in 1984, and $2.27 in 1989. Burton (1992), *supra* note 47, at 2 tbl. 1. Federal reports, which do not make the adjustments in Burton's data and which include federal compensation programs, estimated the rates as $1.66 in 1984 and $2.36 in 1990. 1992 STATISTICAL SUPP., *supra* note 28, at 324 tbl. 9.B1.

49. Between 1984 and 1990, covered payroll increased by a total of about 67%, from $1516 billion in 1984 to $2250 billion in 1990. "Covered" refers to total wages, earnings, and salaries in employment governed by workers' compensation. 1992 STATISTICAL SUPP., *supra* note 28, at 131 tbl. 3.B2.

50. From 1984 to 1990, the average annual increase in the general Consumer Price Index was about 4.5%. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 469 (1992).

51. William Hager, *Workers' Comp.: 24 Months to Meltdown*, NAT'L UNDERWRITER PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Oct. 29, 1990, at 13. The notion that workers' compensation is in meltdown status is common in these articles. *See, e.g.*, Diane Levick, *Investments Keep Insurers Profitable; Investments Net Insurers Profit Despite Disasters, Best Makes Estimates for 1992*, HARTFORD COURANT, Jan. 12, 1993, at B1 (stating: "A 'system meltdown is in the making' if meaningful reforms aren't made in workers' compensation insurance during the next several years."); Barry Meier, *Some 'Worker Leasing' Programs Defraud Insurers and Employers*, N.Y. TIMES, Mar. 20, 1992, at A1, (discussing worker leasing fraud directed against state workers' compensation pools, a lawyer for the National Council on Compensation Insurance (NCCI) said, "'This is just one more factor contributing to the overall meltdown of the workers' compensation system.'"); *Louisiana Tries New Path*, ENGINEERING NEWS-REC., Nov. 11, 1991 (quoting Derrell D. Cohoon of the Louisiana Associated General Contractors claiming: "'We were nearing meltdown when companies would no longer be willing to write new [workers' compensation] coverage in [Louisiana].'"); *Firms Flee Comp. System; Decision Could Benefit, Backfire on Texas Employers*, BUS. INS., June 10, 1991, at 19 (stating that Texas' system is "in meltdown" because of excessive litigation and pro-claimant court rulings").

refer to the "death spiral"[52] and "nightmare"[53] of workers' compensation. In one industry survey, seventy percent of employers reported that workers' compensation costs were threatening their financial results;[54] in another, five of the fifteen most highly ranked public policy concerns related to workers' compensation and workplace safety issues.[55]

This perception of crisis is the direct result of increasing aggregate, as well as enterprise-specific, costs. Because of cost escalation, insurance carriers press for increases in rates charged to employers;[56] rate increases are, however, seen as antithetical to business development in each jurisdiction in which they are sought. Political and regulatory pressure is brought to bear to restrain rate increases; insurers respond that the rates are inadequate to support the costs and threaten to leave the jurisdiction unless the state legislature enacts programmatic changes which will restrain costs, generally by reducing benefit levels, restricting eligibility for

52. Robert W. Klein, *Regulation, Competition, and Profitability in Workers' Compensation Insurance*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Mar.-Apr. 1992, at 7.

53. Catherine A. Novak, *With Loss Control in Mind*, BEST'S REV., Apr. 1993, at 32, 35.

54. In this 1991 study, 70% of the 576 employers who participated said workers' compensation costs are threatening their bottom line; 30% said workers' compensation costs would be out of control in the next five years. *See* David M. Katz, *What Employers Can Do About the Workers Comp. Crisis*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Jan. 7, 1991, at 21 (citing a study by Tillinghast, a New York based risk management consulting firm).

55. ALEXANDER & ALEXANDER, U.S. RISK MANAGEMENT SURVEY 5 (1992) (on file with author). In this 6th annual survey, questionnaires were sent to 1900 risk managers who were asked to rank, in importance to their companies, 74 legislative and regulatory issues. Most respondents were executives at companies with sales of $500 million or more. *Id.* at 7. "Workplace health and safety topics, including five workers['] compensation issues, dominate A[lexander] & A[lexander]'s findings." *Id.* at 2. In the overall ranking of categories, workplace health and safety issues placed first. *Id.* at 6. Workers compensation was projected to remain a critical issue in the next three to five years. *Id.* at 2.

56. *See* Marian Freedman, *Residual Markets: Bloated and Beleaguered*, BEST'S REV., Dec. 1991, at 20, 20. For a discussion of the residual market, refer to part III.B.1.c *infra*.

benefits, or expanding fraud units.[57]

The price of workers' compensation insurance to insured employers is largely, but *not* exclusively, dependent on the aggregate cost of benefits.[58] In 1989, the ratio of benefits to costs stood at a comparatively high 0.70: that is, about seventy percent of the amount paid by employers was paid in benefits on claims.[59] The cost of benefits has increased steadily over the last twenty years: $1295 million in 1960; $3563 million in 1971; $12,027 million in 1979; $30,733 million in 1988.[60] Expressed in more useful form as a percent of payroll, benefits rose from 0.59% of covered payroll in 1960, to 0.66% in 1970, 1.07% in 1980, 1.58% in 1989, and 1.70% in 1990.[61] Thus, the total cost to employers, 2.27% of payroll in 1989,[62] was (not surprisingly) considerably higher than the cost of benefits in that same year.[63] Unaffected by the vagaries of the financial and insurance markets, benefits, unlike employer costs, do not decrease in response to high interest rates.

Aggregate benefits paid by all state and federal workers' compensation programs are affected by numerous factors: the

57. *See* Freedman, *supra* note 56, at 20 (describing this process).

58. Benefits include all monies paid out in order to meet the insurer's obligation to the insured. In workers' compensation claims, this will include any money paid directly to the claimant and fees paid to health care and rehabilitation providers. Other factors influencing cost for employers include: the insurance pricing mechanisms which assign employers to industrial classifications and then determine the spread of risk through each class; the insurer's administrative costs, including legal costs; the state of the financial market, particularly as it affects the interest rate earned and projected to be earned on reserves; and the rate of return paid to investors or, in the case of mutual funds, to insureds.

59. This ratio has shown some historical fluctuation, but remained at approximately the 70% level from 1983 through 1989. Burton (1992), *supra* note 47, at 2 tbl. 1. It was at a low of 54% in 1980; since 1982 it has fluctuated between 67 and 71%. William J. Nelson, Jr., *Workers' Compensation: Coverage, Benefits, and Costs 1989*, SOC. SEC. BULL., Spring 1992, at 51, 56. Fluctuation in this ratio is primarily the result of changes in the insurance and financial markets. *See id.* at 2. Of course, refusals by state insurance agencies to approve requested rate increases for the regulated workers' compensation insurance market force the ratio of benefits to costs upward. *See* Klein, *supra* note 52, at 7-8 (noting that only half of the rate increases filed by the National Council on Compensation Insurance, the rating organization in the majority of states, have been approved). It is important to note that as the total amount paid by employers for workers' compensation insurance coverage rises, and this benefit to cost ratio remains constant, the amount of money retained by the insurance carriers increases. Note also that efficiency in any insurance market would argue in favor of reducing these non-benefit costs. This can be done: The West Virginia Workers' Compensation Fund, for example, pays out over 90% of its collected premium in benefits on claims.

60. William J. Nelson, Jr., *Worker's Compensation: 1984-88 Benchmark Revisions*, SOC. SEC. BULL., Fall 1992, at 41, 45 [hereinafter Nelson, *1984-88 Benchmark*].

61. 1992 STATISTICAL SUPPLEMENT, *supra* note 28, at 313.

62. Refer to note 48 *supra* and accompanying text.

63. *Id.*

nature and degree of risk in covered industries, the size of the workforce covered by workers' compensation, the earnings of the covered workers, levels of wage rates, severity and frequency of paid claims, costs of medical and rehabilitative treatment, the likelihood that injuries will result in claims, the liberality of the review process when claims are litigated, the administrative handling by state and federal agencies (including the likelihood of settlement below full mandated benefit costs prior to completion of litigation), and the mandated benefit rates.[64] Benefits are divided among four primary categories: temporary total disability, paid while a worker is off work recovering from an injury or acute episode of a chronic illness; permanent partial disability, for permanent disabilities which do not prevent the worker from remaining in the active workforce; permanent total disability, for workers who are unable to return to work or to perform work which is comparable to that which they performed prior to the injury;[65] and medical and physical rehabilitation benefits, largely paid directly to providers of health and rehabilitative services who provide services to workers for their occupational injuries and diseases. Numerically, about three-fourths of claims involve temporary total disability[66] although the majority of money is expended on permanent disability, including both partial and total cases; most, but not all claims involving permanent disability have their genesis in "lost time" claims.[67]

A substantial portion of the total benefits paid goes to health care providers and lawyers, not to injured workers,

64. *See* Lampman & Hutchens, *supra* note 29, at 121. A significant component of the increase in benefits attributable to benefit rates was the result of increases in weekly benefits. The National Commission on State Workmens' Compensation Laws report in 1972 recommended that all states set the maximum weekly benefit at least at the level of that state's average weekly wage. Burton (1993), *supra* note 2, at 4. Prior to 1972, states had paid, on average, 55% of this average wage; by 1980, this had grown to an average of 91%, and many states had enacted automatic annual increases which tracked the state's average weekly wage. *Id.*

65. In many jurisdictions, age, education, and skill of the injured worker will be considered, in addition to medical impairment, in making a determination regarding permanent total disability. *See* 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 57.60, at 10-389, § 57.61(c), at 10-437 to -438 (1993).

66. In 1986, 72% of all cases were those in which the workers suffered a temporary total disability. Nelson, *1984-88 Benchmark*, *supra* note 60, at 44.

67. The percent of all benefits which are paid for temporary disability cases rose from 18% in 1982 to 25% in 1986. *Id.* at 44. These figures appear to include the cost of medical treatment for the injury. Payment for permanent disability cases, both partial and total, accounts for one fourth of the cases but almost three-fourths of the cash payments. *Id.* Examples of cases in which lost-time benefits are not paid but permanent disability results include many occupational disease claims.

however. The medical component of workers' compensation benefits has risen from 33.6% of total workers' compensation benefit costs in 1960, to 40.9% in 1990,[68] to 50% in 1993.[69] In every recent year, the rate of inflation for medical costs within the workers' compensation programs has exceeded the already alarming rate of increase in U.S. health care expenditures generally.[70]

Notably, the level of litigation over claims has risen as benefit costs have grown. Payments to health care providers who perform evaluations and to lawyers have been increasing.[71] The medical cost component can be easily quantified because health care providers are paid directly by the insurer. The cost of lawyers is more difficult to determine, however. Defense of claims is generally included in the administrative costs charged by insurance carriers,[72] but the cost of legal representation to workers is almost always taken

68. Burton (1993), *supra* note 2, at 19 tbl. A6; *Regaining Control of Workers' Compensation Costs*, MED. BENEFITS, Aug. 15, 1993, at 1 (citing a Towers Perrin Publications Report published on July 15, 1993). This translates into $15,067 million in workers' compensation medical costs in 1990. The increasing level of concern about this cost can be found in the growing number of monographs and articles focusing on it. *See, e.g.*, WORKERS' COMPENSATION HEALTH CARE COST CONTAINMENT (Judith Greenwood & Alfred Taricco eds., 1992) [hereinafter Greenwood & Taricco]; Silvana Pozzebon, *Do Traditional Health Care Cost Containment Practices Really Work?*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, May-June 1993, at 17.

69. *Regaining Control of Worker's Compensation Costs*, *supra* note 68, at 1.

70. Burton (1993), *supra* note 2, at 18 tbl. A7 (Health Care Expenditures, US and Workers' Compensation, 1972-1990). As a result of this troubling inflationary spiral, President Clinton's Health Security Act (HSA) proposes that health care related to workers' compensation claims be included in the cost containment strategies to be applied to the health care system generally. In the proposal, health care costs related to workers' compensation claims would be managed and approved through the regional health alliances and health plans. The costs themselves will ultimately be paid, however, by the workers' compensation insurance carrier. S.1757/H.R. 3600, 103d Cong., Reg. Sess. § 10002(a)(1) (1993). States or regional health alliances may develop alternative payment methodologies for treatment of compensable conditions or the workers' compensation carrier may negotiate alternative payment arrangements directly with the health plan. *Id.* § 10002(b). If the final version of health care reform resembles this proposal, workers' compensation premiums will not drop; medical costs will continue to be paid through these premiums. The HSA mandates a study and report regarding the workers' compensation provisions within two years after implementation. *Id.* § 10022. As a result of cost containment efforts generally, the hope is that the rate of increase of workers' compensation medical costs will decline.

71. LESLIE I. BODEN, REDUCING LITIGATION: EVIDENCE FROM WISCONSIN (1988). Obviously, the increased tendency to challenge claims has not succeeded in reducing the overall costs of the system; some employers assert, however, that the aggregate costs would be even greater if litigation were not pursued.

72. There are some exceptions to this, of course. Self-insured employers must pay the litigation costs associated with challenged claims themselves. In addition, some state funds (e.g., West Virginia) do not provide legal assistance on defense of all claims.

from the benefit amount paid directly to workers.[73]

As litigation and medical costs have grown, the relative proportion of benefits paid to workers has declined and the component paid to others—including medical providers, lawyers, rehabilitation specialists, third party claims administrators—has risen. Thus, while the amount of total benefits paid has increased as a percent of payroll, the amount that is paid directly to individual injured workers may not be increasing or may be doing so at a much slower pace.[74]

Workers' compensation costs can no longer be characterized as modest and stable. Presumably, the incentive to reduce claims should have risen with these costs. Unquestionably, escalation in costs has provoked a steady and insistent call for new reform of the workers' compensation system. While states continue to amend their workers' compensation laws, often on an annual basis, the OSHA reform bill pending in Congress now calls for a second National Commission to study the adequacy and efficacy of the current workers' compensation system.[75]

73. States often regulate the fees that can be charged by claimants' representatives. *See, e.g.*, W. VA. CODE § 23-5-5 (1993) (limiting claimant's attorney's fees to 20% of 208 weeks of benefits).

74. The numbers available on this are somewhat contradictory. According to one source, National Council on Compensation Insurance statistics show that workers' compensation delivered the same direct economic compensation, on average, to an injured worker in 1989 ($6049) as it did in 1980 ($6044), but that the amount paid to medical services providers rose by 63%, from $2188 to $3564, on average, during the same period. Michael Pritula, *Starting Over in Workers' Comp.*, 92 BEST'S REV., Jan. 1992, at 22, 24 (numbers adjusted for inflation). If these numbers are accurate, then it is difficult to accept the assertion that increasing levels of benefits are exacerbating the problems of moral hazard as workers file claims in increasing numbers. Refer to note 15 & 18 *supra*. Nevertheless, Pritula indicates that the number of claims grew from 21 to 28 per 1000 workers in the period from 1984 to 1989, noting that this occurred at least in part because employers failed to emphasize safety programs. Pritula, *supra*. In contrast, only a slight increase in compensable cases per covered worker was observed between 1950 and 1980. Lampman & Hutchens, *supra* note 29, at 124. In any event, the total cost per claim has undoubtedly been increasing. Estimates of this trend vary somewhat. One source asserts that the average cost per claim, when not adjusted for inflation, has tripled over the last decade. Raiborn & Payne, *supra* note 2, at 554. The important conclusion to be drawn here is that the primary component of increasing cost may be the cost of medical and other services.

75. H.R. 1280, 103d Cong., 1st Sess., Title XIII, § 1301 (1993). The bill would establish a 15 member Commission which would have the following duties: to review the recommendations of the prior National Commission to determine the extent to which they were implemented and the barriers to implementation; to study the feasibility of utilizing worker's compensation data to target loss prevention activities on high risk occupations; to study workers' compensation laws to determine whether they effectively meet financial and medical needs of injured workers, whether the administrative systems under the laws are adequate, and whether they provide adequately for occupational injuries and illnesses, including sufficient recuperative time

B. Injuries

Public concern about the persistence of occupational injuries is almost always spurred by the occurrence of workplace catastrophes. The fire at Imperial Foods in Hamlet, North Carolina, which killed twenty-five workers and injured another fifty-six, recently stimulated another round of concern.[76] Mainstream professional publications, such as the *Journal of the American Bar Association*, joined the voices of health and safety activists and labor unions in expressing concern about the persistence of serious workplace hazards.[77] The fact that this expression of public concern and outrage tends to dissipate between catastrophes does not mean that it is not justified: Rates of reported occupationally-induced injuries and illnesses have simply not declined in recent years.

Quantifying workplace morbidity and mortality is not easy. When the Centers for Disease Control and Prevention (CDC) convened an expert panel, chaired by a well-regarded injury epidemiologist,[78] to discuss prevention of occupational injuries, a considerable amount of its early discussions focused on the lack of reliable data and the discrepancies among various reporting systems.[79] The panel was ultimately forced to admit that there was not even an accurate count of traumatic occupational fatalities, presumably the most objective and easily counted events among occupational injuries. Estimates of deaths due to traumatic occupational injury vary widely. The

before an injured worker returns to full duty; to investigate the relationship between worker's compensation, safety and health programs, and insurance rates and services; to determine the feasibility of preempting state workers' compensation laws with a national program; and to evaluate the factors responsible for interstate differentials in premiums for high hazard occupations. *Id.* § 1301(c)(1)-(4).

76. Peter T. Kilborn, *In Aftermath of Deadly Fire, A Poor Town Struggles Back*, N.Y. TIMES, Nov. 25, 1991, at A1.

77. Jon Jefferson, *Dying for Work*, A.B.A. J., Jan. 1993, at 46. Although noting that "safety today is better than ever," Jefferson also notes:

> [T]hings may be getting worse again: In 1990 alone, injury rates rose by 6 percent, and occupational illness rates jumped by 17 percent . . . . Why are so many U.S. workers hurt or killed on the job? The main reason, according to many workplace-safety advocates, is a serious lack of government commitment and resources.

Id. at 47.

78. Susan P. Baker, Professor at Johns Hopkins University School of Public Health served as chair of the panel; she is the first editor of *Injury Fact Book* (2d ed. 1991) as well as author of numerous articles in the area of injury epidemiology.

79. As a member of the panel, I had the opportunity to listen to the serious concerns raised by epidemiologists and other public health professionals regarding the abysmal state of data in this field.

National Safety Council reported 10,400 fatalities in 1989.[80] In that same year, the National Traumatic Occupational Fatality (NTOF) study conducted by the National Institute for Occupational Safety and Health (NIOSH) reported 5714 deaths[81] and the Bureau of Labor Statistics (BLS) reported 3600.[82] Despite these numerical discrepancies, all of the

80. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 37 (1991) [hereinafter ACCIDENT FACTS]. According to National Safety Council (NSC) figures, the workplace death rate declined steadily from 1938 to 1990. *Id.* The figure of 10,500 covers both the public and private civilian work force but excludes deaths due to homicide or suicide, despite the increasing level of occupational homicides reported by the Bureau of Labor Statistics. Refer to note 82 *infra*.

81. The figure of 5714 represents a traumatic fatality rate of 5.6 per 1000 civilian workers. The NTOF program, which began to study occupational fatalities for the year 1980, is based on a study of death certificates, not employer reports. NIOSH collects death certificates when the decedent was 16 years of age or older and the death certificate has a positive response to the injury at work item. Unpublished data from the NTOF study which covers the period 1985-89 was supplied to the author by Elinor Jenkins, Division of Safety Research, National Institute for Occupational Safety and Health, Aug. 15, 1993. NTOF data for the period 1980-85 can be found in NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, NATIONAL TRAUMATIC OCCUPATIONAL FATALITIES, 1980-1985 (1988). As the 1988 publication notes:

> The accuracy and completeness of death certificate data depends upon the knowledge and accuracy of those who fill out death certificates. It is likely that some cases are missing from NTOF. For example, it is suspected that NTOF excludes some occupational motor vehicle fatalities and some occupational homicides because these fatalities may not always be identified as 'injury at work.'

Id. at 1-2.

The NTOF data for the period 1980 through 1989 indicates that 62,289 civilian workers died from injuries sustained while working during this period. CENTERS FOR DISEASE CONTROL & PREVENTION, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, FATAL INJURIES TO WORKERS IN THE UNITED STATES, 1980-1989: A DECADE OF SURVEILLANCE x (1993). The leading causes of these fatalities were motor vehicle crashes (23%), machine-related incidents (14%), homicides (12%), falls (10%), electrocutions (7%), and being struck by falling objects (7%). *Id.* It is interesting to note that the fatality rate for male workers (9.8 per 100,000 workers) was 12 times higher than for women (0.8 per 100,000). *Id.* The average annual fatality rate per 100,000 civilian workers decreased from 8.9 in 1980 to 5.6 in 1989, a 37% decrease. *Id.* at xi.

82. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2399, OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES BY INDUSTRY 1990 (1992) [hereinafter BLS 1990]. This figure represents the BLS annual survey of occupational fatalities for private sector employers with 11 employees or more. However, BLS admits that "fatalities are difficult to measure in an establishment survey, and, therefore, the Bureau believes that the count of fatalities presented . . . is significantly understated." *Id.* at 7. It appears that the differences in the numbers between the NTOF and BLS reported fatality rates represent an underreporting of fatal injuries in several high risk industries in the BLS data. Nancy Stout-Wiegand, *Fatal Occupational Injuries in US Industries, 1984: Comparison of Two National Surveillance Systems*, 78 AM. J. PUB. HEALTH 1215, 1216 tbl. 1 (1988).

BLS has, however, recently revised its reporting of occupational fatalities. In its first National Census of Fatal Occupational Injuries, BLS reported 6083 fatalities due to work injuries in 1992; about one-third of these resulted from highway acci-

commentaries on these numbers agree on the following: the number and rates of occupational fatalities have certainly declined over time;[83] the documentation of these deaths is inadequate; and, irrespective of the final tally, these fatalities can be prevented and, therefore, occur too frequently.[84]

Statistics on the incidence and severity of non-fatal work-related injuries and illnesses are maintained by the Bureau of Labor Statistics (BLS), based upon reports supplied by employers under the mandatory reporting requirements instituted pursuant to the Occupational Safety and Health Act of 1970.[85] Questions continuously arise regarding the validity of the statistics developed in this program as well: both the

dents or homicides (each of which accounted for over 1000 deaths). BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-93-406, U.S. DEP'T OF LABOR NEWS, Oct. 1, 1993, at 1 [hereinafter U.S. DEP'T OF LABOR NEWS]. In comparing occupational fatality figures from the above three sources, investigators have concluded that substantial undercounting of fatal work injuries results from relying on a single source for data. Of 582 work fatalities identified from two or more source documents in Colorado and Texas in 1990, 562 (97%) were identified in death certificates, 361 (62%) were identified in workers' compensation reports, and 191 (33%) were identified in the fatality reports employers submitted as required by OSHA. *Digests of Important Publications*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Mar.-Apr. 1992, at 25 (citing Guy Toscano & Janice Windau, *Further Test of A Census Approach to Compiling Data on Fatal Work Injuries*, MONTHLY LAB. REV., Oct. 1991, at 33-36). The new BLS National Census, which draws on multiple sources of data, presumably represents a more accurate count. *See* Guy Toscano & Janice Windau, *Fatal Work Injuries: Results From the 1992 National Census*, MONTHLY LAB. REV., Oct. 1993, at 39 (noting that the elderly, workers in farming, transportation, mining, and construction have higher risk of workplace fatalities).

83. The National Safety Council data, for instance, show deaths to have declined from 14,500 in 1933 to 10,500 in 1990. ACCIDENT FACTS, *supra* note 80, at 37. Some hazardous industries have shown a substantial decline in fatalities. In coal mining, for example, 1000 miners were killed annually in the 1930s and 1940s; that number had declined to about 100 deaths per year by 1982. COMMITTEE ON UNDERGROUND COAL MINE SAFETY, COMMISSION ON ENGINEERING AND TECHNICAL SYSTEMS, TOWARD SAFER UNDERGROUND COAL MINES 43 tbl. 4 (1982).

84. The failure to have some certainty about the numbers affects not only discussions about compensation but also makes it impossible for epidemiologists to follow trends and set priorities for prevention. The CDC Injury Report comments: "Despite the limitations, existing data indicate that the magnitude of occupational injury is staggering. . . . Ideally, all occupational injury should be considered unacceptable, especially severe traumatic occupational injury resulting in death: objectives that call for reductions should be considered minimal goals." CDC Injury Report, *supra* note 9, at 331, 348. Notably, current BLS statistics indicate that 40% of occupational fatalities occur in transportation accidents and 20% involve assaults or violent acts. U.S. DEP'T OF LABOR NEWS, *supra* note 82, at 3. Known preventive strategies, such as safety devices for motor vehicles (e.g., airbags) and effective gun control might therefore result in significant reductions in workplace deaths.

85. 29 U.S.C. § 657(c) (1988); *see* 29 C.F.R. § 1904 (1994) (regulating the recording and reporting of occupational injuries and illnesses).

data collection process itself[86] and potential employer incentives to underreport[87] influence the final counts. One recent report estimated that BLS numbers understate the seriousness of workplace injuries by a factor of four to nine times.[88] Nevertheless, this data base is the primary one which provides a glimpse into the current status of occupational morbidity—and it is not an encouraging picture.

Over six million occupational injury and illness cases were

86. For example, length of time off work in these numbers is affected by the way in which BLS closes the reporting period and other specific aspects of the methodology underlying the data. Arthur Oleinick et al., *Current Methods of Estimating Severity for Occupational Injuries and Illnesses: Data From the 1986 Michigan Comprehensive Compensable Injury and Illness Database*, 23 AM. J. INDUS. MED. 231 (1993). A National Academy of Sciences report concluded there was considerable underreporting in the BLS annual survey. COUNTING INJURIES AND ILLNESSES IN THE WORKPLACE: PROPOSALS FOR A BETTER SYSTEM (Earl S. Pollack & Deborah Gellerman Keimig eds., 1987).

87. During the 1980s, several large employers were subjected to substantial fines by OSHA for their failure to report injuries accurately. Burton (1993), *supra* note 2, at 8. Some commentators postulate that these fines may have increased the likelihood that employers are currently reporting more accurate numbers. *Id.* Others, based upon the low likelihood that OSHA will ever inspect most workplaces (because the OSHA budget supports far too few inspectors to ever reach most enterprises), maintain that employers continue to have "enormous incentives" to underreport. Telephone Interview with James Weeks, Sc. D., Occupational Health Research Scientist, George Washington University (Aug. 10, 1993). Dr. Weeks suggested that the BLS numbers are so inadequate as to be "garbage." *Id.* The reporting problems are compounded in the case of occupational diseases; the disease may be linked to an exposure which occurred many years earlier, sometimes at another workplace. Occupational disease data also suffers from the lack of experience of many primary care physicians in the diagnosis of occupational disease. Additionally, company medical departments may be disinclined to provide such diagnoses to workers who will then become eligible for compensation benefits. *See, e.g.*, Johns-Manville Prod. Corp. v. Contra Costa Sup. Ct., 612 P.2d 948, 953-55 (Cal. 1980) (finding corporate liability when the company medical department failed to disclose to workers that their X-rays revealed asbestos-related lung abnormalities, when the workers continued to be exposed to asbestos in the workplace, resulting in aggravation of the workers' condition). The legislature in California later codified this holding to create liability when an employer fraudulently conceals the existence of an injury and its connection with employment. CAL. LAB. CODE § 3602 (West 1992); *see also* Millison v. E.I. duPont de Nemours & Co., 501 A.2d 505, 507 (N.J. 1984) (stating that the plaintiff's recovery was not limited to workers' compensation where the employer fraudulently concealed injuries from the employee); Martin v. Lancaster Battery Co., 606 A.2d 444 (Pa. 1992) (allowing the plaintiff to recover when the employer fraudulently withheld information from the employee, preventing the employee from taking action to reduce the severity of his condition). The same incentive that can lead employers and insurers to attempt to reduce hazards can also lead them to hide information. ASHFORD, *supra* note 9, at 404. Thus, the issue of data in this area is tied not only to the various economic incentives, but also to the complex interrelationship between employers and workers. Refer to part III.C *infra*.

88. Arthur Oleinick & Jeremy V. Gluck, *Faulty Data Play Down Job Injuries*, N.Y. TIMES, Aug. 15, 1993, at F13 (noting that "this gross inaccuracy about important health and safety data carries ominous implications for public policy").

reported in private industry in 1991.[89] Of these, almost 2.8 million were serious enough for the worker to lose work time or experience restricted work activity,[90] resulting in 60 million reported lost workdays in that year.[91] The incidence rate for injuries in 1991 averaged 7.9 per 100 full time private sector workers, ranging from an average of 2.3 in finance and insurance industries to a high of 12.8 in construction.[92] The rate of injury for the service sector (6.4) was, not surprisingly, lower than the rate for goods producing industries, which averaged 11.3 cases per 100 full time workers.[93]

In addition to the sheer volume of the numbers of reported injuries, which public health officials and advocates view as "largely preventable,"[94] three aspects of the data reported by the BLS are particularly troubling. First, while the incidence of all reported illnesses and injuries declined somewhat from 1972 to 1982, it has edged upward in recent years.[95] It is true that the total count of injury cases in the BLS data base involve a considerable number of minor injuries.[96] More troubling, therefore, is the fact that the rate of injuries involving time lost at work (injuries which are presumptively more severe) has not declined[97] and that the average length

89. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 2424, INJURIES AND ILLNESSES IN THE UNITED STATES BY INDUSTRY 1991, at 2 (1993) [hereinafter BLS 1991]. This is a rate of 8.4 per 100 full time private sector workers. *Id.*

90. *Id.* The National Safety Council, which counts only injuries which result in lost time, reported 1.8 million disabling injuries for 1990. ACCIDENT FACTS, *supra* note 80, at 34. A disabling injury is defined in this report as one which results in death, permanent disability, or any degree of temporary total functional disability beyond the day of the injury. *Id.* at 105.

91. The National Safety Council estimated lost workdays at 75 million for 1990; in this figure, fatalities are included at an average loss of 150 days per case and permanent impairments are included at actual days lost plus an allowance for lost efficiency resulting from impairment. ACCIDENT FACTS, *supra* note 80, at 35.

92. BLS 1991, *supra* note 89, at 2.

93. *Id.*

94. Refer to note 9 *supra*.

95. BLS 1991, *supra* note 89, at 1 tbl. 1. Total cases declined from 11.0 per 100 workers in 1973 to a low of 7.6 in 1983 and then rose to 8.8 in 1990. Data for 1991 shows a slight drop (to a rate of 8.4); it is too early to say that this represents a reversal of the earlier trend. *Id.*

96. Recordable injuries for BLS purposes include all injuries—such as cuts, fractures, sprains, amputations, etc. which result from work-related events—which involve loss of consciousness, restriction of work or motion, transfer to another job, or medical treatment (other than first aid). *Id.* at 73.

97. Lost workday cases were reported at a rate of 3.3 cases per 100 workers in 1972 and 4.1 in 1990. This figure also dropped in 1991, to 3.9 cases per 100 workers. *Id.* This is despite the fact that the use of lost workdays as a criterion for "reporting injuries or as a proxy for severity . . . may be misleading because of the employer's incentive to return injured workers to the workplace to avoid 'reportable' injuries, even if they cannot perform their usual tasks." CDC Injury Report, *supra* note 9, at 334.

of time lost as a result of these injuries has steadily increased.[98]

Second, reports of occupational diseases involving cumulative trauma have skyrocketed. Injuries are generally defined as the result of a single traumatic event.[99] Occupational diseases comprise everything else: acute and chronic illnesses including those caused by inhalation, absorption or ingestion of substances, and repeated exposure to a particular hazard.[100] In general, occupational diseases are consistently underreported in all data systems; uncertainty regarding causality, existence of these diseases in the general population, long latency periods before symptoms appear, as well as scientific disagreement, mean that illnesses caused by work are much less likely than injuries to be reported by employers on OSHA forms or to be reported by workers to workers' compensation programs.[101] The recent phenomenal growth in the reporting of musculoskeletal problems resulting from cumulative or repetitive trauma is significant from several vantage points. The sheer numbers are alarming: of the 368,000 new cases of occupational disease reported by

98. Lost workdays per case rose from 47.9 in 1972 to 86.5 in 1991. BLS 1991, *supra* note 89, at 1.

99. For example, OSHA defines occupational injuries as "any injury such as a cut, fracture, sprain, amputation, etc., which results from a work accident or from a single instantaneous exposure in the work environment." *Id.* at 42.

100. This is the BLS categorization. Some workers' compensation programs classify any health effect of an acute event as an injury. For example, an acute exposure to chlorine resulting in respiratory damage may be characterized as either an injury or an illness, depending upon the system.

101. Several empirical studies confirm that diseases are grossly underreported in workers' compensation data. For example, only 24% out of over 600 individuals diagnosed with severe work-related silicosis in state-based surveillance programs in Michigan and New Jersey, ever *filed* for workers' compensation benefits. Ken D. Rosenman et al., *Mortality Rates Among persons with Silicosis Reported to Two State Based Disease Surveillance Systems*, *in* PROGRAM SYLLABUS, SECOND INTERNATIONAL SYMPOSIUM ON SILICA, SILICOSIS, AND CANCER 174-87 (1993). Similarly, in a study of 238 people with work-related carpal tunnel syndrome, only one-third filed claims for compensation. Rebecca S. Miller & Donald C. Iverson, Carpal Tunnel Syndrome Study in ASPN: Final Report (1990) (on file with the author). A 1980 report estimated that 3% of occupational diseases, and 43% of occupational injuries, received compensation in 1971. U.S. DEP'T OF LABOR, AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASE (1980); *see also* ASHFORD, *supra* note 9, at 416 (noting that, at the time his book was written, occupational disease accounted for only 1% of workers' compensation payments; Ashford also provides a general discussion regarding the underreporting of occupational diseases); WHITE, *supra* note 9, at 43 (estimating that 5% of occupational diseases result in compensation claims). These estimates regarding the extent to which diseases are compensated are obviously guesses, based upon suppositions regarding the true underlying rate of disease.

employers in 1991, 223,600 were cumulative trauma cases.[102] Repetitive trauma cases rose from eighteen percent of reported occupational illnesses in 1981 to sixty-one percent in 1991;[103] in fact, almost all of the increase in reported occupational illness is in this category.[104] These claims are coming from both goods-producing and service industries.[105] This means that the anticipated decline in illnesses associated with work is not occurring because of increases in reported cases in the relatively less hazardous industries.

Third, the industries identified by BLS to be "high impact" (i.e., industries reporting 100,000 or more injury cases in 1991) included primarily service sector industries with large numbers of workers.[106] Although the rates of injury and of severe injury in these industries are lower than the rates for most manufacturing and mining jobs, the number of injuries in non-hazardous industries has important implications for the persistence of occupational injuries.

Finally, and perhaps most troubling, the vast majority of reported injuries involve old and familiar hazards, not new ones. The largest number of reported injuries result in musculoskeletal disorders. Workers file claims for strains and sprains, being hit by or struck by objects, falls, and machinery and motor vehicle mishaps. These injuries involve well known hazards for which there is a substantial literature that explores preventive techniques.[107]

In short, the available data demonstrate a troubling persistence of occupational injuries and illness, in both goods-producing and service jobs. The incidence of illnesses and injuries which require time off from work and significant medical treatment has not declined as health and safety regulation has expanded, compensation costs have risen, and the economy has shifted from goods to service-producing jobs.

102. BLS 1991, *supra* note 89, at 5.

103. *Id.* at 5 tbl. 5.

104. *Id.* at 5 cht. 5.

105. *Id.* at 6.

106. Industries reporting more than 100,000 injury cases in 1991 were: eating and drinking establishments; hospitals; grocery stores; trucking and courier services; nursing and personal care facilities; department stores; motor vehicles and equipment manufacturing; hotels and motels. *Id.* at 2 tbl. 3.

107. The strains and sprains result primarily from material handling such as lifting and carrying heavy objects. Falls often occur because of slippery floors. California Insurance Study, *supra* note 7, at 1-6; *see also* CDC Injury Report, *supra* note 9, at 340-43 (stating that the top 10 injury categories were selected because they occur frequently, are often severe and often preventable; they include injuries, such as burns and lacerations, and external causes, such as falls and motor vehicle mishaps).

C. *Costs/Injuries*

Three issues must be addressed in exploring the relationship between compensation cost escalation and high occupational morbidity and mortality. First, what are the possible explanations for increasing workers' compensation costs? Second, how have employers and insurers responded to escalating costs? Third, is there any evidence that employers can effectively decrease compensation costs?

1. *Explanations for Cost Escalation.* Explanations regarding the escalation in workers' compensation costs and the persistence of injuries cluster into five categories: persistence of workplace hazards, attributes of the workers' compensation system, worker behavior, demographic and industrial changes, and reporting variability and data validity.

a. *Persistence of workplace hazards.* Although internal inflation of costs due to legislatively mandated benefit levels and rising medical costs account for a substantial portion of the cost escalation in workers' compensation, the remainder of the escalation is closely linked to the number and severity of *reported* injuries.[108] The rate of reports of relatively severe injuries which are costly to compensation systems climbed through the 1980s.[109] Workers are still getting injured; compensation costs are rising as a result of the incidence of reported injuries and illnesses.

b. *Attributes of the workers' compensation system.* Wide variations in costs, injury rates, and benefit levels among states make it difficult to assess the impact of changes in definitions of compensable conditions and of structural changes in workers' compensation systems. In fact, there is remarkably little correlation among rates of reported injuries, state ranking by liberality of benefit levels, and employer costs for

108. The occurrence of injuries or illnesses and the filing of claims (or reporting of injuries) are not equivalent. Refer to note 101 *supra*. To the extent that claims are not filed, even if an injury has occurred, costs will be reduced despite the persistence of injuries. For some employers, whose interest focuses solely on the costs associated with compensation claims, the goal therefore becomes to limit the frequency of the filing of claims rather than to limit the injury rate. For a full discussion of this issue, refer to part III.C *infra*.

109. Refer to notes 80-82, 97-98 *supra* and accompanying text.

compensation.[110] States with high aggregate costs report both high and low rates of injury.

Nevertheless, certain changes in the workers' compensation systems have unquestionably contributed to increasing costs. The recognition of the work-relatedness of health conditions has expanded dramatically over the last thirty years. Not surprisingly, recognition of new compensable conditions expands compensation costs. At their inception, workers' compensation programs focused on providing benefits to those individuals who were injured in "accidents"—traumatic, unexpected, observable events.[111] This led, for example, to the exclusion both of occupational diseases and musculoskeletal injuries resulting from repetitive trauma. Over time, this definition expanded to include diseases caused by exposure to both physical and non-physical agents such as dusts, fumes, and noise.[112]

For example, a 1992 article in an insurance trade journal noted that Aetna Life and Casualty had found that forty-five percent of its claim payments were for cumulative trauma disorders.[113] Thus, at the same time that new technology has contributed to these injuries,[114] and their reported incidence

110. *See* ELEVENTH ANNUAL GRANT THORNTON MANUFACTURING CLIMATES STUDY 152-53 (1990) [hereinafter GRANT THORNTON STUDY (showing wide variation in ranking of states with regard to statutory benefit levels and employer premium costs); Burton & Schmidle, *supra* note 28, at 10. Ashford notes that "there does not appear to be a systematic relationship . . . between the level of benefits and the safety record in the State." ASHFORD, *supra* note 9, at 398. Furthermore, there is a surprisingly poor correlation between premium rates and average benefits across states. *Id.*

111. Refer to note 32 *supra*.

112. Problems with determining compensability of occupational diseases are compounded by the fact that many workers' compensation systems historically excluded diseases of everyday life (even if arguably occupationally-caused) or set statutes of limitations based upon time of exposure, which may have occurred years before the worker developed the disease and discovered its work-relatedness. Difficulties in proving "work-relatedness" also result in increased litigation over the compensability of conditions. As noted above, the vast majority of occupational diseases are probably not compensated. Refer to note 101 *supra*.

113. *Aetna Ergonomics Workbook Now Available to Employers*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Oct. 5, 1992, at 15; *see also* Junius C. McElveen, Jr., *Recent Trends in Workers' Compensation*, 18 EMP. REL. LAW J. 255 (1992) (noting large increase in repetitive trauma claims); Ruth Gastel, *Occupational Disease: Insurance Issues*, INS. INFO. INST. REP., Jan. 1993 (indicating that "[s]ome insurance industry data support the BLS figures. However, several insurers believe that a much greater proportion of workplace injuries than is indicated by the BLS data are due to cumulative trauma. In an informal survey of its national accounts, one large national insurer found that about 45 percent of injuries and 63 percent of workers' compensation claim payments were due to repetitive motion injuries.").

114. California Insurance Study, *supra* note 7, at 35.

has risen dramatically,[115] workers' compensation systems have expanded their willingness to compensate for illnesses caused by non-acute events. This expansion of the flexibility of the definition of compensable conditions, and the accompanying growth in claims filing, causes some employers and insurers to be highly suspicious about the diagnoses.[116]

Even with the large number and size of compensation claims currently associated with repetitive trauma, these claims are probably vastly underreported in the compensation systems. In one study, twenty percent of people afflicted with cumulative trauma disorders became unable to work and another thirty-five percent required modified work activities, but only about one-third of the workers with occupationally-caused disorders filed claims for compensation.[117] The implication of trends in cumulative trauma disorders and claims is troubling: the changing nature of work does not promise either reduced injury rates or fewer compensation claims.[118] In fact, the pandemic nature of some cumulative exposure diseases could bring massive costs to compensation systems if the rate of claims filing actually reflects the incidence of the diseases.[119]

115. Refer to notes 102-05 *supra* and accompanying text.

116. This suspicion has been applied to cumulative trauma disorders. Similarly, insurers are now expressing concern about diagnoses of reflex sympathetic dystrophy (RSD) syndrome, a relatively rare condition in which a simple injury may trigger significant and persistent pain. "While RSD is a very real and debilitating condition, insurers are concerned that increased knowledge about it is causing an increase in the number of RSD diagnoses and claims. . . . Costs associated with RSD can be enormous as patients and doctors search for answers to the pain." *New Workers' Comp Claims*, MED. BENEFITS, Aug. 30, 1993, at 10-11.

117. Miller & Iverson, *supra* note 101, at 9-10 tbl. 18. There were a total of 552 people with carpal tunnel syndrome in this study. *Id.* at 9. The disorder was job-related for 43% of these, or 238. *Id.* at 9. Of the 552, 14% filed workers' compensation claims. *Id.* Therefore, if only people whose disorder was job-related filed claims, one-third of those who could legitimately file claims did so. Lawrence Fine, M.D., Director of the Division of Surveillance, Hazard Evaluation, and Field Studies (DSHEFS) of the National Institute for Occupational Safety and Health, reported on this study at the New Challenges in Occupational Health conference in Houston on March 4, 1993. For other similar findings, refer to note 101 *supra*.

118. California Insurance Study, *supra* note 7, at iii.

119. Noise-induced hearing loss (NIHL), for example, probably afflicts a majority of older industrial workers and miners. *See generally* 1B LARSON, *supra* note 65, § 41.51 (discussing the potentially pandemic nature of hearing loss claims). However, NIHL rarely results in lost time from work. Because hearing loss is also attributable to aging, most compensation systems have been reluctant to provide any, or very much, compensation for this well-documented, occupationally-caused, objectively determinable impairment. *See id.* § 41.54. The underreporting of occupational diseases (which involve cumulative exposure to workplace hazards rather than traumatic events) to workers' compensation programs is a frequent subject of study and commentary. Refer to note 101 *supra*. Professor Larson notes, with regard to this, that

In addition to expanding the definitions of compensable conditions, legislatures in many states have also increased levels of statutory benefits, expanded medical benefits, and, in some places, broadened the definition of covered workers.[120] As noted above, the National Commission's Report in 1972 precipitated an expansion of benefits during the 1970s.[121] The combination of expanded benefit levels, increases in the covered workforce, expansions in the definitions of compensable conditions, and increasing friction costs have contributed significantly to cost escalation.

c. *Worker behavior.* While workers and their representatives point to the persistence of occupationally-caused morbidity and mortality, some employers and economists argue that worker behavior is the primary cause of increased costs. Several studies conclude that workers file more claims when benefit levels rise: that increases in statutory benefit levels are associated with rising numbers of lost-time claims and with lengthening duration of claims.[122] The estimated magnitude of this increase in claims varies. The two explanations that are offered for this phenomenon—decreased

the early workers' compensation laws made no serious attempt to address compensation for occupational diseases, in part because the "heavy incidence of certain diseases in particular industries or areas would make their full coverage an impossible burden on the compensation system." 1B LARSON, *supra* note 65, § 41.20, at 7-488. Similarly, with regard to restrictions imposed on compensation for respiratory diseases, Larson speaks of "the fear that the compensation system could not bear the financial impact of full liability for dust diseases simply because they were so wide spread in particular industries." *Id.* § 41.81, at 7-685. Legal barriers to awarding compensation for occupational diseases were therefore established; some of these persist today. *E.g.*, *id.* § 41.80, at 7-681, 7-684.

120. *See* 1 LARSON, *supra* note 65, § 5.30, at 2-21 to 2-24 (discussing increases in percentage of employees covered and maximum benefits); ANNE TRAMPOSH, AVOIDING THE CRACKS: A GUIDE TO THE WORKERS' COMPENSATION SYSTEM 16-20 (1991) (discussing the commonalities in the compensation benefits in many states, including medical benefits, wage loss benefits, and death benefits).

121. For example, medical benefits are now provided so that the injured worker will receive lifetime treatment for his or her occupational injury or disease. *See generally* U.S. CHAMBER OF COMMERCE, 1993 ANALYSIS OF WORKERS COMPENSATION LAWS (1993) [hereinafter U.S. CHAMBER OF COMMERCE]. States have raised minimum and maximum benefit levels, so that in the majority of states injured workers will receive two-thirds of their pre-injury gross wage (to a maximum, generally, of 100% of the state average weekly wage). *Id.* Minimum and maximum benefit levels are now tied to the state's average weekly wage so that the maximum weekly benefit now increases automatically in at least 45 states. *Id.* In addition, the majority of jurisdictions have expanded the availability of permanent total disability benefits so that these benefits are awarded to people who, as a result of occupational injuries, become totally disabled through a combination of factors, including age, education, and the state of the labor market. Refer to note 65 *supra*.

122. Refer to note 18 *supra* (listing some of these studies).

attentiveness to safety as a result of increasing adequacy of benefits, and increased claims filing behavior independent of increasing injury rates—are discussed in more detail in part III.C of this Article. Some of the authors of these studies have concluded that benefit rates should be curtailed in order to control this perceived (negative) phenomenon;[123] their focus is therefore on the potential inducement to workers offered by the availability of more adequate benefits, rather than upon establishing a benefit which provides economic adequacy to workers who are partially or totally disabled from working.

d. *Demographic and industrial changes.* Demographic, wage, and industrial changes influence costs as well. First, and most obviously, total cost is associated with increased covered payroll. Increasing numbers of workers and legislative expansion of the categories of covered employees meant that covered payroll increased ten-fold from 1960 to 1990.[124] Again, although this provides a partial explanation for the rise in costs, it cannot account for the rise in the percent of payroll paid in workers' compensation premiums.

Second, the shift to a service-sector economy does not appear to be providing the anticipated major shift away from occupational morbidity. The relative decline in more hazardous goods-producing jobs and increase in service-sector jobs has not meant that the reported injury and illness cases in either the BLS data set or in workers' compensation programs has declined.[125]

Third, the increasing duration of lost time claims is associated at least in part with the aging of the workforce: while more experienced workers generally have fewer injuries,[126] injuries of older workers tend to be more severe and require a longer healing period.[127] The number of lost

123. *See, e.g.*, Ehrenberg, *supra* note 18, at 77; Chelius, *The Influence of Workers' Compensation on Safety Incentives*, *supra* note 18, at 155.

124. Payroll covered by workers' compensation programs increased from $220 billion in 1960 to $2250 billion in 1990. 1992 STATISTICAL SUPP., *supra* note 28, at 318 tbl. 9.B1.

125. Refer to note 106 *supra* and accompanying text.

126. California Insurance Study, *supra* note 7, at 18 (citing a four year study of construction accidents showing that a greater percentage of accidents occur during the first year of work for an employee, regardless of the workers' age); *see also* Upjohn Report, *supra* note 7, at V-6 to V-7 (stating that low claims employers tend to have employees with more years of experience).

127. *See* Alan E. Dillingham, *Demographic and Economic Change and the Costs of Workers' Compensation*, *in* SAFETY AND THE WORK FORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION, *supra* note 18 at 163; Nelson, *1984-88 Benchmark*, *supra* note 60, at 46 (stating that although older workers have a lower

workdays per claim is expected to continue increasing as the median age of workers rises.[128]

e. Reporting variability/data validity. Data validity problems raise separate questions about the interpretation of trends in the reports of occupational injuries. To the extent that neither employers' reports nor workers' compensation claims provide us with an accurate picture of the true level of occupational morbidity and mortality, it is impossible to assess the interaction between claims and costs.[129] The fact is that changes in claims or reports of injuries may reflect nothing but changes in reporting.

2. Employer and Insurer Responses to Costs. Increasing costs have not been ignored by either employers or their insurers. Many of their reported responses have not been focused on primary prevention, however.

a. Changes in the insurance market. Increasing costs have had significant effects on the workers' compensation commercial insurance market. Self insurance has increased as employers attempt to extricate themselves from the additional costs incurred through insurance and, in return, assume the risk of loss themselves.[130] At the behest of insurance carriers,

frequency of injuries, their injuries tend to be much more severe).

128. Nelson, *1984-88 Benchmark*, *supra* note 60, at 46.

129. For example, if claims were historically underreported because of benefit inadequacy or other factors in the employment relationship, the frequency of current claims may be a better reflection of true underlying injury rates. Similarly, the current BLS statistics indicate that injury rates are highest in medium size firms and lowest in very small (under 50 employees) and large firms (over 1000 employees). BLS 1991, *supra* note 89, at 2-3. Other studies raise serious questions as to whether the low reported incidence of injuries in small establishments can be accurate. *See, e.g.*, Katherine L. Hunting & James L. Weeks, *Transport Injuries in Small Coal Mines: An Exploratory Analysis*, 23 AM. J. INDUS. MED. 391, 398-99 (1993) (stating that reporting in larger mines may be more complete). According to this study, injuries occur at a disproportionate rate at smaller mines. *Id.* at 398.

130. Workers' compensation insurance is compulsory for almost all employers in all states except New Jersey, South Carolina, and Texas. Nelson, *1984-88 Benchmark*, *supra* note 60, at 41, 42. In most states, workers' compensation coverage has generally been obtained through the purchase of insurance from private carriers. Larger employers, however, are often permitted to self insure; that is, rather than buying insurance and transferring the risk to an insurance carrier, the employer retains the risk. Self insurance is a regulated option requiring proof that the employer is financially able to assume the risk; often, bonds or letters of credit are used to guarantee the claims costs. As insurance costs have increased, the percentage of employers who self insure has risen substantially: from 18.1% of the workers' compensation market in 1980, to 20.0% in 1985, 25.9% in 1990, 29.0% in 1991, and 30.3% (projected) in 1992. Burton (1993), *supra* note 2, at 14 n.27. This move toward self insurance is also evident in other lines of insurance in which costs are

states have moved to deregulate this portion of the insurance market and to allow competitive pricing of workers' compensation insurance.[131] Not surprisingly, deregulation results in competitively lower pricing for employers who are favorable risks.[132] As a consequence, higher risk employers are forced into the residual (high risk) market to purchase this mandatory insurance.[133] There has been an explosion nationally in both the number of employers in the residual market and the extent to which the residual market operates at a deficit.[134]

b. Enterprise and insurer attempts to contain costs. There is no question that insurers, and to a lesser extent employers, are aware that compensation costs are not immutable and can be affected by their own behavior. Three variables affect workers' compensation costs: the occurrence of injuries, the filing of claims, and the cost of claims once filed. Employers and insurers recognize, and can influence, all three of these variables.

First, they have, of course, attempted to reduce both the number and severity of injuries and the numbers of claims filed after injuries have occurred.[135] Private insurance carriers expend between one and two percent of their gross revenue on "loss control" efforts;[136] these efforts include both

escalating rapidly, most notably health insurance.

131. Workers' compensation rates were traditionally regulated through administered pricing systems. Burton (1993), *supra* note 2, at 11. Deregulation was implemented in many states during the 1980s. *Id.* Open competition removes all regulation on pricing and was adopted in Arkansas in 1981; 16 other states followed by 1990 (Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, New Mexico, Oregon, Rhode Island, South Carolina, Vermont). *Id.* at 20 tbl. A11.

132. *See, e.g.*, H. Allan Hunt et al., *The Impact of Open Competition in Michigan on the Employers' Costs of Workers' Compensation*, *in* WORKERS' COMPENSATION INSURANCE PRICING: CURRENT PROGRAMS AND PROPOSED REFORMS 140-41 (Philip S. Borba & David Appel eds., 1988) (describing the decrease in costs for some employers after the deregulation of the workers' compensation insurance industry in Michigan).

133. For the nature and effects of the residual market, refer to part III.B.1.c *infra*.

134. Burton (1993), *supra* note 2, at 11. For the resulting problem of subsidy for high risk employers, refer to part III.B.1.c *infra*.

135. Refer to part III.C.3 *infra*.

136. Telephone Interview with Barry Llewellyn, Vice-President, National Council on Compensation Insurance (Feb. 26, 1993) (stating that insurance carriers expend less than one percent). Members of the National Association of Casualty & Surety Agents expend about two percent of annual revenue on loss control services. Novak, *supra* note 53, at 32. Loss control includes any activity by an insurer which will reduce the amount paid out to an insured. In this context, it may include, for exam-

cost containment strategies and safety efforts. Loss control initiatives in the private insurance market are also utilized as marketing tools and for purposes of competitive pricing. Part III.B of this Article discusses these efforts in greater detail.

Second, employers and insurers have focused efforts on costs incurred in claims, particularly medical cost containment devices and early return-to-work programs.[137] These efforts are directed not at the underlying rates of injuries but are, instead, a *post hoc* approach focusing on the cost of a claim after these injuries occur.

c. Political attempts to constrain systemic costs. Finally, the political hysteria surrounding workers' compensation has grown with the increase in workers' compensation costs.[138] Political solutions focus on three areas: medical cost containment; benefit reductions, restrictions on eligibility of claims, and increased system-vigilance against fraud; and an attempt to reintroduce safety and prevention into workers' compensation legislation. The nature and success of these responses are discussed in Part IV of this Article.

3. Successful Ventures into Cost Control. Thus, costs are rising, injuries are not declining, hysteria is growing, and there is little evidence that costs motivate employers or insurers to act aggressively to decrease injuries. Evidence does indicate, however, that if employers take prevention seriously, the cost savings can be substantial.

Anecdotal accounts of such success abound. Mennen Company claims to have cut back injury claims by ninety percent after instituting an aggressive safety program.[139] John Deere Company attributes a seventy-four percent decrease in their OSHA recordable injury rate from 1975 to 1984 to development of facility-based occupational health and

ple, any advice which reduces the number of claims filed against the insured or the costs of those claims once filed. It is *not* limited to efforts to reduce injury, illness, and fatality rates.

137. *See generally* Greenwood & Taricco, *supra* note 68.

138. Refer to part II.A *supra*.

139. *Safety Program At Mennen Co. Cuts Claims More Than 90 Percent*, 3 Workers' Comp. Rep. (BNA) 169 (1992). The effort at Mennen to reduce back injuries resulted in a 92% reduction in workers' compensation claims at five plants between 1989-91. The program included safety audits and subsequent design of a safety program, including training, minor engineering changes (including reducing size of shipping boxes), an aggressive light duty program, creation of safety committees, and weekly safety meetings.

safety goals supported by management.[140] An automobile parts manufacturing company implemented revised material handling procedures in 1986 and experienced a seventy-three percent reduction in annual injury-related workers' compensation claims.[141] Cord Moving and Storage Company in California reportedly made a concerted effort to improve safety by hiring a safety manager, establishing training programs, performing equipment maintenance, investigating accidents, and developing an incentive program; after three years, workers' compensation losses were reduced 116 percent, even though the company had grown over ten percent.[142] Weyerhauser Company instituted a combined safety and post-injury control program and trimmed workers' compensation costs from $700 per employee in 1984 to $300 in 1990.[143] And the stories go on.[144]

In 1988, the W.E. Upjohn Institute for Employment Research completed a major study of workers' compensation claims for the State of Michigan.[145] Michigan, like most states in the country, was beset by charges that workers' compensation costs exceeded those in neighboring states and created a negative economic development climate.[146] At the same time, employers in the same industries paid widely divergent insurance rates for compensation coverage, based upon experience rating factors.[147] The Upjohn Report studied intrastate variations in insurance rates among employers, attempting to explain why some insured employers achieved such substantially better experience, and therefore substantially lower rates, in the workers' compensation

140. CDC Injury Report, *supra* note 9, at 338 (citing F.W. Lanclanese, *Training: Vital to Safety's Success*, 1984 REKINDLE 11, 13 (Oct. 1984)).

141. *Id.* (citing D.M. Oleske et al., *An Epidemiologic Evaluation of the Injury Experience of a Cohort of Automotive Parts Workers: A Model for Surveillance in Small Industries*, 10 J. OCCUP. ACCID. 239, 239-53 (1989)).

142. California Insurance Study, *supra* note 7, at 62-63.

143. Richard W. Palczynski, *Coping with the Crisis: Examining Workers' Compensation*, BEST'S REV., Nov. 1992, at 69, 94.

144. *See, e.g.*, Martha H. Miller, *A Corporate Safety and Health Program: The First Line of Defense*, in Welch, *supra* note 7, at 57-63; James C. Soule, *Commitment at Steelcase*, in Welch, *supra* note 7, at 65-71; Kevin M. Meade, *An Attitude Problem*, in Welch, *supra* note 7, at 73-80.

145. Upjohn Report, *supra* note 7. The report was submitted to the Bureau of Workers' Disability Compensation, Michigan Department of Labor. *Id.*

146. *Id.* at I-2.

147. *Id.* at I-4.

program.[148] The purpose of the study was to identify organizational variables associated with employers with high and low workers' compensation claims experience "in order to provide guidance to employer initiated actions that may favorably impact their workers' compensation experience."[149]

The study concluded that considerable variation exists in claims incidence among employers even within the same industry[150] and that a "significant portion of the variance among employers . . . is due to policy and behavioral differences *that are under company control*."[151] As in other studies, the largest companies (over 500 employees) tended to be in the low claims group.[152] High claims employers had significantly more employees with less than two years of seniority, were much less likely to provide training to their new employees, and had more turnover among their workers.[153] High claims employers were somewhat more likely to be unionized, although the report notes that forty percent of the low claims employers were also unionized.[154] Somewhat against conventional wisdom, a wide variety of factors were found not to be significant in predicting compensation experience. These included geographic location, type of insurance (including self insurance), age of the workforce, rurality, gender breakdown of the workforce, and use of part time workers or routine overtime.[155]

Most importantly, "low claims employers engage in

148. The study was designed as follows. Researchers identified employers in four industries (food production, fabricated metals, transportation equipment, and health services) which were in the top 15% and bottom 15% in terms of workers' compensation *claims* experience. *Id.* at II-2 to II-3. The identification of the study group did *not* rely upon the modification factors assigned for experience rating purposes but, rather, on the actual claims experience. The study included both self insured and insured employers. Only firms with 50 or more employees which had at least one closed case for the relevant period were studied. The researchers note that the employers with the very best claims experience may have been excluded from the study. High and low firms were drawn from homogeneous populations relative to accident exposures. *Id.* at II-3. Identified firms were asked to complete an extensive questionnaire; the self-reported responses to the questionnaire form the basis for the conclusions in the report. A total of 63 firms agreed to participate in the study and returned questionnaires. *Id.* at II-1 to II-9. The participating employers represented a cross-section of employers in the chosen industries. *See id.* at II-4.

149. *Id.* at I-4.

150. Insurance costs for the employers studies varied within the same industry by a factor of six. *Id.*

151. *See id.* at I-3 to I-4 (emphasis added).

152. *Id.* at III-2.

153. *Id.* at III-21, V-6 to V-7, V-9. Seventy-five percent of low claims employers provided safety training to new employees. *Id.* at III-21.

154. *Id.* at V-5 to V-6.

155. *Id.* at III-3 to III-6, V-5 to V-6, V-8.

systematically different patterns of behavior to prevent and manage work related disabling conditions."[156] In its introduction, the report noted that accident prevention is the key element in controlling occupational injuries.[157] With regard to safety programs, low claims employers showed significantly higher ratings of achievement on the safety and prevention subscale.[158] Low claims employers also demonstrated more aggressive approaches to disability management, including return-to-work programs.[159]

Equally telling were the findings with regard to corporate culture. Low claims employers consistently showed less suspicion of both injured workers and the compensation system.[160] They were more likely to treat their employees as "stakeholders";[161] they were less likely to feel that the rate of absenteeism in the enterprise was unfavorable, even though there was no significant difference in absence rates between the two groups of employers.[162] They achieved significantly higher scores in a variety of self assessment evaluations regarding organizational behavior, including safety and prevention activities, employee participation in problem solving, and information and communication transfer.[163]

The Upjohn study indicates that workers' compensation costs and claims experience are within the autonomous control of enterprises. The study does not attempt to explore why the corporate culture and safety practices of some employers differ so markedly from others. There is no indication in the report that the cost of workers' compensation was a primary motivator for low claims employers. It appears (although this

156. *Id.* at V-9.

157. *Id.* at I-9 (noting that "this requires the establishment of an effective safety program that has the capacity to identify hazardous conditions, ensure proper design of facilities and machinery, train employees, ensure safe work practices and motivate employee safe behavior").

158. Under this category, low claims employers reported

> increasing employee awareness through the use of incentives, recognition, rewards and peer influence for individual and departmental achievements in safety and lost time control. . . . Pre-employment screenings, including back exams and physicals for health and disability, as well as counseling and training for those experiencing accidents and injuries were also noted. Ergonomic work site modifications also appeared to be frequently employed or planned as strategies.

Id. at V-13. Several of these strategies may result in reductions in claims filing, and therefore cost reduction, without reducing injuries. *Id.* at V-14 to V-15.

159. *Id.* at V-11.

160. *Id.* at V-10 to V-11.

161. *Id.* at V-10.

162. *Id.* at III-8 to III-9.

163. *Id.* at V-9 to V-10.

is certainly not verifiable) that the differences in corporate culture spawned the differences in workers' compensation experiences, rather than the reverse.[164]

The Upjohn study also does not distinguish between managerial techniques which prevent the occurrence of injuries and those which might simply discourage the filing of claims;[165] it is not clear that the decrease in costs in low claims firms is necessarily associated with improved safety in all of these firms. Although low claims employers clearly demonstrated a higher score on safety and prevention activities,[166] the study also notes that "low claims employers also showed a very interesting differences [sic] in the number of injuries that turned into compensable claims. It appears that low claims employers are somehow able to prevent many accidents from becoming lost work day injuries."[167] In other words, low claims employers may have both prevented injuries *and* successfully encouraged workers not to file claims.[168]

Motivated by similar concerns which led to the Upjohn study and alarmed by the substantial increases in costs in the California workers' compensation system, the California

164. This impression is confirmed by Kevin Meade, a Michigan businessman, who writes,

> It is clear to us that by making our organization and our management at the plant level responsive to people's concerns about safety and health issues, we were able to effect a change in employee attitudes that was reflected in workers' compensation costs. Some of our attempts at change were certainly successful; grievances went down, lost-time accidents diminished, and workers' compensation costs decreased dramatically . . . . I think there is . . . an interrelation between employee attitudes and things that indicate employee attitudes and workers' compensation. I think they go hand in hand and I think you can control and influence workers' compensation costs in your facilities without concentrating specifically on workers' compensation. In fact, if you concentrate on workers' compensation, I think you are at the wrong end of the problem. Your company's safety record and your people's opinion of how you respond to and deal with safety problems in the plant are what are going to cause attitudes to improve, opinions to change, and accidents and costs to go down.

Meade, *supra* note 144, at 80.

165. *Cf.* Ison, *supra* note 20, at 726 (discussing practices that have been adopted to reduce recorded claims costs including discouraging workers from reporting claims).

166. Upjohn Report, *supra* note 7, at III-17.

167. *Id.* at V-14.

168. This is consistent with a study conducted by Boeing that indicated that employees who disliked their jobs and their supervisor were more likely to "injure" their backs—i.e., file claims for back injuries. *See* Pritula, *supra* note 74, at 80. Successful strategies to discourage claims may reflect an employer's greater willingness to accommodate workers who are injured. Lower claims filing experience may, on the other hand, be the result of implicit coercion which makes workers perceive that the filing of a claim will result in adverse employment consequences. Refer to part II.C *infra* for a full discussion of this issue.

legislature directed the State Department of Insurance to investigate workers' compensation claims in 1989.[169] Many of the anecdotal stories about fraudulent claims have emanated from California;[170] the system is expensive, while benefits are comparatively low.[171] The legislature directed the Department of Insurance to study the types and causes of injuries and illnesses which resulted in significant proportions of workers' compensation losses; to determine whether employer size or insurance experience rating contributed to significant differences in types of injuries; and to identify investments employers could make which would be most effective in reducing the injuries causing major proportions of the losses.[172] Finally, the Insurance Department was asked to recommend methods to encourage employers to make investments identified as most likely to reduce workers' compensation losses.[173]

The study, completed in February 1993, concluded:

- Employers can minimize the rate and severity of injuries by as much as forty percent.[174]
- Cost effective actions were often identified by employees.[175]
- The primary causes of large claims were commonplace

169. *See* CAL. INS. CODE § 11745 (Deering 1989) (repealed 1992) (directing the insurance commissioner of California to review workers' compensation claims and prevention strategies); California Insurance Study, supra note 7, at XV (stating that the Senate Bill was enacted because of concern with the rate of injuries and the cost of compensation).

170. *See, e.g.*, Peter Kerr, *Vast Amount of Fraud Discovered in Workers' Compensation System*, N.Y. TIMES, Dec. 29, 1991, at L1, L14 (reporting that in California as much as 20% or more of claims may involve cheating, and recounting stories about the encouragement of fraudulent claims by pitchmen working for doctors and lawyers).

171. GRANT THORNTON STUDY, *supra* note 110, at 152-53 (showing, out of 50 states, California with the 4th lowest statutory average cost per case and third highest premium cost for employers); *see also* Burton & Schmidle, *supra* note 28, at 10; John F. Burton, Jr. & Timothy P. Schmidle, *Comparing States' Benefits: Multiple Choices*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Nov.-Dec. 1991, at 6 (showing that in 1989 California ranked 47th of 50 jurisdictions in average benefits provided by statute for all types of cases).

172. California Insurance Study, *supra* note 7, at i.

173. *Id.* This study looked only at serious indemnity claims, which were determined to account in California for 20% of claims but 85% of incurred losses in any policy year. *See id.*

174. *See id.* at iii (noting individual employers committed to having a healthy workplace have reduced injury rates by up to 40%).

175. *See id.* at iii-iv (citing Ford Motor Company's use of ergonomics committees at each plant for nearly a decade as an example of soliciting employee input).

injuries and not new or unknown risks.[176]

- Not all effective primary prevention actions require spending large amounts of money.[177]
- Changes which improve health and safety also improve productivity.[178] In fact, changes in material handling were most often motivated by productivity, not safety, concerns.[179]
- The most significant causes of injuries were known hazards with proven prevention strategies.[180] For example, the high incidence of injuries among carpenters and roofers[181] was the result of familiar hazards of construction which "have changed little over time";[182] a study of burn injuries concluded that "lack of compliance with safety orders was a major cause of the injuries."[183] In the trucking industry, in which one in six drivers reported work-related injuries in 1989, two-thirds of the accidents resulted from overexertion, falls or slips, or motor vehicle accidents.[184]

The report concludes:

> Although requirements to improve working conditions are not acceptable if they unduly burden employers, the evidence suggests that employers can minimize the risk and severity of injury in a cost-effective manner. In fact, strategies to minimize the risk of injury have been found to increase productivity and profit.[185]

In sum, there appears to be no question that employers *can* decrease costs of compensation by efforts which are internal to

176. *See id.* at 6 tbl. 3. Strains, sprains, fractures, contusions, punctures, concussions and lacerations comprised two-thirds of the injuries (66.8%). Another 14% were for claims filed for cumulative trauma injuries. Psychiatric claims constituted 3.7% of claims. All other types of claims were 1% or less of the total. These data also confirm the continuing allegation that occupational diseases—particularly occupationally-caused hearing loss and respiratory disease—are rarely compensated. *Id.* at 11.

177. Some inexpensive investments, such as supplying personal fall arrest system to a five person crew of roofers or slip resistant soled shoes to employees, have a pay-back period of less than one year. Even more costly investments have rapid pay-back periods. For example, a conveyor belt to reduce carrying injuries had a two year payback. Job rotation, requiring almost no investment, can have significant impact on repetitive trauma disorders. *See id.* at iv.

178. *See id.* at iv-v. For example, a company with a high incidence of carpal tunnel syndrome (CTS) began a program of morning calisthenics, five-minute hourly breaks, and frequent job rotation. Their productivity increased from two-thirds to 95%, and their incidence of CTS " 'almost disappeared.' " *Id.* at iv.

179. *Id.* at 88.

180. *Id.* at 11.

181. One in six carpenters and one in five roofers were injured in 1989. *Id.* at 13.

182. *Id.*

183. *Id.* at 17.

184. *Id.* at 56-57, 65-66 tbl. 1.

185. *Id.* at v.

the enterprise. There is little evidence, however, to show that the costs themselves are the predominant reason that these managerial techniques are adopted; general corporate culture appears to be the primary determinant of compensation activity. Thus, at the July 1993 conference on the future of the U.S. workplace sponsored jointly by the Departments of Labor and Commerce, the characteristics of high performance workplaces were found to include commitment to total quality, ongoing training for workers, employee participation, work organization centered around self-managing, innovative compensation systems, emphasis on diversity, a safe and healthy workplace, and sensitivity to family issues.[186] Safety and health appears to be an integral component of successful corporate culture, not a byproduct of high workers' compensation costs.

III. Exploring the Paradox

The resulting question is inescapable: If it makes both economic and managerial sense, why would more employers not adopt the strategies observed among low claims employers in the studies in California and Michigan? The following sections explore four interrelated explanations for the failure of high workers' compensation costs to promote effective deterrence of workplace injuries.

Part A examines the history and consequences of the no-fault design of the workers' compensation system.[187] This no-fault design often results in the view that the root cause of compensation claims does not lie in employer behavior (or misbehavior).

Part B looks at the distribution of costs among employers and the impact of insurance pricing on deterrent effects in workers' compensation.[188] Not only has the general insurability of risks limited the deterrence value of the liability, but the particular pricing mechanisms and subsidies within the workers' compensation insurance market dilute any deterrent effect. Moreover, despite the apparent internalization of costs by employers, significant components of these costs are borne by workers, other social insurance programs, and the general populace.

186. *Conference Showcases Innovative Employers*, 143 Lab. Rel. Rep. (BNA), at 399-400 (July 26, 1993).

187. Refer to notes 192-261 *infra* and accompanying text.

188. Refer to notes 262-372 *infra* and accompanying text.

Part C explores the impact of the employment relationship and the law governing that relationship on the behavior of employers and employees within this social insurance structure.[189] The inherent inequality of the bilateral employment relationship engenders a prevalent view that behavior of employees is the primary cause of increased costs and should therefore be the primary focus of employer activity and program redesign. The problem is perceived to be either unsafe activity on the part of workers or the filing of unnecessary claims by workers. Increases in internalization of costs may result in unintended pressure on employers to decrease claims cost independent of injury rates instead of stimulating efforts at prevention. This behavior confounds the process of assessing both the extent of injuries and the appropriateness of costs.

Part D reviews the transactional costs which are generated as a result of the particular structure of workers' compensation.[190] Employer ignorance about the extent to which prevention may influence expenditures contributes to these transaction costs. The ability to blame legislators, doctors, and lawyers (in addition to workers) for the escalation in costs creates a barrier to employer self-scrutiny. Interstate variations reinforce the view that the problems lie in the legislative design of the program, not with conditions within workplaces. The end result is a "rush to the statehouse door"[191] instead of an internal safety audit.

A. *The Workers' Compensation Paradigm*

1. *The Rise of Workers' Compensation Programs.* Suffering and death from industrial work jolted the American social consciousness at the turn of the twentieth century. Spectacular industrial expansion in the latter half of the nineteenth century resulted in an explosion of work-induced disability.[192] Real

189. Refer to notes 273-460 *infra* and accompanying text.

190. Refer to notes 461-82 *infra* and accompanying text.

191. Telephone Interview with Anthony W. Skiff, Director, Division of Worker Education, Connecticut Workers' Compensation Commission and Chairman, Safety Committee, International Association of Industrial Accident Boards and Commissions (Feb. 15, 1993).

192. Peak industrial injury rates were reached during the first decade of the twentieth century. In the year ending June 30, 1907, 4534 railroad workers were killed; mine injuries resulted in the deaths of 2534 men in that same year. *See* SOMERS & SOMERS, *supra* note 34, at 7-9. An estimated 35,000 deaths and two million injuries occurred each year during this period; one quarter of the injuries produced disabilities lasting longer than one week. The railway injury rate doubled between 1889 and 1906. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 60 (1987).

catastrophes (including the deaths of 361 miners in a coal mining explosion in West Virginia[193] and of 164 women in New York City in the Triangle Shirtwaist Fire[194]) and muckraking fiction (such as Upton Sinclair's mesmerizing account of work in the meatpacking plants in Chicago[195]) combined to change the way people thought about injury at work.

One sign of the rising tide of concern came in the form of dramatic changes in the way courts and juries responded to injured workers' lawsuits against employers. Perhaps encouraged by public opinion which blamed capitalists and industrial enterprises for the extent of their misery, increasing numbers of employees brought tort actions against their employers, seeking damages for work-related injuries.[196] Injured employees undoubtedly were bucking the system: employers had been aggressively shielded from legal liability for workplace injuries by preindustrial notions of their duty of care; common-law defenses which evolved in the latter part of the nineteenth century appeared to offer an almost impregnable shield to successful lawsuits.[197] But workers brought suit; judges, perhaps acceding to growing public pressure, allowed the cases to be heard by juries;[198] and juries, reflecting the changing views of the times, began to bring in verdicts that, more and more frequently, were a resounding statement that industry

193. BRIT HUME, DEATH AND THE MINES 4 (1971).

194. *See* SOMERS & SOMERS, *supra* note 34, at 32. The fire occurred on March 25, 1911, the day after the New York court found the first mandatory workers' compensation law to be unconstitutional in Ives v. South Buffalo Ry. Co., 201 N.Y. 271 (1911), on grounds that the workers' compensation law was "plainly revolutionary" and amounted to an unconstitutional taking.

195. UPTON SINCLAIR, THE JUNGLE (1906).

196. *See* Friedman & Ladinsky, *supra* note 192, at 59-69 (noting that industrial injury litigation increased because of the larger number of injuries due to technological change and providing an historical account of the rise of popular hostility against financial institutions, the railroads, and corporations).

197. During the nineteenth century, workers injured at work were unlikely to prevail when they brought suit against their employers. Their difficulties were rooted in two problems. First, proving negligence hinged upon a showing that the employer had violated its very limited duty of care to its employees. Second, plaintiffs had to overcome judicially-developed defenses of assumption of risk, the fellow servant rule, and contributory negligence. Workers who knew of the risks inherent in the work before accepting employment, or whose injuries were in some part the result of their own or co-worker negligence, could not prevail. Professor Richard Epstein argues that the development of these defenses in fact represented an expansion of the duty of care owed by employers to employees (rather than a retraction). Richard A. Epstein, *The Historical Origins and the Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 776-79 (1982). In any event, the common-law defenses significantly impeded recovery by workers. *See* Friedman & Ladinsky, *supra* note 174, at 53.

198. *See* Edward Berkowitz & Monroe Berkowitz, *The Survival of Workers' Compensation*, 68 SOC. SERV. REV. 259, 260-61 (1984).

would be held culpable for the hardship of its workers. Plaintiffs won awards in growing numbers;[199] the number of cases, and of reported cases, increased substantially.[200]

Industrial carnage was almost universally viewed as an inevitable, albeit unfortunate, consequence of modern industrial enterprise. Commissions established to study the issue,[201] preambles to state laws,[202] and contemporaneous

199. *See id.* at 261 (stating that most injury cases turned on whether the worker was negligent, but most juries were very hesitant to find that the employee was at fault).

200. During this period, exceptions developed to the traditional defenses. For example, the duty to furnish a safe place to work, safe tools, and safe appliances developed as an exception to the fellow servant rule. *See* Friedman & Ladinsky, *supra* note 192, at 62. Employer liability laws, including the Federal Employer Liability Act of 1908, 35 Stat. 65 (codified as amended at 45 U.S.C. § 51 (1988)), provided statutory modification to the common- law defenses as well. *See* SOMERS & SOMERS, *supra* note 34, at 318. As a result, workers began to prevail in civil actions. For example, in Wisconsin, of 307 personal injury cases involving workers that were reviewed by the state supreme court in 1907, nearly two-thirds had been decided in favor of the worker in the lower courts (although some of these were reversed on appeal). *See* Friedman & Ladinsky, *supra* note 192, at 61. Between 1818 and 1873, the Illinois Supreme court ruled on only 25 cases involving master-servant law; by 1910, that number had grown, on average, to 13 cases per year. Berkowitz & Berkowitz, *supra* note 198, at 261-62. In a study of industrial conditions in Pittsburgh between 1908 and 1913, families of workers who died in industrial accidents received some compensation in 216 of 304 cases. *See id.* at 262. In another study, involving 604 fatalities before 1911 in three states, 32.5% received no compensation and 19.7% received over $500. *See* SOMERS & SOMERS, *supra* note 34, at 24. In fact, a study by Richard Posner showed an average award in cases in which the employee lost a limb or had an equivalent injury in 1905 of $10,138, at a time when the average earnings were about $500 per year. *See* WHITE, *supra* note 9, at 69 (citing Richard Posner, *Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972)). On the other hand, a New York study in 1910 showed that of 48 fatality cases in Manhattan which were studied, 18 families received no compensation, only four received over $2000, and most received less than $500. *See* Friedman & Ladinsky, *supra* note 192, at 66.

201. For example, the Report of the House of Representatives accompanying the bill providing for the appointment of a Congressional Commission on Employers' Liability and Workmen's Compensation noted: "One of the most pressing problems of interstate commerce that today demands the attention of congress is that of wisely and equitable [sic] adjusting the loss to workmen of life and earning power which is the certain and inevitable consequence of modern methods of transportation." REPORT OF THE WEST VIRGINIA EMPLOYERS' LIABILITY LABORERS COMPENSATION COMMISSION, PART I: LIABILITY AND COMPENSATION LAWS 255-56 (1911) [hereinafter WEST VIRGINIA REPORT].

202. The Washington statute, for example, stated: "Injuries in such works, formerly occasional, have become frequent and inevitable." *See* Arthur B. Honnold, *Theory of Workmen's Compensation*, 3 CORNELL L.Q. 264, 266 (1918). Similarly, the Maryland statute stated: "Whereas, the common law system governing the remedy of workmen against employers for injuries received in extra hazardous work is inconsistent with modern industrial conditions, and injuries in such work, formerly occasional, have now become frequent and inevitable." *Id.* at 267.

commentators[203] reiterated this theme. The courts presented the same motif:[204] irrespective of any efforts at safety regulation, the "price of our manufacturing greatness will still have to be paid in human blood and tears."[205] President Theodore

203. Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 241-42 (1914).

> Whence arose the movement for such revolutionary legislation? It is largely due to the introduction, in recent times, of new methods of industry. The use of modern agencies, especially steam and electricity, led to great changes in the modes of manufacturing and transportation. Workmen are now frequently employed in large masses, so that the personal supervision of the employer is no longer possible. The danger of serious harm to the workman in some modern undertakings was at first much greater than under the old forms of industry; and it was more difficult to prove fault on the part of the employer . . . . The accidents are not unfrequently [sic] due to the dangers inherent in the method of work; and the damaging results may be viewed as "inevitable" in the broad sense of the term.

Id.; *see also* Honnold, *supra* note 202, at 264 (noting the following:

> [A]ccidents and injuries to employes, particularly those engaged in hazardous employments, or working about dangerous machinery, were inevitable. In fact, it could approximately be determined in advance what would be the number of accidents in any particular employment. With each succeeding year, the number of these accidents increased. *Breakage of the human machine was just as certain to occur as breakage of the machinery used in carrying on industries.*)

(emphasis added).

204. *See* Mulhall v. Nashua Mfg. Co., 115 A. 449 (N.H. 1921).

> These statutes have been enacted in response to public sentiments and beliefs, widely prevalent, that the burdens, delays, inadequate relief and unequal operation of the common-law remedies as applied to industrial accidents rendered them unsuited to modern conditions. The evils of the common-law remedies, which were not noticeable in the days of small and scattered shops, few employees, and simple tools, became intolerable in the days of crowded factories, equipped with complicated and dangerous machinery. The changes incident to this industrial development had not only largely increased the opportunities for avoidable injury, *but had multiplied the dangers of inevitable accidents.*

Id. at 451. (emphasis added). As late as 1943, in a case arising under the 1939 amendments to the Federal Employers' Liability Act, the U.S. Supreme Court opined:

> Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry. The assumption of risk doctrine for example was attributed by this Court to "a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business," but would also encourage carelessness on the part of the employee.

Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 58-59 (1943) (citations omitted).

205. Borgnis v. Falk Co., 133 N.W. 209, 215 (Wis. 1911). This was the first case to hold a state workers' compensation statute constitutional. The full quote from *Borgnis* is instructive:

Roosevelt joined the call for reform, noting in 1907:

> [I]t is neither just, expedient, nor humane; it is revolting to judgment and sentiment alike that the financial burden of accidents occurring *because of the necessary exigencies of their daily occupation* should be thrust upon those sufferers who were least able to bear it.[206]

The primary concern was the destitution and poverty caused by the injuries and, ultimately, who should pay the resulting costs.

Some European countries, following Germany's lead, established social welfare programs to address the developing demands of displaced and disabled workers during the nineteenth century.[207] The United States, in contrast, did not develop any national social welfare agenda before the turn of the century. Nevertheless, public opinion galvanized around this issue. Industrialists were faced with a rising level of uncertainty and potential liability for injuries. Employers occasionally even offered "lifetime" contracts to injured

> It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employé against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop, with few employés, and the stagecoach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employé who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common-law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty.

Id. at 215.

206. Friedman & Ladinsky, *supra* note 192, at 68 n.69 (emphasis added).

207. Paul R. Gurtler, Note, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 HAMLINE J. PUB. LAW & POL. 285, 288-93 (1989).

employees in an attempt to avoid other liability.[208] Both the size and the unpredictability of jury awards in lawsuits brought by injured workers, and the apparent trend toward ever-expanding liability, made employers and their organizations uncomfortable with the status quo;[209] the leadership of the National Association of Manufacturers called insistently for a compensation system for injured workers.[210]

At the same time, workers and their families were facing injury, death, and economic destitution. Economic recovery through litigation was equally uncertain for them and often failed to provide adequate compensation for the loss of the primary breadwinner for the family.[211] The visible presence of large numbers of people who were displaced from work due to injuries—not due to lack of desire to work—called attention to the magnitude of the problem.

The perceived inevitability of significant harm and the uncertainty regarding the distribution of its attendant costs underlay the political consensus which emerged to support the workers' compensation bills which were introduced in state after state.[212] The political movement for a social insurance

208. *See, e.g.*, Rhoades v. Chesapeake & Ohio Ry. Co., 39 S.E. 209 (W. Va. 1901) (following the amputation of the plaintiff's leg as a result of an industrial injury, he threatened to sue the employer for negligence but released his claim in return for a promise of continued employment; this lawsuit was brought in response to his subsequent termination). This case was recently cited in Williamson v. Sharvest Mfg. Co., 415 S.E.2d 271, 275 n.4 (W. Va. 1992) as an example of sufficient consideration for a lifetime employment contract.

209. *See* Berkowitz & Berkowitz, *supra* note 198, at 262 (observing that "the laws can be seen as the means by which employers protected themselves against an impulsive and hostile legal system").

210. Representatives and officers of the National Association of Manufacturers (NAM) publicly called for the creation of a compensation system which would provide payment to injured workers on a no-fault insured basis. John Kirby, President of NAM at that time, called for creation of a system "that will eventually distribute the burden over the community and which will insure the employer immunity from liability other than the payment into a fund, properly controlled, of a predetermined per capita sum upon the workmen in his employ." WEST VIRGINIA REPORT, *supra* note 201, at 258. A committee of the National Association of Manufacturers polled 25,000 manufacturers to learn their attitude toward compensation; of those who replied, more than 95% were favorable. *See* DOMENICO GAGLIARDO, AMERICAN SOCIAL INSURANCE 395 (1949).

211. Although some verdicts were large, many cases settled for very limited amounts and large numbers of workers received nothing at all. Refer to note 197 *supra*.

212. *See* MONROE BERKOWITZ, WORKMEN'S COMPENSATION: THE NEW JERSEY EXPERIENCE 5 (1960). Berkowitz notes that workers' compensation legislation was designed to reduce the uncertainty surrounding recovery amounts and to provide a no-fault social insurance program, stating, "[s]uch a drastic change can be rationalized only in terms of social welfare principles. Industrial injuries are conceived of as the inevitable by-product of modern industry." *Id.*; *see also* Friedman & Ladinsky, *supra* note 192, at 65-70 (discussing the economic impact on industry from the unpredict-

system, ultimately supported by progressives, trade unions, and employer organizations,[213] focused on the need to provide certainty both to employers and workers. Workers' compensation was thus born out of an historic compromise in which workers relinquished their right to sue their employers in exchange for guaranteed (but limited) cash benefits from a no-fault system. Despite the lack of federal guidance in the development of social insurance models, most states passed legislation between 1910 and 1920 mandating employer-financed insurance to provide workers' compensation benefits, replacing common law negligence actions and employer liability statutes.[214]

All of these state statutes focused on the need to provide certainty for both workers and employers in a world in which injuries or death were an expected part of the industrial landscape. The compromise system which emerged provided this certainty. Workers' compensation was intended to be a self-contained system for dealing with the social, economic, and legal problems associated with workplace injuries.

2. *The No-Fault System as a Shield to Employer Responsibility.* The availability of workers' compensation benefits effectively discharged *any* further obligation that an employer had to an injured worker. Four legal doctrines combined to shield employers from any additional liability. First, the workers' compensation remedy was explicitly made exclusive.[215] The breadth of this exclusivity, and therefore the resulting employer immunity from common law actions brought

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able costs of industrial accidents and suggesting that the existing tort system eventually represented a net economic loss to the industrial establishment, prompting industry to play a positive role in shaping new workmen's compensation law).

213. *See* GAGLIARDO, *supra* note 210, at 395 (stating that the workers' compensation movement eventually gained the support of the American Association for Labor Legislation, the National Civic Federation, the National Association of Manufacturers, the American Bar Association and the American Federation of Labor).

214. *See* Friedman & Ladinsky, *supra* note 174, at 70.

215. Professor Larson argues that there are "two central purposes to exclusiveness: first, to maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability, and second, to minimize litigation, even litigation of undoubted merit." 2A LARSON, *supra* note 65, § 68.15, at 13-65. Employers not covered by workers' compensation would not, of course, be shielded from tort liability. *See, e.g.*, Jones v. Rinehart & Dennis Co., 168 S.E. 482 (W. Va. 1933) (holding that the failure of workers' compensation to provide benefits for acute silicosis meant that victims of the notorious Hawks Nest Tunnel disaster could bring civil actions). For a general discussion of the exclusivity doctrine, see 2A LARSON, *supra* note 65, § 65.

by injured employees, was (and continues to be) remarkable.[216] Whether the risk was inevitable or preventable at little cost, employers were shielded by the exclusivity provisions in these laws from any action for damages by employees or any on-going obligation to the workers after they were injured. *Immunity provided under the workers' compensation compromise allowed employers full rein to be negligent or even reckless in their approach to safety*; injuries were, after all, an

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216. The exclusivity doctrine has protected employers even in extreme cases involving reckless and wanton disregard for workers' lives. *See, e.g.*, Briggs v. Pymm Thermometer Corp., 537 N.Y.S.2d 553, 556 (N.Y. App. Div. 1989). This case was a suit by employees against the employer to recover for injuries caused by excessive exposure to mercury. *Id.* at 554. The employer had previously been convicted of assault. *Id.* at 556. Plaintiffs charged that the employer had concealed a clandestine mercury recovery operation from OSHA inspectors and exposed workers to deadly levels of mercury, resulting in significant injuries and that the employer knew of the danger and knew that workers, if they had understood the danger, would have refused to continue working. *Id.* He did not explicitly intend to cause the death, however. He was therefore protected by the exclusivity provisions of the New York compensation law. *Id.* For background on the *Pymm* case, see People v. Pymm, 563 N.E.2d 1, 2 (N.Y. 1990) (upholding state conviction of Pymm for assault in the first and second degree and rejecting employer's argument that remedies under OSHA are exclusive and preempt state's ability to act under state's criminal code), *cert. denied*, 498 U.S. 1085 (1991).

Workers' compensation exclusivity has even been extended by a few courts (albeit a minority) to immunize employers from lawsuits involving statutorily created employee rights, including state law claims of illegal discrimination on the basis of disability or handicap. *See, e.g.*, Karst v. F.C. Hayer Co., 447 N.W.2d 180, 186 (Minn. 1989) (following the reasoning of the *Schachtner* court that the Workers' Compensation Act barred the disability discrimination claim because the act provided a remedy for an employer's refusal to rehire); Norris v. Wisconsin, Dep't of Indus., Labor & Human Relations, 455 N.W.2d 665, 667 (Wis. Ct. App. 1990) (stating that the Workers' Compensation Act provides the exclusive remedy for an employer's refusal to rehire because a job-related injury creates a perceived disability); Schachtner v. Dep't of Indus., Labor & Human Relations, 422 N.W.2d 906, 909-10 (Wis. Ct. App. 1988) (reasoning workers' compensation is designed to provide the exclusive remedy for job-related injuries); *see also* Deborah A. Ballam, *The Workers' Compensation Exclusivity Doctrine: A Threat to Workers' Rights Under State Employment Discrimination Statutes*, 27 AM. BUS. L.J. 95, 102 (1989) (characterizing the exclusivity doctrine as the "sacred cow" of workers' compensation). After a brief period in which the exclusivity dam developed chinks, Professor Larson declared that the assault on employer immunity had failed. Arthur Larson, *Tensions of the Next Decade*, *in* NEW PERSPECTIVES IN WORKERS' COMPENSATION *supra* note 18, at 23 (concluding that "the doctrine of exclusiveness is in better health today than it was a few years ago"). Thus, the exclusivity doctrine remains part of the bedrock foundation of the workers' compensation political compromise, despite occasional court decisions which have appeared to weaken this doctrine. *See generally* David B. Harrison, Annotation, *What Conduct is Willful, Intentional, or Deliberate Within Workmen's Compensation Act Provision Authorizing Tort Action for Such Conduct*, 96 A.L.R.3D 1064 (1979) (summarizing the status of laws in various states); refer to note 247 *infra*.

inevitable component of the new technological age.[217] The compensation laws provided employers with two critical components of legal armor: they exempted enterprises from liability for the exercise of their continued complete managerial control over safety risks and guaranteed a predictable, and for many years quite low, level of cost.[218]

Second, benefits were paid to injured workers whether or not the employer was at fault.[219] While expanding the number of employees to whom benefits would be due, this no-fault principle also served to shield employers from any legal obligation to eliminate workplace hazards[220] and from any psychological sense of fault. The view that these compensated injuries were an inevitable consequence of industrialization combined with the no-fault nature of the system to absolve employers from blame.

Third, the new programs were specifically designed to allow employers to insure the risk of workplace injuries. The combination of the enormous, growing, and apparently inevitable numbers of injuries and the declining protection from liability for employers led to the development of a comprehensive system of liability insurance in order to manage the costs associated with workplace injuries; it was, in fact, in

217. This did not substantially change until federal regulation of occupational safety and health expanded significantly after 1970. More recently, several states have experimented with an expansion of criminal prosecution in cases involving gross employer disregard for worker safety. *See* People v. Chicago Magnet Wire Corp., 534 N.E.2d 962, 968 (Ill. 1989) (stating that conduct identical to that subject to federal regulation can also be regulated by state criminal law), *cert. denied*, 493 U.S. 809 (1989); *Pymm*, 563 N.E.2d at 6 (stating that workers' compensation does not preempt state criminal laws or federal occupation and health standards, in the workplace).

218. Refer to notes 30-33 *supra* and accompanying text.

219. "[I]t must be remembered once again that this is a no-fault system as to both employer and employee. 'Unjust' results, by conventional standards, are commonplace." 2A LARSON, *supra* note 65, § 68.15(e), at 13-108.

220. It has been a frequent criticism of no fault systems that the removal of fault based liability determinations avoids any possibility of effective deterrence. *See, e.g.*, Thomas A. Ford, *The Fault with "No Fault"*, 61 A.B.A. J. 1071, 1072 (1975) (stating that the no fault system undermines responsibility and does not compel businesses and industries to review their standards, methods, and practices); Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49, 49-50 (1982) (explaining that removing liability for damages to others permits malfeasors to shift some of the costs to potential victims, thereby limiting deterrence). Although the level of the actual payroll tax or premium paid by an employer does vary somewhat as a result of increased claims experience, this variation is often sufficiently attenuated and so obscured by ignorance that it tends to shield employers from a strong financial incentive to remove hazards. For a discussion of this issue, refer to part III.B *infra*.

this arena that liability insurance first became commonplace.[221] Insurance solved a critical element of the workers' compensation puzzle by spreading costs and protecting individual employers from excessive losses. It thereby made the cost of industrial injuries more predictable and allowed employers to pass these costs directly to consumers in the pricing of products;[222] thus emerged the frequently quoted slogan, "the cost of the product should bear the blood of the workman."[223]

The later development of liability insurance for most fault-based torts was often viewed unfavorably by many commentators.[224] To the extent that the tort system was expected to provide deterrence as well as compensation, insurance was initially viewed as allowing "antisocial conduct and a relaxation of vigilance toward the rights of others, by relieving the actual wrongdoer of liability."[225]

In the workers' compensation paradigm, however, liability insurance made perfect sense. Since employers were to bear the costs without having committed any legal wrong, the natural

221. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 82, at 585 (5th ed. 1984). Liability insurance "developed first as a means of protecting employers against the increased litigation and liability resulting from employers' liability and workmen's compensation acts. As the experience with this proved satisfactory, new demands were made for protection against other risks." *Id.* In fact, most employers were insured for liability for workers' injuries by private casualty companies before the passage of workers' compensation laws. REEDE, *supra* note 34, at 233.

222. One of the early advocates for workers' compensation in Massachusetts, William W. Kennard, Chairman of the Commonwealth of Massachusetts Industrial Accident Board, said in 1918 that "the Workmen's Compensation Act is not a regulation of any substantive duty; it is exclusively an economic readjustment of the burdens of industrial accident from the shoulders of the employees to the shoulders of the consuming public." Beckwith, *supra* note 7, at 72-73 n.63 (quoting a Letter to Governor Samuel McCall, published in REPORT OF THE SPECIAL RECESS COMMITTEE ON WORKMEN'S COMPENSATION, Massachusetts General Court, Boston, Feb. 1919, at 23).

223. KEETON ET AL., *supra* note 221, § 80, at 573 (quoting a campaign slogan attributed to Lloyd George). Prosser and Keeton note:

> The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer. In this he is aided and controlled by a system of compulsory liability insurance, which equalizes the burden over the entire industry. Through such insurance both the master and the servant are protected at the expense of the ultimate consumer.

Id. at 554-55.

224. *See id.* § 82, at 585 (stating that "[l]iability insurance was attacked as a form of maintenance, by which professional litigants were provided to replace the true defendants").

225. *Id.* As Prosser and Keeton note, this system led to observations by tortfeasors such as: "'Don't worry, I carry insurance.'" *Id.* at 586.

solution was to distribute the costs in a manner which would best incorporate those costs into the price of the products.[226] Thus, consumers were ultimately to pay for the costs of workplace injuries. Since the imposition of costs on employers was a product of social policy, not blame due to wrong-doing, the intent was that cost ultimately would be spread, not fully internalized. To the extent internalization of costs was achieved at all, it was dependent upon insurance pricing decisions which were made by insurance carriers, primarily to maintain price equity.[227]

Fourth, employers retained full managerial control over internal enterprise decisions. Workers' compensation legislation was not, and was not intended to be, a substantive legal intervention into the employment relationship.[228] At the time workers' compensation legislation was passed, employers owed no general duty to employees to provide safe work or to accommodate workers who were absent or disabled as a result of occupational injury. An employer's duty was thus clearly circumscribed: the obligation was to buy insurance to make provision for the workers who were rendered destitute by inevitable "accidents"[229] at work. From their inception, workers' compensation laws were designed to be a carefully circumscribed system to provide benefits, not safe jobs, to workers who were injured as a result of exposure to occupational hazards. Deborah Stone notes that the development of workers' compensation, "however fortunate for the injured worker in the short run, was also symbolically and politically a denial of responsibility of employers to prevent occupational injury."[230]

The compensation levels provided to cushion this destitution were intentionally minimal. Workers' compensation was a cash transfer program designed to help the obviously destitute. Victims of no-fault based harm were really seen as

226. *See id.* § 80, at 573 (stating that "human accident losses" were just part of the cost of doing business).

227. For a full discussion of the distribution of costs and pricing mechanisms within workers' compensation, refer to part II.B *infra*.

228. The nature of the general duty owed by the employer to the employee is discussed in part III.C *infra*.

229. The word "accidents" appears in quotation marks because injury epidemiologists believe that the environmental causes of adverse events can be identified and removed, much as immunizations can prevent childhood illnesses. Gordon S. Smith, *Injuries as a Preventable Disease: The Control of Occupational Injuries from the Medical and Public Health Perspective*, 30 ERGONOMICS 213, 213 (1987) (comparing passive protective devices, such as airbags, to immunizations). Injuries and fatalities therefore do not have the completely random character which "accident" implies. *Id.*

230. DEBORAH A. STONE, THE DISABLED STATE 191 (1984).

third party beneficiaries of a social aid contract, not as recipients of make-whole relief arising from a legal wrong. Moreover, modern notions of adequacy, which assume that wage replacement should approximate pre-injury income,[231] were not prevalent at the time these laws were passed. The laws provided really limited,[232] but theoretically certain,[233] compensation to workers for some but by no means all of their industrial risk. Workers either returned to work quickly or were "paid off" and displaced from employment.

3. *Workers' Compensation Laws and the Movement for Industrial Safety.* Despite the persistent rhetoric of inevitability which surrounded the development of workers' compensation remedies, there was nevertheless a contemporaneous growth of advocacy for industrial safety, which recognized that at least many deaths and injuries could, and should, be prevented;[234] this view unquestionably provided a counterweight to notions of inevitability of risk. Apparently enlightened industrialists combined with others to form the National Safety Council in 1912 and began to campaign for voluntary workplace-based changes.[235] This voluntary safety movement, assisted by technological developments which changed workplace processes, claimed responsibility for significant reductions in occupational injuries over the ensuing decades.[236]

231. *See, e.g.*, COMMISSION REPORT, *supra* note 32, at 56 (recommending that workers' weekly benefits be at least 80% of their spendable weekly pre-injury earnings).

232. Refer to note 32 *supra*.

233. Substantial questions about the efficiency and certainty of the system grew over time, however. *See* COMMISSION REPORT, *supra* note 32, at 99-110.

234. SOMERS & SOMERS, *supra* note 34, at 198-210. The authors cite 1907-1912 as the birthdate of the modern safety movement. Around this time, employers began to acknowledge that, although legally an injury may not have been their fault, they could have prevented it. *Id.*

235. *Id.* at 201-02. Of course, the rising concern about safety, and the growing threat of substantive workplace regulation, may have contributed to the eagerness with which industrialists sought to promote voluntary improvements.

236. One frequently cited example of this is the experience of U.S. Steel, which invested $5 million in equipment and worker education, saw its injury rate fall 40%, and reduced its injury-related costs by 35%. BERMAN, *supra* note 9, at 77; *see also* SOMERS & SOMERS, *supra* note 34, at 202 (describing the general success of the safety movement in its early years). Some commentators attribute the decline in fatalities to the development of the workers' compensation system during this period. *Cf.* Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 42 (1989) (citing one empirical study which draws this connection). The empirical evidence is limited, however, to the contemporaneous occurrence of reductions in fatalities and institution of workers' compensation. Therefore, the conclusion that workers' compensation was the cause of this decline may be fallacious.

Despite the early voluntary discussions of safety and removal of hazards in the workplace, attempts to require safety improvements through direct legal intervention into the employment relationship were consistently challenged by industry and thrown out by the courts. Not only were state laws which created the new workers' compensation systems initially struck down,[237] but laws which were designed to promote general safety in industrial workplaces were held to be unconstitutional.[238] Thus, the judiciary, which had consistently protected the employment-at-will doctrine after its development in the late nineteenth century, continued to support industrial attempts to protect managerial prerogative in the early twentieth century. In limited decisions, the courts endorsed the exercise of traditional state police powers in the arena of public safety,[239] for regulation of extremely hazardous work,[240] and for oversight of working conditions of

237. *See, e.g.*, Ives v. South Buffalo Ry. Co., 94 N.E. 431, 448 (N.Y. 1911) (holding the New York law on workers' compensation unconstitutional); Cunningham v. Northwestern Improvement Co., 44 Mont. 180 (1911) (invalidating the 1909 miners' compensation act); Franklin v. United Rys. & Elec. Co., 2 Baltimore City Rep. 309 (1904). After the decision in *Ives*, seven states amended their constitutions to specifically authorize compensation legislation. SOMERS & SOMERS, *supra* note 31, at 32. Nine states circumvented the *Ives* decision by adopting non-compulsory laws which permitted employers to elect coverage or forfeit common-law defenses. *Id.* Compulsory laws did, however, receive judicial endorsement in 1917 from the U.S. Supreme Court. *See* New York Central R.R. v. White, 243 U.S. 188 (1917) (upholding New York's new compulsory law and noting: "In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself."); Hawkins v. Bleakley, 243 U.S. 210, 212-13 (1917) (upholding Iowa's elective law); Mountain Timber Co. v. Washington, 243 U.S. 219, 239 (1917) (upholding Washington's exclusive state insurance fund).

238. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 61 (1905) (holding a maximum hour law for bakers, designed to promote safety in bakeries, unconstitutional "as an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best").

239. The initial narrowly drawn occupational safety legislation does not appear to have been challenged in the courts with the same vigor as the wage and hour laws. *See* SOMERS & SOMERS, *supra* note 34, at 200 (stating that constitutionality of narrow safety laws was not seriously challenged, unlike other labor legislation). These specific laws were "detailed, inflexible, and rapidly obsolete." *Id.* Industry feared that more general statutes would give too much discretion to individual factory inspectors; they therefore successfully opposed them. *Id.* When challenged, the narrowly drawn laws appear to have frequently been upheld by the courts. *See* Adkins v. Children's Hosp., 261 U.S. 525, 569 (1923) (Holmes, J., dissenting) (listing a series of cases in which the Supreme Court had upheld limited intervention in private contractual relations). The specific safety legislation of the nineteenth century was, in fact, largely "cosmetic." ROTHSTEIN, *supra* note 10, at 2.

240. *See, e.g.*, Holden v. Hardy, 169 U.S. 366, 398 (1898) (refusing to invalidate law governing hours of work in mines, smelters, and refineries on public safety grounds).

people who were viewed as in particular need of protection (primarily women and children).[241] These were exceptions, however, to the general rule which resisted any serious legal intrusion into the at-will employment relationship. Until the New Deal, the courts considered substantive legal regulation of the employment to be a presumptively invalid intrusion into a private contractual relationship. It was not until the Supreme Court, confronted with massive misery and economic turmoil, upheld New Deal legislation that such intervention became constitutionally acceptable.[242] This did not, of course, put an end to employer challenges to workplace safety regulation.[243]

Although direct regulation was met with resistance from employers, the safety movement did imbue the early compensation movement with the rhetoric of safety. A majority of the investigating commissions established by states as a prelude to the drafting of workers' compensation statutes concluded that a primary result of the laws would be a reduction in injury frequency and severity.[244] Nearly every monograph and treatise that has been written on workers' compensation has included what appears to be an obligatory chapter or section dedicated to prevention.[245] The substantive provisions of most of the workers' compensation statutes, however, made little or no explicit provision for safety incentives or for employer

241. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 416 (1908) (upholding a statute that was designed to protect the health, safety, and welfare of female employees). *But cf. Adkins*, 261 U.S. at 554 (rejecting a minimum wage law for women and children enacted by Congress to regulate employment in the District of Columbia; the Court noted that the law, in protecting women, was protecting those "who are legally as capable of contracting for themselves as men").

242. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding the constitutionality of the National Labor Relations Act); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding the constitutionality of Washington statute setting minimum wage for women). This has been described, quite appropriately, as "a watershed constitutional event." Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1787 (1993).

243. *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 630-52 (1980) (invalidating the benzene standard in a case brought by the petroleum industry); American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 541 (1981) (rejecting a challenge, in which industry argued that the cotton dust standard should be replaced with less stringent environmental standards and mandated use of respirators); Marshall v. Barlow's Inc., 436 U.S. 307, 311-25 (1978) (restricting OSHA's right to perform non-consensual searches or inspections in the absence of a search warrant). *See generally* ROTHSTEIN, *supra* note 10 (discussing cases in which employers challenged workplace safety regulation).

244. REEDE, *supra* note 34, at 321.

245. *See, e.g.*, *id.* at 321-76 (discussing the safety movement and its prevention of injuries); SOMERS & SOMERS, *supra* note 34, at 197-235 (discussing prevention of injuries).

penalties for perpetuation of unnecessarily hazardous work.[246]

The compensation laws which did provide some increased liability for employer misconduct were of two types. Some states simply exempted intentional torts from the exclusivity provisions of the law. In general, these provisions were strictly construed; their application was limited to situations in which the worker could prove that the employer intended, not simply the existence of the hazardous conditions, but the occurrence of the injury itself.[247] Other states, instead of removing

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246. Several states did, however, give the agency established to administer the workers' compensation system the additional responsibility of developing safety rules and regulations. REEDE, *supra* note 34, at 322-23. Yet even when this occurred, this authority carried little real weight.

247. Workers' compensation statutes explicitly provide for a common-law right to sue for intentional injury committed by employers in Kentucky, Oregon, Washington, and West Virginia; for wilful misconduct in Arizona; and for a wilful act or gross negligence resulting in death in Texas. 2A LARSON, *supra* note 65, § 69.10, at 13-334 to 13-335. In addition, a few states have judicially developed limited exceptions to exclusivity based upon findings that an injury was the result of intentional conduct, rather than an "accident" and, therefore, did not fall within the exclusive ambit of workers' compensation. *See, e.g.*, Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 576 (Ohio) (finding that injuries received as the result of intentional acts do not arise in the course of employment, and therefore exclusivity does not apply), *cert. denied*, 459 U.S. 857 (1982).

Nevertheless, the exclusivity doctrine has remained strong. Refer to note 216 *supra*. Until recently, even those states which allowed common-law actions for intentional injuries limited the applicability of this exception to situations in which the worker could prove that the employer intended the specific injury to be the outcome; these suits were therefore generally limited to physical assaults by employers on employees. 2A LARSON, *supra* note 65, § 69.22, at 13-343 to 13-349. Thus, workers could not pierce an employer's common-law immunity in situations involving aggravated negligence, breach of safety regulations, or failure to correct a hazard after several injuries had occurred. *Id.* The commitment to safety, which appeared to have been embodied in the original legislative provisions allowing for common-law suits in limited circumstances, was not evident in the subsequent interpretations of these provisions. *See id.*

More recently, however, some state courts have carved out exceptions to the exclusivity rule in order to allow workers to sue their employers in extreme situations in which there appears to be disregard for fundamental safety principles. *Id.* at 13-353 to 13-362. These cases have relied on one of two theories. First, the statutory provision allowing workers to sue for intentional injuries is interpreted to allow common-law actions in situations involving conduct that meets a higher standard than mere negligence but which is less restrictive than the earlier interpretation of intentional harm. *See, e.g.*, Beauchamp v. Dow Chem. Co., 398 N.W.2d 882, 893 (Mich. 1986) (holding that the exclusivity provision does not apply if the employer knew that the injury was substantially certain to occur and intended the act which caused the injury); Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1055 (Ohio 1984) (holding that an act committed with the knowledge that an injury was substantially certain to occur results in liability); Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978) (holding that reckless and wanton misconduct results in liability).

Second, injured workers have prevailed when their injuries were aggravated by the employer's fraudulent failure to disclose known safety risks. *See, e.g.*, Johns-Manville Prod. Corp. v. Contra Costa Superior Ct., 612 P.2d 948, 956 (Cal. 1980) (holding that the employer was liable for fraudulently concealing hazardous conditions from the employee and the employee's doctor); Millison v. E.I. duPont de Nemours & Co., 501 A.2d 505, 516-17 (N.J. 1985) (holding actionable allegations that defendants fraudulently concealed knowledge of already contracted diseases); Martin v. Lancaster Battery Co., 606 A.2d 444, 447-48 (Pa. 1992) (holding that the employer's fraudulent misrepresentation resulting in a delay which aggravated a work related injury did not fall within the exclusivity provision); *see also* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 679 (1992) (discussing some of the implications of these cases). *See generally* Harrison, Annotation, *supra* note 216 (providing a comprehensive review of intentional tort cases involving occupational injuries).

For a brief period, as a result of these state explorations with loopholes to the exclusivity bar, it appeared that the exclusivity doctrine was being eroded by the expansion of the intentional injury exceptions. This trend in judicial decisions seemed to be largely motivated by concerns that wanton disregard of workplace safety should not be protected by the mantle of immunity bestowed by workers' compensation.

In the first three states in which the courts reinterpreted the statutes, the state legislatures moved rather quickly to close this potential hole in employer immunity. In Ohio, the expansion of the common-law remedy was limited to situations in which the employer acts with deliberate intent to cause an injury, and damages were capped at $1,000,000. OHIO REV. CODE ANN. § 4121.80 (Anderson 1991). This legislative response was held to be unconstitutional under state law. Brady v. Safety-Kleen Corp., 576 N.E.2d 722, 730 (Ohio 1991). The current law in Ohio retains a common-law remedy for workers who can show that their injuries were substantially certain to occur. *See, e.g.*, *Jones*, 472 N.E.2d at 1052.

In West Virginia, the legislature adopted a statutory definition of intentional injuries which allowed employees to pursue common-law remedies when they could prove that the employer maintained excessively dangerous conditions that the employer knew to be dangerous and which violated safety and health standards or standard business practice. W. VA. CODE § 23-4-2(c)(2) (Supp. 1993). Although it was the stated purpose of the legislature to reinforce the exclusive nature of the workers' compensation remedy, this statute appears to have codified the West Virginia court's adoption of a reckless and wanton standard for intentional injuries which the court had articulated in *Mandolidis*. 246 S.E.2d at 914. At the same time, the statute limited the availability of punitive damages to actions involving the older, more restrictive, intentional torts in which the employer intended the specific injury to result. *See* W. VA. CODE §§ 23-4-2(b), 23-4-2(c)(2)(iii)(A) (Supp. 1993). Subsequent judicial opinions interpreting this statute have permitted injured workers to prevail when employers have allowed known dangerous conditions to persist, resulting in a worker's injury. *See, e.g.*, Mayles v. Shoney's, Inc., 405 S.E.2d 15, 27-28 (W. Va. 1990) (holding that the employer acted with deliberate intention in causing the employee's injuries and was subject to liability).

In Michigan, after the decision in *Beauchamp*, 398 N.W.2d at 882, the legislature adopted language restricting common-law actions to situations in which the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. MICH. COMP. LAWS § 418.131(1) (Supp. 1993). The challenges to this statute have been unsuccessful. *See* Smith v. Mirror Lite Co., 492 N.W.2d 744, 745-47 (Mich. Ct. App. 1992) (applying the Michigan statute); Pawlak v. Redox Corp., 453 N.W.2d 304, 308 (Mich. Ct. App. 1990) (analyzing the action under the exception to exclusivity in the Michigan statute but holding that the employee could not recover because he had failed to prove intent).

The current status of these judicial re-interpretations of intentional injury is as follows. When the employer knows that hazardous conditions existed and were substantially certain to result in workplace injuries, at least four states (Louisiana, North Carolina, Ohio, and South Dakota) allow injured workers to circumvent the exclusivity provision of the state statute. *See* Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981) (stating that the exclusive remedy rule is inapplicable to situations in

intentional torts entirely from the exclusivity bar, provided for increased benefits as a penalty for employer misconduct. These penalties were imposed in such circumstances as when an employer employed a minor below legal working age[248] or, in a few states, when the employer was guilty of reckless and wanton or intentional misconduct, particularly if this conduct violated accepted safety practices or rules.[249] The penalties

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which the employers believe the results of their actions to be substantially certain to occur); Woodson v. Rowland, 407 S.E.2d 222, 228 (N.C. 1991) (stating that when an employer engages in misconduct knowing it is substantially certain to cause injury, the employer is liable to the injured employee); Fyffe v. Jeno's, Inc., 570 N.E.2d 1108, 1111-12 (Ohio 1991) (explaining that an employee can recover if the employer knew with substantial certainty that harm would result); VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983) (stating that if the known danger poses a foreseeable risk and a substantial certainty of injury, then the employee can recover from the employer). Although some other states have softened the definition of intentional torts to some degree, only West Virginia appears to have maintained a standard which is somewhat, although not substantially, more lenient. *See Mayles*, 405 S.E.2d at 24 (allowing employees to recover from employers when they could prove the employer maintained excessively dangerous conditions, which the employer knew to be dangerous and which violated safety and health standards or standard business practice).

There does not appear to be any continuing threat to the exclusivity doctrine; plaintiffs' attempts to expand employer immunity in a substantial way have apparently failed. Nevertheless, some commentators continue to argue in favor of expanding tort liability in order to promote safety incentives. *See generally* Kenneth Matheny, *Achieving Safer Workplaces by Expanding Employers' Tort Liability Under Workers' Compensation Laws*, 19 N. KY. L. REV. 457 (1992) (arguing that exclusivity provisions often result in injustice).

Interestingly, there is no evidence that expanded employer liability in the above states has resulted in a relative decrease in occupational morbidity and mortality rates. No epidemiologic or statistical study has been done of injury and fatality rates in these states to investigate whether the expansion of liability can be associated with any reduction in injuries or illnesses. A review of the available data on fatality rates from the National Institute for Occupational Safety and Health National Traumatic Occupational Fatality study does not appear to indicate that, in the aggregate, fatality rates declined at a relatively greater rate subsequent to the change in the law in any of these states. Of course, this type of relatively cursory review of aggregate data lacks statistical validity; further study deserves to be done.

It is also important to note that the excess risk associated with this expanded liability is generally insurable. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND COMMERCIAL PRACTICES § 5.3(g), at 494-96 (1988). Although some states impose limitations on the availability of insurance for punitive damages, compensatory damages, even those associated with employer misconduct, are always insurable.

248. 1B LARSON, *supra* note 65, § 47.52(a), at 8-396 to 8-398.

249. Arkansas, Connecticut, California, Illinois, Kentucky, Massachusetts, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Utah, and Wisconsin are states where a penalty is imposed for certain employer misconduct, such as reckless or intentional acts. 2A LARSON, *supra* note 65, § 69.10, at 13-335 to 13-340. These penalties were generally an alternative to allowing common-law suits for intentional or reckless misconduct by employers. Intentional misconduct under these penalty provisions was equivalent to the intent required to evade exclusivity entirely in the

directed specifically at safety practices appear to have been utilized infrequently.[250] In any event, the penalties themselves were (and are) small enough to have no impact on the direct cost to most insured employers.[251]

4. The Workers' Compensation Paradigm Today. Workers' compensation laws today retain the same fundamental structure as they had when first enacted. Eligibility criteria and adequacy of benefits have expanded without changing the basic no-fault paradigm. Historically, attempts to alter this paradigm by providing return-to-work and rehabilitation programs for injured workers[252] or expanding employer

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states allowing limited common-law actions. *Id.* Intent was generally very narrowly construed, so that penalties were rarely assessed. *See, e.g.*, Gibbs Automatic Moulding Co. v. Bullock, 438 S.W.2d 793, 794 (Ky. 1969) (denying additional compensation for employer's intentional breach of safety regulation because there was no showing that the employer had actual knowledge of the regulation). If any pattern at all can be discerned, it appears that the lesser the penalty, the lower the standard applied to intent. 2A LARSON, *supra* note 65, § 69.22, at 13-343 to 13-349. Although violation of a safety standard appears to be adequate to create a foundation for a charge of wilful misconduct, it is not necessarily adequate for an intentional injury. *Id.* §§ 69.22-.24, at 13-343 to 13-370. Violation of federal or state OSHA regulations is not, in all states, grounds for penalty. *Id.* § 69.24(b), at 13-361 to 13-362.

250. Given the magnitude of the number of reported cases arising under state workers' compensation laws, the number which address the question of increased penalties is remarkably few. *See* 2A LARSON, *supra* note 65, § 69.22, 13-343 to 13-349. This can be viewed in one of three ways: that few injuries are the result of misconduct by employers; that misconduct is very narrowly defined; or that employees are unlikely to press claims for penalty compensation.

251. The penalties were generally established as a percentage of the workers' compensation award. *See id.* § 69.10, at 13-340 (ranging from a 100% increase in Massachusetts to much less in other states). Because of the rate-making methodologies used to determine premiums, this amount is unlikely to have a substantial impact on most employers' costs. Refer to part II.B *infra*.

252. A brief attempt during the 1950s to reform workers' compensation in order to provide effective rehabilitation opportunities for injured workers was abandoned. Berkowitz & Berkowitz, *supra* note 198, at 170-71. Regarding this failure, commentators concluded that workers' compensation programs were unable to assist injured employees in returning to work; they noted in particular that workers' compensation systems were simply not designed to reach into and alter the relationship between employers and injured workers. *Id.*

Interestingly, the failure of workers' compensation programs to develop effective rehabilitation efforts in the past is now the subject of considerable criticism. *See, e.g.*, Peter S. Barth, *The Twentieth Anniversary of the National Commission on State Workmen's Compensation Laws: A Symposium: Observations of Peter S. Barth*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Nov.-Dec. 1992, at 10-11. Peter Barth, who was Executive Director of the National Commission on State Workmen's Compensation Laws, wrote the following on the twentieth anniversary of the Commission's Report:

> I want to turn to what I now believe was the core problem with the report. In my view, we lost sight of the absolutely central purpose of the compensation, i.e., to restore the injured worker to his or her pre-injury status as

liability[253] did not meet with any significant or continuing success.

Workers' compensation is a social insurance program which differs in important ways from traditional liability systems.[254]

> promptly as possible, including a return-to-work. . . . Since 1972, state laws have been judged by many in terms of the number of essential recommendations that they comply with, yet reemployment is not one of these essential recommendations. Progressive states are so described because they have a high maximum weekly benefit level, not because of their return-to-work policies. . . . [W]hen an injured worker takes a lump-sum payment in settlement of a claim, everyone (the attorneys, the insurer, the employer, and the state's workers' compensation agency) views their responsibility as having ended. Ask them, as I have. . . . By focusing on benefit adequacy, those of us involved with the commission's report probably allowed everyone to think that the job of workers' compensation is simply one of paying benefits . . . . How did the National Commission let this omission occur? To understand that, one needs to recognize how awful state workers' compensation laws were in 1972 . . . . In 1972, the problems were obvious, the benefits inadequacies were all too simple to recognize and impossible to defend, and in the minds of many, all could be remedied with a little bit of political will. . . . What we do need are imaginative ways to provide incentives to the principal parties, that is, the worker, the employer, and the insurer, to restore the person as a worker. Perhaps that will be the legacy of the next national commission.

Id. Barth may have been ignoring the true roots of workers' compensation in this statement, but he certainly echoed the rising concern about displacement of injured workers. *See* Emily A. Spieler, *Injured Workers, Workers' Compensation, and Work: New Perspectives on the Workers' Compensation Debate in West Virginia*, 95 W. VA. L. REV. 333, 340-41, 354, 375 (1992-93).

253. As noted previously, attempts through litigation to break down the exclusivity of workers' compensation and expand employer common-law liability enjoyed some initial success in the 1970s and 1980s; there has been no further erosion of the exclusivity principle in recent years, however. Refer to note 247 *supra*.

254. Social insurance programs are built on the assumption that benefits have been paid for and become vested; this is true even when the programs are, like Social Security, funded on a "pay as you go" basis. They are intended to reduce (or prevent) poverty in "*nonstigmatizing* ways." Jeffrey S. Lehman, *To Conceptualize, To Criticize, To Defend, To Improve: Understanding America's Welfare State*, 101 YALE L.J. 685, 692 (1991). Social insurance programs guarantee future benefits to beneficiaries when specific non-need-based eligibility requirements are met. Participation in these programs is based on prior participation in the workforce or on direct financial contribution to the program. THEODORE MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 99 (1990). Eligibility for benefits can be based on such factors as age or disability, as in the case of social security, or disabilities suffered as a result of injuries or illnesses arising out of employment, as in the case of workers' compensation. Workers undoubtedly pay for their workers' compensation benefits, both by working, often receiving lower wages than would have been available in the absence of compensation costs, as well as through their statutory waiver of other remedies against the employer.

Perhaps as a result of the no-fault nature of the workers' compensation system, workers' compensation has taken on some of the political trappings of social welfare programs. In contrast to compensation associated with social insurance (which is deemed to be vested) or that which is associated with legal wrong (which is viewed as making the victim whole), social welfare programs mandate redistribution based upon need. There is strong antipathy for need-based programs in Ameri-

Eligibility for compensation is based upon the occurrence of an event—an injury or illness—but not upon the perpetration of a wrong. As a "no-fault" system, the victims, injured workers, are not presumptively the victims of wrongful harm; instead, they are simply the victims of workplace mishap.

In contrast, when redistribution is based upon the occurrence of harm, it is primarily derived from traditional tort liability schemes which link the availability of compensation to notions of wrong: the victim of the harm receives compensation; the perpetrator of the wrongful harm is charged with the cost of compensation. This appears "just," in the distributive sense, because the victim is compensated and the wrongdoer, rather than innocent bystanders or victims, is forced to pay the costs of the injury. Moreover, it appears "just" in the normative sense because the internalization of costs is often viewed as providing an important incentive to deter repetition of the wrong.

Like tort liability systems, workers' compensation provides payment to victims because of the occurrence of harm. As in tort systems, it is hoped that the payment of the costs by the employer will ultimately result in the minimization of both total costs and human suffering by providing the necessary incentive to prevent injuries.[255] The presumption is that

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can society, apparently rooted both in bias against recipients and in resistance to redistribution financed by broad-based contributions from those who work. The result is that recipients of these programs must almost always prove worthiness by showing membership in a sub-class of needy people who meet other eligibility criteria. The common standards for this redistribution focus on poverty coupled with an inability of the recipient to work. Therefore, these programs provide redistribution for those with disabilities (e.g., the Supplemental Security Income Program, in which beneficiaries must meet dual eligibility of disability and need, The Social Security Act, 42 U.S.C. § 1381 (1988)), or for those engaged full time in the sustenance of young children (e.g., Aid to Families with Dependent Children (AFDC), 42 U.S.C. § 601 (1988)). As in social welfare programs, recipients of workers' compensation benefits have not provided any visible cash payment to create their interest in the program. Many employers and others tend to view with suspicion recipients of disability-based benefits if these recipients do not have the appearance of being adequately "needy." Perhaps as a result, injured workers, like social welfare beneficiaries, are often stigmatized if they apply for benefits. Workers' compensation is also beset by the political backlash against the payment of benefits which characterizes policy debates over payment of social welfare benefits.

255. The efficacy of tort law as a deterrent has, of course, been explored at great length elsewhere and has been seriously questioned, as both expanded liability (particularly strict liability) and insurance availability have changed the tort landscape. *See, e.g.*, TERENCE G. ISON, THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY AS A SYSTEM OF PERSONAL INJURY COMPENSATION 81-89 (1967). One commentator has identified at least eleven factors which contribute to the failure of tort-based deterrence: ignorance (of both law and facts); individual and organizational incompetence; discounting of the threat; high stakes in behaving dangerously; small penalties; poverty of the wrongdoer (making them unable to pay damages); inadequacy of tort damage awards; market imperfections; and the availability of liability insurance.

employers will invest in safety to the extent that the marginal costs of prevention are less than the marginal gain—and that relationship is understood. As costs rise, prevention should become more financially attractive; that is, the balance should be achieved through more effective prevention.[256]

But the no-fault, insured nature of workers' compensation impedes this process. Employees are entitled to limited compensation because of their status as workers injured at work, not because of their status as victims of fault-based harm at work. The amount of the compensation is limited; this limitation is, in part, justified on the basis that high levels of compensation create incentives for workers to stop working.[257] Limitations on benefits are also, however, a reflection of the assumption that full compensation is based upon application of notions of fault, which are presumptively irrelevant to workers' compensation liability.

Employers are charged with the cost, but not because they are defined as the perpetrators of wrongful harm; there is, by definition, no wrongful harm in a no-fault system. The no-fault nature of the system masks, or perhaps obliterates, the commitment to individual corrective justice which imbues

Sugarman, *supra* note 19, at 565-73.

Similarly, Professor Guido Calabresi has argued that the tort system failed as a mechanism for internalizing costs for three reasons: imperfect insurance pricing, imperfect information, and a system of transfers which results in charging others for the costs of any injury. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 244-49 (1970). All of these are painfully present in the workers' compensation system and are addressed in this Article. For a summary of Calabresi's thinking on this issue, see Keith N. Hylton & Steven E. Laymon, *The Internalization Paradox and Workers' Compensation*, 21 HOFSTRA L. REV. 109, 126-29 (1992) (explaining Calabresi's theory of externalities, but rejecting his concerns regarding the impact of insurance because of trust in the market incentives in insurance arrangements). As the discussion of workers' compensation pricing in part II.B illustrates, it is not clear that trust in market incentives is merited.

256. When commentators argued for increased compensation for victims of occupational hazards prior to the 1972 Commission Report, *supra* note 32, they assumed that increased compensation would result in increased deterrence. As Arthur H. Reede wrote, "[a]dequate compensation makes safety more imperative. Increased safety makes adequate compensation possible." REEDE, *supra* note 34, at 371. This Article had its genesis in the fact that, at least up until now, this reciprocity has apparently failed to develop.

257. The National Commission, while noting the inadequacy of benefits in 1972, also warned that "[a]s the proportion of wages replaced is increased, the worker is assumed to have less incentive to return to work." COMMISSION REPORT, *supra* note 32, at 56. This is the issue of moral hazard: that, as benefits rise, workers will take fewer precautions, and thus file more claims. Refer to notes 15 & 18 *supra*. The behavior of workers is discussed at greater length in part III.C. Obviously, this tension plays out in the political arena, with those more concerned about the adequacy of benefits for injured workers on one side, and those who are more concerned about work disincentives on the other side.

discussions of tort liability. The no-fault legal paradigm tends to legitimize some employers' views that the fault lies elsewhere.[258]

258. In the workers' compensation literature it is sometimes forgotten that moral hazard can occur either *ex ante* or *ex post* the occurrence of the loss. Priest, *supra* note 12, at 1547; refer to note 15 *supra* (defining moral hazard). "*Ex ante* moral hazard is the reduction in precautions taken by the insured to prevent the loss. . . . *Ex post* moral hazard is the increase in claims against the insurance policy beyond the services the claimant would purchase if not insured." Priest, *supra* note 12, at 1547. The workers' compensation social science literature focuses to a significant degree on the moral hazard created for workers in the compensation system because of the economic security which is presumed to increase either workers' carelessness or filing of claims. Refer to note 18 *supra*.

Investigation of employer behavior has generally focused on assessing the effectiveness of merit-rating insurance pricing schemes in inducing greater preventive efforts by employers. *See, e.g.*, JAMES R. CHELIUS & ROBERT S. SMITH, *Experience-Rating and Injury Prevention*, *in* SAFETY AND THE WORKFORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION, *supra* note 18, at 128, 130; Chelius, *Influence of Workers' Compensation*, *supra* note 18, at 235, 237; Chelius, *Incentive to Prevent Injuries*, *supra* note 18, at 154, 155; Ehrenberg, *supra* note 18, at 18-20; Alan B. Krueger, *Incentive Effects of Workers' Compensation Insurance*, 41 J. PUB. ECON. 73, 74 (1990); *see also* John W. Ruser, *Workers' Compensation and Occupational Injuries and Illnesses*, 9 J. LAB. ECON. 325, 326 (1990) (discussing the effects of experience rating pricing on the business' safety investments). All of these studies conclude that experience rating fails to significantly increase employers' preventive efforts. *See, e.g.*, CHELIUS & SMITH, *supra*, at 137 (stating that the effects of experience rating on employers' safety expenditures were negligible); Ehrenberg, *supra* note 18, at 19 (supporting the conclusions of Chelius and Smith). *But see* MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY 134-35 (1990) (concluding that in the context of fatal injuries workers' compensation plays a "constructive role . . . . [W]orkplace fatalities could double in the absence of this program. Worker's compensation thus represents by far the most influential governmental program for reducing workplace fatalities."); Worrall & Butler, *Experience Rating Matters*, *supra* note 12, at 92 (finding that in 15 industries studied in the period 1940-1971, a 10% increase in firm size led to a 4.95% decrease in the permanent partial injury rate and a 10.17% reduction in the all indemnity claims rate). These studies in part are an attempt to investigate the potential positive effects on employer preventive activities that may be derived from merit rating systems which make an individual employer's cost responsive to that employer's own claims experience. Some of the investigators note that employers' preventive activities may be obscured by the increased filing of claims by workers as benefits rise, or that employers' preventive efforts may decline when pricing schemes fail to make an employer's costs responsive to the costs incurred by that enterprise. *See, e.g.*, Chelius, *Incentive to Prevent Injuries*, *supra* note 18, at 155 (stating that injury prevention by employers is influenced by the level of benefits given to the employee).

The workers' compensation paradigm poses a moral hazard for employers as well as employees; both employers and employees are insured by the program. The existence of a no-fault workers' compensation system undoubtedly depresses employers' incentives toward prevention in two ways. First, it provides an economic cushion for workers so that employers can feel that they have discharged any responsibility to injured workers. Second, the mechanisms for the distribution of costs and the maintenance of benefits below full costs of injuries (which are discussed at greater length in part II.B) mean that employers' liability may not always increase as the incidence or, particularly the severity, of injuries increases. *See* ASHFORD, *supra* note 9, at 417 (arguing that because employers do not pay the full social cost of

Advocates of prevention, relying upon the apparently certain costs of injury which the compensation laws created, believe that employers' enlightened self-interest should force them to engage in *aggressive preventive practices.*[259] Their arguments presume that the forced internalization of cost will affect employers' practices, even if the employers are not charged with wrongful behavior, and even if there is a general belief that many injuries are inevitable.[260] There is, however, an internal, paradoxical tension between the presumptions of inevitability (which are supported by the no-fault insurance paradigm) and assumptions of preventability (supported by the financial incentives). Arguably, this tension contributes to the political controversy surrounding compensation, as employers fight the costs of compensation without investigating the cause of the injuries.

The fact that employers have not committed a legal wrong does not obviate the fact that the employer may nonetheless have both control over the conditions leading to injuries and superior knowledge regarding strategies for prevention.[261] It is not, however, at all clear that the relationship of costs to

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each additional disability, their incentive to reduce hazards is too low, and that the "*problem of moral hazard is inevitable*").

259. Current commentators continue to view the costs of workers' compensation as a source of incentive for safety. *See, e.g.*, Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 843 (1989) (explaining that if employers have substantial financial responsibility for all workplace injuries, they will be sufficiently motivated to invest in precautions that will prevent their occurrence).

> Workers' compensation was expected to induce employers to provide greater workplace safety because each firm would assume the costs of its workers' injuries more predictably than under tort liability. The costs of industrial injuries thus would be included among other business costs, and employers would be motivated to reduce them by increasing job safety.

ECONOMIC REPORT OF THE PRESIDENT, *supra* note 18, at 197. Other commentators have noted that the strict liability workers' compensation rules adopted by the states were supported by Calabresi's argument that "other things being equal, liability should be placed on the party best able to recognize a relationship between caretaking and costs, and to use this information to reduce accidents." Hylton & Laymon, *supra* note 255, at 128. This view echoes that of earlier workers' compensation commentators. Arthur H. Reede, for example, insisted that "[a]ll available evidence supports the view that workmen's compensation is a stimulus to prevention of industrial injuries." REEDE, *supra* note 34, at 324.

260. The presumption is, I think, that the pricing of workers' compensation insurance will provide a sufficient incentive to trigger preventive activities. This is the focus of part II.B of this Article.

261. This calls for an analysis of the difference between a legal wrong which causes harm and action which is not a legal wrong but which is known in advance to result in harm. Clearly, not all actions which are known to cause harm, even on a regular basis, are actionable as legal wrongs. It is precisely the process of drawing these lines which makes the problem of deterrence in workers' compensation so difficult.

prevention is obvious or even that the system itself is designed to induce improved safety as a result of increased costs. Even in theory, internalization of costs will *only* promote deterrence if costs and the payer's control over the occurrence of the harm are related, and the payer understands the relationship.

B. Distributing Cost

In order to maximize the potential deterrent effect from the imposition of liability, two initial objectives must be met: costs must be charged to, and internalized by, the entity responsible for the harm; and the costs must fluctuate with the degree or amount of harm. Aggregate cost, which does not fluctuate with individual experience, is unlikely to provide the necessary incentive to induce preventive activities. This section explores the extent to which workers' compensation achieves effective internalization of costs.[262]

As noted above, our current system of liability insurance had its roots in employer liability for workplace injuries and grew with workers' compensation systems.[263] The first statutes which mandated employers to carry insurance created a state fund to provide the coverage.[264] States later established requirements either for purchase *of private* insurance or, in some jurisdictions, for proof of financial responsibility for purposes of self-insuring.[265]

The requirement that employers purchase insurance to cover workers' compensation claims provided protection to both workers and employers. The desire for reliable protection was substantial enough to overwhelm any concern that insurance would dampen the deterrent effects of these costs. This insurance guaranteed that compensation would be available to the extent that it was required by law, irrespective of the financial status of the employer. Then, and now, employers incurred penalties for failing to obtain insurance.[266] In addition, the insurance mandate, when combined with the general

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262. This exploration is undertaken as an exercise that *is independent* of the concern raised in the next section: that increased internalization of enterprise-specific costs may encourage perverse cost-containment strategies on the part of employers. Without abandoning the notion that unintended consequences may overwhelm the socially useful and intended consequences of cost internalization, it is nevertheless instructive to review the degree to which internalization has been achieved in the workers' compensation system.

263. KEETON ET AL., *supra note* 221, § 82, at 585.

264. *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219, 246 (1917) (upholding Washington's exclusive state insurance fund for workers' compensation).

265. *See* REEDE, *supra* note 34, at 231-32.

266. 2A LARSON, *supra* note 65, § 67.22, at 12-132 to 12-140.

limitations on liability inherent in the system, guaranteed the economic stability of firms by protecting employers from both the full cost of injuries and major fluctuations in costs associated with these injuries.

The general implications of insuring a risk have become much more obvious in the years since the first enactment of workers' compensation statutes. Insurance is fundamentally an arrangement that allows for the transfer and distribution of the costs associated with risk.[267] Insurance provides an established prospective cost ("premium") which quantifies the future risk and which protects the insured from any further losses. The risk, and any incentives associated with assuming the risk, are transferred to the insurer.[268]

Insurance by its very nature requires the spreading of the costs of risks through a population; it is the law of large numbers which creates a sufficiently high probability that predictions regarding the total losses for the pool will be correct. As one commentator has noted, "the purpose of the insurance is to protect the person liable from the consequences of his liability; in so far as this protection can be bought at a reasonable price, the economic deterrent effect of liability disappears."[269]

267. KEETON & WIDISS, *supra* note 247, at 3. "For a price, usually referred to as a premium, an insured transfers to an insurer the risk of loss or the responsibility for certain costs that may arise . . . . [Thus] an insured will be able to avoid sustaining further losses." *Id.* at 11.

268. The effect of the insurance contract is, therefore, to transfer any incentives to decrease claims costs from the insured employer to the insurer. The employer's premium costs are set at the beginning of a policy year. If the insurer can reduce or assist the employer in reducing the actual costs of claims during that year, the insurer will receive the benefit. Employers' gains will not appear until subsequent policy years in which their premiums are adjusted to reflect past claims reductions through the merit rating process that is discussed below. It is therefore surprising that insurers have not pursued loss prevention more aggressively as a strategy. Refer to part III.C.2 *supra*. More recently, as state insurance regulators have resisted rate increase applications, loss prevention has become more of a focus. *See, e.g.*, *Loss Control and Prevention*, IV NCCI DIGEST, Dec. 1990, at 1 (studying the possibilities for loss prevention). "Insurers are no longer content to share the risk; they are committed to decreasing risks as well . . . . In the area of workers' compensation, this means the establishment of a safe workplace." *Id.* The article notes further that "[i]t is unclear whether the experience rating system has any effect on the average employer's workplace injury rate." *Id.* at 9.

269. MORGENSTERN, *supra* note 7, at 65. Or, stated another way, "the existence of liability insurance tends to undermine both the corrective justice and deterrence rationales for the imposition of tort liability." Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COL. L. REV. 75, 86 (1993). *See generally* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY (1986) (explaining the relationship between corrective justice and liability insurance programs). Of course, as I have previously noted, corrective justice

Despite the high aggregate level of workers' compensation costs, the current methodology for the distribution of costs associated with occupational hazards fails to encourage improved safety practices among many employers for two reasons. First, costs are not spread in a manner which provide financial incentives to many employers to engage in primary prevention. The insurance pricing scheme, which provides some fluctuation of rates based upon the experience of individual employers and classes of employers, maintains the appearance of an incentive-based system. To the extent that insurance premiums are merit-based, the market would tend to reward low-risk employers with lower costs and penalize high-risk employers with higher costs. The particular nature of the pricing of workers' compensation premiums, however, tends both to attenuate the relationship between cost and risk for many employers, particularly smaller high risk employers, and to obfuscate the connection that does exist.

Second, despite the apparent internalization of costs, employers do not pay the full costs of injuries. A system of "sensible compensation"[270] means that costs are transferred, directly and indirectly, to the injured workers, their families, to administrative agencies, and to others. These two issues are explored more fully in the following subsections.

1. The Workers' Compensation Insurance Pricing Scheme and Market. The nature of insurance means that costs associated with risk are shared. Generally, to the extent that rates are set based upon a group or community risk and are not adjusted for individual experience, those who make more or larger claims against the insurance will be subsidized by those who make smaller ones. This effect can be partially corrected by rate-making processes which adjust the rates of individuals within the group in order to reflect individual experience more accurately. The goal in the adjustment of rates is to pool that portion of the risk that involves uncertain or random events, and to individualize rates to the extent that the risks, and therefore the costs, are predictable.

Alternatively, the subsidization characteristic of insurance can be decreased by reducing the size of the risk pool, so that those in it will be closer to each other in experience, making the community rate charged closer to the actual experience of

and deterrence were not foundation blocks of the workers' compensation system. Refer to part III.A.4 *supra*.

270. Weiler, *supra* note 234, at 840.

each member of the group. As experience-rating increases or pools become smaller, however, the advantages which flow from the sharing of risk decline.[271] The result is that, in the workers' compensation market, there is a tension between more accurate merit rating, which should promote safety incentives, and class rating, which helps employers share financial risks related to occupational hazards in their industries.[272]

In workers' compensation today, as costs and premiums have risen, questions of affordability, solvency, cost containment, equity and adequacy of benefits, and accuracy of pricing have all merited attention from the insurance industry.[273] In order to understand the current concerns and their relationship to safety promotion, it is necessary to understand the mechanisms used by insurers to price employers' workers' compensation premiums.[274]

271. ABRAHAM, *supra* note 269, at 218. From insurers' perspectives, as the size of the pool grows, the amount of predictive uncertainty declines and less capital is needed to fund the future risk adequately. Telephone Interview with Robert Finger, Consulting Actuary, Milliman & Robertson, Inc. (Oct. 23, 1993). Insurers themselves are more concerned with issues of funding and marketing than with social policy implications of rating decisions.

272. Kenneth Abraham characterizes this tension as follows:

> Stress on loss prevention in insurance obviously tends to reflect a focus on individual responsibility. In contrast, emphasis on risk distribution underscores the social consequences of loss. Both loss prevention and loss distribution, of course, are methods of avoiding the effects of injury and loss. But they do so from very different perspectives. Increased stress in the future on risk distribution could indicate an evolving recognition of the inevitability of a certain amount of injury in a society as technological and industrial as ours. At some point it would symbolize a very significant change in social perceptions: a collective acceptance of the current—and perhaps ultimate—imperfectability of our world. Increased stress on loss prevention, on the other hand, would reflect the dominance of more traditional ideas about individual responsibility for loss and a continuing belief in the possibility of progress toward a safer, more secure world. Stress on loss prevention through insurance devices might indicate as well that more public forms of loss prevention, such as direct regulation and the promulgation of mandatory safety standards, had failed to live up to their promise.

ABRAHAM, *supra* note 269, at 216. This underlying tension between acceptance of the inevitability of risk (which Abraham characterizes in a positive light) and prevention are, of course, precisely what underlie workers' compensation discussions. Of course, there is always a middle ground which acknowledges both the imperfectability of our world and our ability to achieve reductions in risks.

273. David Appel & Philip S. Borba, *Costs and Prices of Workers' Compensation Insurance*, *in* WORKERS' COMPENSATION INSURANCE PRICING: CURRENT PROGRAMS AND PROPOSED REFORMS, *supra* note 132, at 1.

274. The brevity of this summary requires some generalizations. The process described is that used by the National Council on Compensation Insurance (NCCI), a national rate-making bureau, that prepares rate analyses for the insurance industry in 32 states. A similar, but not identical, rate-making methodology is utilized in every state, whether the insurance is provided through a monopolistic state fund, a competitive state fund, a private insurance carrier, or from a separate high risk pool. It is important to remember that rate-making methodologies are developed by actuaries with concern for adequacy and equity of rates based upon the predictive value of past experience; actuaries are not, in general, concerned about the efficacy of insurance rate-making in achieving other goals, including safety. The summary provided here does not attempt to explain the precise justification for the resulting rate methodologies. For more information regarding rate-making methodologies, see generally WORKERS' COMPENSATION INSURANCE PRICING: CURRENT PROGRAMS AND PROPOSED REFORMS, *supra* note 132; Beckwith, *supra* note 7, at 58-60; C. Arthur Williams, Jr., *Workers' Compensation Insurance Rates: Their Determination and Regulation*, *in* CURRENT ISSUES IN WORKERS' COMPENSATION 209 (James Chelius ed., 1986).

a. Rate setting methodology. Employers' workers' compensation insurance requirements can be met in most states either by purchasing insurance or by self insuring.[275] Employers who self insure pay all of their own costs associated with the mandated workers' compensation benefits, as well as the costs of litigating any claims which they may choose to contest.[276] These employers may also be required to contribute to various administrative costs of the state agency which oversees the workers' compensation program.[277] Self insurance results in the purest form of experience rating: self insured employers' costs are tied absolutely to their incurred costs. As the number of employers who self insure has grown,[278] the number of employers and employees who operate in an environment in which payment reflects true workers' compensation cost has risen.[279] It is, in fact, these employers who are most often credited with aggressive safety or, at least, claims-reducing programs.[280]

Employers who purchase insurance have their individual premium rates determined through a three-step process of rate-making.[281] First, the average premium rate for a state is calculated. Second, rates are calculated for separate industrial classes into which all employers are grouped.[282] Based upon

275. Beckwith, *supra* note 7, at 52.

276. *Id.* at 59.

277. *See, e.g.*, W. VA. CODE § 23-2-9 (Supp. 1993).

278. Refer to note 30 *supra*.

279. Workers' compensation costs are limited in a variety of ways. Not only are all injuries and illnesses not compensated, but the level of compensation itself results in externalization of costs from the system. The issue of this externalization is discussed below. Refer to part III.B.2 *infra*.

280. *See, e.g.*, Beckwith, *supra* note 7, at 59 (stating that self-insurance provides the greatest incentive to the employer to provide a safe working environment for employees).

281. Appel & Borba, *supra* note 273, at 5.

282. *Id.* NCCI uses more than 600 industrial classifications in calculating rates, although only about 300-400 of these may be in active use in any particular state. *Id.* Telephone Interview with Robert Finger, *supra* note 271. Other rate making entities may use fewer. For example, the West Virginia Workers' Compensation Fund, a

the aggregate claims experience in that class, generally over the preceding three year period, the size of payroll in that class, and the insurer's administrative and related expenses, the insurer calculates a base or manual rate for the entire class.[283] This manual rate, expressed as an amount per $100 of payroll, reflects the total predicted costs that the insurer anticipates employers in that class will incur during the subsequent policy year.[284] Third, the insurer may adjust the employer's premium from the manual rate based upon that employer's claims loss experience.

Manual rates vary widely from one industry to another, reflecting the variation of the experience of different groups of employers. The highest rate in a state "will routinely exceed the minimum by a factor of 100, and in extreme cases can exceed the minimum by a factor of 1000."[285] This grouping of employers lessens or eliminates cross-subsidization between industries as long as rates are adequate to cover the incurred costs in any policy year.[286] Obviously, manual rates rise as the average experience of an industrial group worsens, and fall as the average experience improves. In the majority of states, changes in these rates must be approved annually by the state insurance department or an equivalent oversight agency.[287]

Small employers who pay below a certain amount of

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monopolistic state fund, uses 91 such classifications. These classes are established based upon the level of risk in an industry, not upon the product that is produced; they therefore do not coincide with the Standard Industrial Code (SIC) classifications utilized for other employment data-gathering. This further complicates the data problems discussed in Part I of this Article.

283. Appel & Borba, *supra* note 273, at 5-6.

284. In theory, the manual rate should represent a true average. Because of some aberrations in the rate-making processes, however, the manual rate in some instances deviates from the actual average of employers' calculated rates. This is the result of the distribution of employers after the application of the experience rating formula and is referred to as the "off balance." The precise nature of aberrations like this in the rate-making process are beyond the scope of this discussion.

285. Appel & Borba, *supra* note 273, at 5.

286. Workers' compensation rates must be adequate to cover the expected losses which are allocable to the particular industry. "The failure to adhere to this principle can cause unintended interjurisdictional, interindustry and interfirm cross-subsidization, which can have far-reaching and adverse implications." *Id.* When inadequate rates are charged, the resulting deficit may require cross-subsidization between industries in subsequent years. *See* Robert Finger & Robert Briscoe, *Workers' Compensation Insurance Arrangements in West Virginia*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, May-June 1991, at 3. To the extent that the payroll in high risk industries declines, the funding is likely to be drawn from other industries. *Id.*

287. Historically, most states had administered pricing systems in which changes in manual rates for industries were subject to review and approval by a state regulatory body. Klein, *supra* note 52, at 7-8. Since 1982, sixteen states have instituted competitive (rather than regulated or "administered pricing") rating for workers' compensation. *Id.*

premium per year are required to pay the base or manual rate, irrespective of their own claims experience. The size of these non-rated employers varies depending upon the base rate in their industry; in an industry with a $10 per $100 base rate, the minimum amount will be reached with fewer employees and less payroll than in an industry in which the base rate is $0.50 per $100.[288] Because of the small pool of employees, and the resulting low frequency and small numbers of claims, the injury experience of these employers is generally viewed by actuaries as too random to have any predictive value; prospective adjustments to rates would therefore not make sense. Any effort by these employers to improve their own safety records will therefore not be recognized by the workers' compensation rate-making process.

In contrast, larger employers' rates are individualized and therefore deviate from the manual rates of their industries. The merit rating process is designed to create rates which better reflect the individual employer's experience in relation to the entire class. Three different methods are used for merit rating purposes: schedule rating, retrospective rating and dividend plans, and, most commonly, experience rating.[289]

Schedule rating involves the *prospective* adjustment of the manual rate at the beginning of the policy year in order to reflect the employer's internal practices. Individual employer's rates are based, at least in part, on a prediction about anticipated future claims, but this prediction is not based on the actual past claims experience of the employer. For example, in the early years of workers' compensation, this prediction might have been based on safety audits of the enterprise's operations.[290] This approach to rate-making was common until 1934, at which time it was largely, although temporarily, abandoned as the industry came to view it as actuarially unsound.[291] Schedule rating has recently reappeared in some

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288. The minimum premium amount for merit rating is currently set at $5000 per year in a typical state. Telephone Interview with Robert Finger, *supra* note 271. This means that employers paying $10 per $100 will be experience rated when their payroll reaches $55,000 (or about two to three employees earning $15,000 to $20,000 per year). In contrast, employers paying $0.50 per $100 will need a payroll of $1,100,000 or 55 employees earning $20,000 in order to be experience rated. The minimum amount of premium which triggers experience rating has, of course, increased over time. Williams, *supra* note 274, at 211. In 1983, it was $2500. *Id.*

289. *Id.*

290. SOMERS & SOMERS, *supra* note 34, at 106.

291. *Id.* at 106-07 (noting that in this early form,

> [d]ebits or credits were given to the insured employer, in advance of actual experience, on the basis of plant safety inspection [sic] . . . . Gradually, however, the inherent limitations of the [schedule rating] plan determined

states in the form of legislatively-mandated prospective premium *discounting*, which *is designed to provide* an inducement for employers to engage in cost-cutting or injury preventing practices.[292]

Retrospective rating, introduced in 1936 after schedule rating was abandoned, adjusts the employer's premium at the end of the rating period based upon that employer's actual experience during the policy year.[293] In general, retrospective rating is a device used by insurers to market insurance to larger employers who might otherwise self insure. In essence, the insurance carrier agrees, within formal negotiated boundaries, to rebate premium to employers who perform better than anticipated during the policy year.[294] Dividend plans similarly rebate premium at the end of the policy year;[295] these plans, although actuarially similar to retrospective rating, do not guarantee the end-of-year return and are more clearly driven by market factors.[296] Retrospective plans offer to employers an intermediate solution between simple experience rating, which operates on a prospective basis only, and self insurance, which requires the employer to bear the entire risk.[297]

Prospective experience rating is the most common form of merit rating in workers' compensation. Experience rating formulas generally look at an individual employer's claims costs over the preceding three years in comparison to the average claims costs in the industrial classification. The insurer then calculates an "experience modification rate" or "modification factor," based upon the employer's relative experience. For low claims employers, this modification factor will be less than one; for high claims employers, it will be greater than one. The individual employer's rate is adjusted prospectively by

its demise. Most important were its reliance on physical or engineering factors as the sole criterion of safe operation to the exclusion of morale and other human factors, its inapplicability to many occupations, and the impossibility of creating satisfactory inspection standards).

292. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 152, § 53A (West 1989); MO. ANN. STAT. § 287.125 (Vernon 1986); W. VA. CODE § 23-2B-3 (Supp. 1993). For a full discussion of this recent development, refer to Part IV *infra*.

293. SOMERS & SOMERS, *supra* note 34, at 107.

294. *Id.*

295. *Id.*

296. Telephone Interview with Robert Finger, *supra* note 271. Dividend plans are less highly regulated and generally do not have to be filed with state insurance departments. Appel & Borba, *supra* note 273, at 8.

297. On the other hand, this rating system may decrease the insurer's incentive to provide loss control services to an employer-client, because the partial transfer of risk to the employer decreases any potential gain for the insurer in providing loss management services.

multiplying the industry's base rate by the specific calculated modification factor. Thus, employers with better than average claims experience pay less than the manual rate; employers with worse than average experience pay more than the manual rate.

All merit rating schemes serve several purposes. First, they are a device for correcting rate inequities through modifying manual rates.[298] Second, schedule-rating and dividend plans provide a weapon of competition for different insurance carriers in a largely regulated environment. Third, merit rating is viewed, by some, as an important stimulus for injury prevention.

b. Rate setting and safety incentives. The merit rating system is the cornerstone to arguments that workers' compensation costs create safety incentives. In theory, the rate-setting characteristics of workers' compensation should increase safety effects in two ways. First, by increasing the overall unit cost of labor relative to capital in hazardous industries, the rate setting process should contribute to an economy-wide reduction in injuries by reallocating labor from more dangerous to safer industries.[299] This reallocation from more hazardous goods-producing employment has, of course, occurred.[300] Needless to say, it is difficult to attribute this change to workers' compensation costs, nor is there any evidence that the most risky operations within an industry are the ones that close.[301] Second, the experience rate setting system should increase the costs for more hazardous firms within an industry, relative to safer ones.[302] The incentive for the more dangerous firms to

298. The insurance industry "has always viewed the [experience rating] program as one primarily *intended* to produce equity, by more closely tying an individual risk's price to expected costs." Appel & Borba, *supra* note 273, at 13.

299. Smith, *supra* note 7, at 571.

300. The relative *decline* in manufacturing and mining jobs over the past two decades has been substantial. In 1972, goods-producing jobs constituted 39% of private employment; by 1992, they had fallen to 26% of private employment. *See* BUREAU OF LABOR STATISTICS, *DEP'T OF LABOR*, EMPLOYMENT AND EARNINGS 47 tbl. B-1 (1993) [hereinafter EMPLOYMENT AND EARNINGS 1993].

301. In fact, the high risk residual market in workers' compensation may be rescuing some of these excessively hazardous enterprises from extinction. Refer to part III.B.1.c. *infra*.

302. "Each insured should expect to pay for the loss *exposure* it brings to the system." Robin Gillam, *Some Issues in Workers Compensation Experience Rating*, VII NCCI DIGEST, Dec. 1992, at 51.

reduce claims costs, and hopefully injuries, is thereby increased.[303]

Employers' rates within the same industrial classifications can indeed vary tremendously based upon experience rating calculations. The Upjohn Study[304] was in part instigated by the existence of variations in intrastate rates paid by employers in the same industry. In West Virginia, employers' rates in the same industry vary by a factor of six or more.[305] This pattern is common throughout the country.[306] It is these variations

303. RICHARD B. VICTOR ET AL., WORKERS' COMPENSATION AND WORKPLACE SAFETY: SOME LESSONS FROM ECONOMIC THEORY (RAND REPORT) x-xi (1982) [hereinafter VICTOR, WORKERS' COMPENSATION AND WORKPLACE SAFETY] (concluding, based on a simulated model, that the experience rating system may increase safety incentives for large firms and decrease it for small firms. Firms with as few as 25 employees in hazardous industries may, however, have significant financial incentives to reduce claims costs); Smith, *supra* note 7, at 571. But see the various experience rating studies, *supra* note 258, which have failed to find any relationship between safety and experience rating.

304. Refer to note 7 *supra*.

305. The following are examples of rates, modification factors, and calculated rates per $100 of payroll for West Virginia employers with high and low modification factors (1989 data, information drawn from files of the author). "A" and "B" in each industry represent different employers with substantially different claims experience. The base rates in West Virginia during this period were artificially depressed and therefore, although the relationships among classes and employers are instructive, the actual amounts are not actuarially sound. *See* Spieler, *supra* note 252, at 347.

Industry	Base Rate	Mod Factor	Assigned Rate
Hospitals	0.83	A. 0.66 B. 3.38	0.55 2.81
Coal	16.80	A. 0.35 B. 3.76	5.88 63.17
General Construction	6.71	A. 0.66 B. 2.47	4.43 16.57
Clerical	0.38	A. 0.68 B. 6.64	0.26 2.52

The very high modification factors on this chart may, however, represent errors in the ratemaking process. According to Robert Finger, consulting actuary to the West Virginia Workers' Compensation Fund, modification factors should rarely rise above 2.0. Telephone Interview with Robert Finger, supra note 271. Higher modifications may, therefore, reflect the fact that an employer has been classified into the wrong industrial class. *Id.*

306. The Business Roundtable's publication for the construction industry gives the following example:

> [C]onsider two contractors with different EMRs [experience modification ratings] bidding a job with $10,000,000 direct labor costs and a manual rate of $15.00.

which have led to a call to employers to pay attention to safety in order to control their costs.[307]

The actual experience rating methodology dampens the incentive effects, however; the relationship between claims costs and experience is not as simple as the general contours of the rate-making process would make it appear. First, the calculation of an individual employer's modification factor does not include any adjustment for the relative wages paid to employees in the same industry; the total workers' compensation premium for an employer is the product of total payroll multiplied by that employer's calculated rate.[308] This has the troubling consequence of penalizing high wage, safe enterprises and rewarding low wage enterprises in the same industry. Thus, if relatively safe employers pay wages that are higher than average, their total premium paid for each full time worker may be higher than in firms with higher injury rates but lower wage rates. In some industries, particularly construction, the failure to correct for wage differentials may also encourage the hiring of less skilled, lower paid, workers.

Second, the use of a three year average for the calculation of individual employers' rates results in a significant lag time before improvements in injury rates yield substantial reductions in workers' compensation premiums.[309] A single year reduction in claims costs is generally not viewed as actuarially credible for rate making purposes. Employers who have achieved claims cost reductions may, however, have a difficult time understanding this delay.

Third, and perhaps most importantly, not all of an employer's experience "counts" in the calculation of modification

> Contractor A has an EMR of 0.60
> His workers' compensation insurance premium is:
> $10,000,000/$100 x $15.00 x 0.60 = $900,000
> Contractor B has an EMR of 1.40
> His workers' compensation insurance premium is:
> $10,000,000/$100 x $15.00 x 1.40 = $2,100,000
> The safety dividend to Contractor A is $1,200,000 ($2,100,000 less $900,000)—12 percent of direct labor cost!

THE BUSINESS ROUNDTABLE, THE WORKERS' COMPENSATION CRISIS . . . SAFETY EXCELLENCE WILL MAKE A DIFFERENCE 12 (1991) [hereinafter THE BUSINESS ROUNDTABLE].

307. *See generally* Welch, *supra* note 7 (citing empirical studies showing that employers with aggressive safety programs tend to exhibit lower workers' compensation costs).

308. Appel & Borba, *supra* note 273, at 6.

309. Richard B. Victor, *Experience Rating and Workplace Safety*, in WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY, *supra* note 29, at 71, 76 [hereinafter Victor, *Experience Rating and Workplace Safety*] (stating that because insurers base the experience modification factor computation on data collected from the previous three years, current prevention will not yield instantaneous savings).

factors. The extent to which an employer is rated as a result of its own experience depends on the credibility or predictive value of that employer's experience.[310] As employers' total premium amounts grow, reflecting both larger payroll and the level of general hazard in the industry, the credibility of their past experience also grows. About ten to fifteen percent of firms, in which ninety percent of employees work, are experience rated.[311] Because experience rating cutoffs rely on size of total premium, not on size of payroll, the more hazardous the industry, the more that experience rating reaches smaller firms.

The *degree* of experience rating varies, however. Workers' compensation insurance rate-making assumes that the severity of an injury is less predictable than injury frequency.[312] The most important factor is therefore the frequency, not the size, of claims; an employer's rate may be affected more by two relatively minor injuries (e.g., sprains) than by one injury resulting in permanent total disability or death.[313]

310. Although the incentive value of experience rating appears to indicate that more is better, insurance industry researchers argue that "it would be unfair to insureds to charge back losses that were random and essentially unpredictable." Gary Venter, *Experience Rating—Equity and Predictive Accuracy*, 11 NCCI DIGEST, Apr. 1987, at 27, 28.

311. Appel & Borba, *supra* note 273, at 6 (discussing the impact of experience rating in NCCI jurisdictions). This distribution is reasonably consistent with the general distribution of workers by employer size, which shows that 15% of employees work in firms with nine or fewer employees. Small firms constitute 76% of total establishments. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 2419, EMPLOYMENT AND WAGES, ANNUAL AVERAGES 532-33 (1993).

312. This assumption is based on historical experience. Telephone Interview with Robert Finger, *supra* note 271. Injury frequency is apparently viewed as a reflection of underlying conditions in the workplace, while severity is tied more to the behavior and characteristics of the individual worker who is injured. The particular individual's reflexes, age, overall conditioning, level of work motivation, access to quality to medical care, etc. may affect the size (i.e., the severity) of the claim. *Id.*

313. In other words, the employer with a single claim of $150,000 is presumed to be a better risk for an insurer than an employer with ten claims of $2000 per claim. This may in part explain the energy with which some relatively knowledgeable employers seek to deter the filing of smaller claims through a variety of strategies, including having injured workers report for work (and pay) without assigning them work. This particular strategy may benefit workers in the short run, since they will collect full wages during the period of temporary disability, but may disadvantage them in the long run, as they lose both permanent partial and medical benefits related to the injury.

This weighting toward frequency is accomplished by dividing each actual loss into primary and excess components. Victor, *Experience Rating & Workplace Safety*, *supra* note 309, at 75. Although both losses are adjusted based upon the credibility of an individual employer's experience, the primary loss (currently set at $5000) is given greater weight for all individually rated employers, irrespective of size. Venter, *supra* note 310, at 33. This figure also has changed periodically. Victor, *Experience Rating and Workplace Safety*, *supra* note 309, at 75 ($2000 was previously the pri-

As employers' size, hazardousness, and wage scale, and therefore annual premium, grow, the credibility of that employer's experience with more severe claims is also presumed to grow (reflecting increasing levels of actuarial certainty that past experience will be replicated in the future). The rate therefore becomes more sensitive to the employer's actual experience.[314] Although manufacturing firms with as few as three to four employees may be experience rated, the size of the firm's workforce would have to be 1000 or more before the firm is fully experience rated.[315] The result of this process is that relatively smaller employers' premium rates cluster around the manual rate; their rates can only change significantly as the experience of the entire class changes.[316]

mary loss cutoff). Because the excess loss is viewed as less predictable, it is given relatively less weight, particularly for smaller employers. The amount of the excess loss that affects an employer's rate depends on a variety of factors, including amount of premium paid in the last benefit period. There is also an upper limit for the amount of the excess loss that counts in the rate-making process; losses above a certain amount are, thus, always viewed as random for purposes of rate-making. *Id.* Therefore, irrespective of the size of an employer, no employer will be charged fully for an extremely severe claim or for catastrophic events in which multiple workers are severely injured or killed. This means that mine disasters or fires resulting in deaths are not fully recognized by the experience rating system. This is true irrespective of the level of employer culpability. In other words, the fact that workers died because the doors of the Imperial Foods' chicken plant were locked might not result in significantly increased workers' compensation rates.

314. For example:

> Employer A has a poor experience rating, with losses double the industry average, yet its credibility factor is only 25 percent. Employer B has a better injury record, 50 percent lower than the industry average, with the same 25 percent credibility factor. With no credibility factor used, experience rating would double Employer A's premium, and give a 50 percent discount to Employer B. With the credibility factor, Employer A is charged only 25 percent above the industry average, and Employer B receives a discount of just 12 1/2 percent . . . . [T]he effect of the credibility factor is to reduce financial incentives for injury prevention, and to blunt financial disincentives for firms that accrue poor industrial accident records.

Beckwith, *supra* note 7, at 59.

315. Worrall & Butler, *Experience Rating Matters*, *supra* note 12, at 85. Thus, a continuum exists along which employers can be experience rated. The weight given a firm's own experience increases with the firm's size. Smith, *supra* note 7, at 571-72. For example, a 50% reduction in injury costs would result in no decline in premiums for a firm of seven employees. *Id.* at 591-92. However, the same 50% reduction in a firm of 10 employees would result in a 5% drop in premiums; the reduction would equal a 17% decline for a firm of 75, a 36% decline for a firm of 750, and a full 50% decline only for firms with 1750 or more employees. *Id.* at 572.

316. In reviewing the experience modification of employers with risks of $20,000 to $50,000 expected losses, employers with *no* losses had modification factors in one state between 0.70 and 0.80; employers with a single loss or a small number of minor losses had modification factors of 0.80 to 1.10. *See* Gillam, *supra* note 302, at 51, 53. In contrast, larger employers, with expected losses between $200,000 and $500,000, end up with a distribution of modification factors which looks like a bell-shaped curve. *Id.* at 57.

Several other problems result from this experience rating process. Relatively high risk smaller employers tend not to pay for the full cost of their individual experience, thereby attenuating any incentive effects to increase worker safety. The clustering of rates around the manual rate *appears* to result in a subsidy of high claims employers by low claims employers.[317] In addition, low claims employers may not be fully rewarded for their superior experience; their rates will remain close to the manual rate even after years without any injuries or claims.

Not surprisingly, many employers do not understand the rate-making system. Because of its approach to limiting the full impact of losses, the experience rating system can yield higher modification factors, and consequently higher insurance rates, for employers with relatively lower claims costs. A Business Roundtable publication provides the following example. A very small contractor, with minimum expected losses, cannot have a modification rate of less than 0.90 in one state's workers' compensation system.[318] A larger contractor with a worse overall safety record may have a modification factor of 0.6, because the larger employer's past experience is seen as having greater predictive value; the larger payroll therefore provides this employer with the potential for a lower rating.[319] The larger contractor will therefore pay a substantially lower insurance rate than the smaller employer, despite the smaller employer's better experience. Even with complete information, employers would have a difficult time understanding this result; although this process may be actuarially justifiable, the result certainly appears illogical.

These problems are compounded by certain anomalies in the rate-making process which, until recently, tended to reward certain employers excessively. In some instances, these rate-making quirks may have resulted in providing very strong

317. In fact, this is not a true subsidy. Small employers' rates cannot drop because their prior experience lacks sufficient predictive value. *Id.* at 56. They therefore remain in a pool of insureds who *may* have worse experience in the coming policy year. Since rates are established prospectively, the rates of these employers remain relatively high. This can happen year after year. This effect extends to employers with risks (i.e., annual premiums) in the $200,000 to $500,000 range. *Id.* at 57. The fundamental question is whether the experience of these smaller employers is as uncertain as NCCI rating methodology would appear to indicate.

318. THE BUSINESS ROUNDTABLE, *supra* note 306, at 10-11.

319. *Id.* at 11.

incentives for loss prevention for some employers.[320] While these quirks appeared to provide substantial safety incentives to employers, they also contributed to the level of confusion and resulting hostility engendered by the complexity of the rate-making process. Thus, the relationship between prevention and cost savings may be confusing, even when it in fact offers maximal safety incentives.

Finally, experience rating and the rate-making process in general can only effectively reflect the incidence of injuries and illnesses for which compensation is actually paid or approved.[321] As a result, the process fails to reflect any injuries which have occurred but which have not appeared in the compensation system. In particular, occupational diseases, as a class, tend to be inadequately reflected in insurance rates. Because of long latency periods, uncertainty in diagnosis, and obstructions to eligibility found in many compensation systems, they may never be compensated at all.[322] Moreover, because of their latency periods, the costs of many diseases cannot be charged against an employer in the period in which the exposure to the disease-causing agents occurred; if these diseases are ever reflected in the rates, their impact generally does not occur contemporaneously with the existence of hazard.

Therefore, the experience rating process fails in three ways to send a clear message to employers regarding the benefits of improved safety. First and perhaps most obviously, the process does not reflect any of the externalized costs associated with occupational morbidity and mortality which are not included in the workers' compensation system. Second, for many employers, it fails to respond to true underlying injury and illness costs.

320. *See generally* VICTOR, WORKERS' COMPENSATION AND WORKPLACE SAFETY, *supra* note 303; Victor, *Experience Rating and Workplace Safety*, *supra* note 309, at 79. According to Victor, NCCI's prior rating plan produced both debits and credits that were too high for large accounts and too low for smaller insureds, although it worked well for risks whose expected losses fell in the middle range. As a result of these anomalies, some employers actually made more than $1 for each $1 saved in claims costs through the experience rating process. At the same time, "[f]irms with greater than expected losses are penalized with premium increases that exceed the additional losses. This world is quite symmetric." *Id.*

The NCCI has recently revised the rate setting methodology to correct for these aberrations. *See* Venter, *supra* note 310, at 31-35 (noting that the new plan "builds in a little less sensitivity to actual loss experience" for the group for whom the rating system had previously shown excess sensitivity). The new methodology was adopted by NCCI in July 1990. *See* Hager, *supra* note 13, at 44.

321. The ratemaking process thus provides employers significant incentive to reduce the number of claims that are filed or paid, either through pressuring injured employees not to file claims or through challenging the eligibility of claims once they are filed. This problem is the focus of the discussion in part III.C *infra*.

322. Refer to note 101 *supra*.

Third, to the extent that it does reflect these costs, the rate-making process tends to obscure this message, making it difficult to discern the relationship between costs and injury and illness rates.

There is good reason to believe that many employers have no idea of the interrelationship between their workers' compensation premium rates and their underlying rates of injury. The findings in the Upjohn Report were particularly troubling on this subject.[323] The survey asked the 124 respondent employers to report their current cost level and to indicate the trend in these costs over the preceding three years. Only 17 employers actually provided an estimate of their costs, and, according to the report, "*many of these were not credible responses*."[324] The conclusion reached was unavoidable: "[M]any if not most employers did not know their current WC [sic] cost level."[325] Employer ignorance of both the amount paid and the reasons for it, may explain one of the report's accompanying observations: that high claims employers are likely to blame either workers or the workers' compensation system for their high costs.[326]

This level of ignorance also helps to explain the results of studies which have investigated the effectiveness of the experience rating process in promoting safety. In general, these studies have failed to demonstrate a clear relationship between experience rating and increased safety efforts.[327] Those

323. Refer to note 7 *supra*.

324. Upjohn Report, *supra* note 7, at III-13 (emphasis added).

325. *Id.* This conclusion is certainly consistent with my own experience as West Virginia Workers' Compensation Commissioner. Between 1985 and 1989 manual rates in West Virginia were frozen. Many employers nevertheless continued to approach legislators to complain about increases in workers' compensation costs. During this period, an individual employer's rate could *only* have gone up if that employer's modification factor had increased; an increase in the modification factor could only have occurred if the particular employer's experience had worsened in comparison to that of the other employers in that industrial classification. That is, increases in cost during this period were *all* attributable to relatively worsening claims experience. These employers not only had no idea that this was true; many of them would not believe it was true after being shown documentation.

326. Upjohn Report, *supra* note 7, at IV-2, V-11.

327. Refer to note 258 *supra*. The findings of these studies are somewhat blurred by the fact that several of them conclude that any "real" safety effects may be obscured by the observed phenomenon that workers file more claims when benefits rise. *See* Smith, *supra* note 7, at 581 (noting "[e]vidence that OSHA and workers' compensation have reduced injuries in the workplace is minimal . . . . In the case of workers' compensation, real safety effects are clearly swamped by reporting effects."). The specter is therefore raised that if claims increase with benefit increases, and efforts at safety fail to offset these increased costs, then "marginal benefit of safety provision falls and the number of injuries could rise." Worrall & Butler, *Experience Rating Matters*, *supra* note 12, at 83. This further stimulates charges that the workers' compensation crisis is the fault of workers, who make inappropriate or excessive claims upon the system. Refer to part III.C *infra*.

investigators who have concluded that experience rating "matters" have primarily found an association between larger firms and better safety records.[328] Because larger employers' premium rates more closely reflect their true experience, these studies have concluded that experience rating is the cause of improved safety. Given the wide number of variables which may cause a larger employer with greater financial and personnel resources to achieve better safety, the drawing of this causal link may be fallacious. It is nevertheless interesting to note that experience rating studies confirm information collected elsewhere: larger firms do tend to have, or to report, fewer injuries.

c. The effect of special funds and the residual market. The evidence is, therefore, not strong that the distribution of costs through the experience rating process is an effective stimulant for safety. To the extent that smaller high risk employers have their experience discounted through the rate-making process (or do not understand that process), the likelihood that workers' compensation costs will encourage them to improve workplace safety inevitably declines. Moreover, high risk employers have the effects of their own experience further dampened as a result of two other components of workers' compensation cost distribution: special funds and the rate structure in the residual high risk insurance market.

Special funds in workers' compensation are explicitly designed to create a large, non-merit-rated insurance pool for certain risks.[329] Most commonly, second injury funds subsidize injuries that occur to employees who have preexisting disabilities.[330] These funds have a laudable goal: to encourage the continued employment of previously injured workers by

328. *See, e.g.*, Worrall & Butler, *Experience Rating Matters*, *supra* note 12, at 91-92 (noting an association between firm size and safety and concluding that larger firms' comparatively better safety record is derived from the workers' compensation experience rating system). This conclusion is consistent with the simulation model developed by Richard Victor which projected greater incentives for larger insured firms. VICTOR, WORKERS' COMPENSATION AND WORKPLACE SAFETY, *supra* note 303, at 51-54.

329. *See* Lloyd W. Larson & John F. Burton, Jr., *Special Funds in Workers' Compensation*, *in* WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY, *supra* note 29, at 117; Hylton & Laymon, *supra* note 255, at 167-70.

330. Some states require these preexisting disabilities to be of a particular type or to be work-related; others do not. Most states require that the combined injuries result in permanent total disability. *See* Larson & Burton, *supra* note 329, at 123-25.

removing any direct liability for reinjury from the individual employer. The funding for these injuries is usually drawn from all employers without regard to claims which are made against the fund and without regard to where the original injury occurred.[331] The result is that the costs of claims paid by these funds are not internalized by individual employers; instead, they are paid through the fund without any effect on the employer's premium rates.[332] An unintended consequence of this is that both experience-rated and self-insured employers, as well as insurers, have an incentive to "dump" claims into a second injury fund to avoid any financial responsibility for the costs of the claim.[333] This dumping results in further expansion of administrative review of claims to weed out those which are improperly filed against the special funds.[334]

The functioning of the residual market in workers' compensation further subsidizes high risk employers. As costs rise at a rate greater than payroll, manual rates should increase. If rates are prevented from rising as experience worsens by either market or regulatory forces, insurers will only write private voluntary insurance for those potential customers who have better than average experience. In systems which do not require an enterprise or individual to purchase insurance, high risk individuals will often forego buying insurance if the merit rating system makes the insurance prohibitively expensive. This phenomenon has, for example, been observed in the health insurance market and is a contributing element to the current reform attempts.[335]

On the other hand, if insurance is mandatory and

331. The basis for the funding can be a surcharge on benefits, premium, or a flat amount. *Id.* at 127-28.

332. *Id.* at 127 (listing the various ways in which the funds are financed).

333. Experience with dumping was particularly acute in West Virginia, where the second injury funds premiums were grossly inadequate to cover the incurred costs for permanent total disability claims, particularly those claims which arose from declining hazardous industries like coal mining. *See* Spieler, *supra* note 252, at 354-55.

334. Often, this is accomplished by requiring employers to notify the workers' compensation administrative agency regarding the disabled status of individual employees when they are hired. Needless to say, this in turn led to a rather complex discussion regarding the interrelationship of this process to the hiring procedures under the Americans with Disabilities Act. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 9.5 (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL] (suggesting that an employer may make the necessary inquiries and require a medical examination after a conditional offer of employment).

335. *See generally* William H. Huff III, *Deep in the Heart of Reform*, 92 BEST'S REV., Dec. 1991, at 24.

individuals cannot obtain insurance in the private voluntary market, the government may be forced to establish a high risk pool. As insurers perceive rate adequacy to decline, the need for governmental intervention grows. In the case of workers' compensation, the National Council on Compensation Insurance (NCCI) has alleged that state regulators, who must approve increases in manual rates, are inappropriately suppressing rates for political reasons.[336] Finding that workers' compensation is a less profitable line of insurance,[337] insurers have either withdrawn from states entirely or have limited their voluntary market share to those employers who are good risks.[338]

Since employers must carry this insurance, states have mandated the creation of high risk nonvoluntary or "residual" pools (often administered by NCCI)[339] or have legislatively created state funds to serve the residual high risk market.[340] As insurance carriers have become increasingly unwilling to provide insurance to relatively high risk firms in the voluntary market, the residual market has grown from 5.5 percent of the workers' compensation market in 1984 to 24.1 percent in 1990.[341] NCCI estimates that operating losses for the residual market have grown from $223 million in 1983 to $4.2 billion in 1990.[342] The insurance industry blames rate inadequacy, resulting from denial of rate increases by regulatory bodies, for this growth in the residual pool.[343]

336. Ronald C. Retterath, *Regulation, Competition, and Profitability in Workers' Compensation Insurance: A Response*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Mar.-Apr. 1992, at 21-22 (Retterath was Senior Vice President and Actuary for the NCCI at the time this article was written). In 1991, regulators approved less than the requested increase in 24 out of 28 states in which increases were sought. NCCI had filed for an overall 16.4% increase in the 32 states in which it acts as an advisory body; only a 7.6% increase was approved. Klein, *supra* note 52, at 10. Notably, the original rate requests ranged from a decrease of 12.2% in Oregon to an increase of 44.6% in Alabama. *Id.* at 11-12 tbl. 2. Refer to Part IV *infra* for more on the Oregon story.

337. Profits declined steadily from 1985 to 1990; the estimated rate of return dropped from 13.7% in 1985 to 4.8% in 1990. Klein, *supra* note 52, at 15.

338. Freedman, *supra* note 56, at 20-21.

339. The National Workers' Compensation Reinsurance Pool, administered by the NCCI, is now the largest writer of workers' compensation insurance in the nation. Appel & Borba, *supra* note 273, at 16 n.1.

340. Freedman, *supra* note 56, at 20.

341. Klein, *supra* note 52, at 15-16 (for states administered by the NCCI). In 1989, 38 states had a residual market loss, led by Texas, whose $551 million loss represented 22% of the total countrywide loss, followed by Massachusetts, Florida, Maine, Louisiana, and Rhode Island. These six states accounted for 63% of the total residual market loss in 1989. Huff, *supra* note 335, at 24.

342. Klein, *supra* note 52, at 16.

343. Freedman, *supra* note 56, at 22.

The problem is not the existence of this residual pool per se, but the fact that the premium rates charged to the employers in this pool are not adequate to insure the covered risks. In those states without state-run funds which insure the high risk market, these underwriting losses in the residual markets are passed to insurers participating in the voluntary market through assessments based upon their share of the voluntary market.[344] Employers who have obtained insurance in the voluntary market pay for the underwriting losses in the form of a surcharge on rates.[345] The extent of this problem varies considerably from one state to another.[346] According to the insurance industry, a "death spiral" results as insurers pull out of voluntary markets; in Maine, it led to the collapse of the voluntary market.[347]

This system means that lower risk employers in the voluntary market are forced to subsidize the costs of high risk employers in the residual market; this hardly makes sense if one believes that deterrent effects are enhanced by appropriate internalization of enterprise-specific costs. In fact, no employer appears to be forced from the market entirely as a result of

344. According to one source, there is a lack of price differential between the voluntary and involuntary markets despite the fact that the experience of the employers in the involuntary market is "wildly different." *Id.* Thus, "if both groups are paying the same price, the voluntary market inevitably is paying part of the cost of the involuntary market." *Id.* This phenomenon of depressed rates in the residual market may, however, be changing. Telephone Interview with Robert Finger, *supra* note 271.

345. According to the NCCI, this residual market "burden" has grown from 4.3% of voluntary premiums written in 1983 to 16.8% in 1990. Klein, *supra* note 52, at 16; *see also* Burton (1993), *supra* note 2, at 10-11 (noting the same trend).

346. "In 1990, the residual market share ranged from 3.1 percent in Arizona to 87.1 percent in Maine. Similarly, the residual market burden for policy year 1990, as calculated by NCCI, ranged from 1.3 percent in Arizona to 304.8 percent in Rhode Island." Klein, *supra* note 52, at 16.

347. *Independent Panel Issues Plan for Rescuing State Comp System Workers' Compensation Report*, *in* EMERGING TRENDS IN WORKERS' COMPENSATION AND SAFETY 21 (1992) (noting that in Maine, the major insurers in the voluntary market withdrew; the residual market has a $547 million deficit; self insurance and the high risk pool comprise 90% of workers' compensation insurance in the state; and Maine leads the nation in the number and duration of workplace injuries). The situation in Maine spawned aggressive litigation by the insurance industry. First, insurers unsuccessfully challenged the refusal of the insurance department to approve rate increases. National Council on Compensation Ins. v. Superintendent of Ins., 481 A.2d 775 (Me. 1984). After the legislature passed a new rate statute in 1985, which mandated reduction in insurance rates, required participation in an assigned risk pool, and placed a limit on future rate increases, insurers again went to court, arguing that the revised statute was unconstitutional and confiscatory. They did not prevail. National Council on Compensation Ins. v. Superintendent of Ins., 538 A.2d 759 (Me. 1988) (holding that appeal of adverse lower court judgment was moot as a result of the legislative repeal of the law which was the subject of the complaint).

engaging in excessively risky activity; no state is willing to close an enterprise because of its high risk status.[348] Nor have most states, in the past, required safety inspections or other loss prevention measures by employers in order to obtain insurance in the residual market.[349] Imperial Foods in Hamlet, North Carolina, was in the residual market at the time of its fire that killed twenty-five people;[350] it was, therefore, receiving a subsidy from safer employers for its reprehensible, and ultimately deadly, activities.

2. Externalization of Costs. The underlying workers' compensation paradigm never intended that workers be fully compensated for the cost of their injuries. Because all occupational injuries are supposed to be compensated in this system—not only those that are the result of a wrong committed by the employer—workers simply have no fundamental legal claim to full compensation. Therefore, injured workers themselves, their families, and the public are expected to contribute to the costs of workplace injuries.

This sharing of costs occurs in numerous ways. First, many occupational injuries and illnesses are simply never compensated at all. As noted above, workers do not receive compensation for many occupational illnesses.[351] In addition, to the extent that injured workers are discouraged from filing claims for eligible injuries, or choose not to file them, they are, in effect, choosing to absorb directly the costs associated with

348. In this kind of mandatory market, when the primary goal is to assure compensation to victims, "denying coverage for losses caused by breach of safety standards could be viewed as undesirable." ABRAHAM, *supra* note 269, at 60. As a result, the residual market provides the insurance coverage; once insured, the enterprise's right to continue operating is also assured.

349. In 1990, Texas adopted workers' compensation reform that allows the cancellation of policies of employers in the residual pool if they fail to carry out safety recommendations of the assigned carrier's safety engineer. Huff, *supra* note 335, at 25. Note, however, that Texas is one of the few states in which workers' compensation insurance is not mandatory.

350. William Hager, *Time to Act: Examining Workers' Compensation*, 93 BEST'S REV., Nov. 1992, at 47, 48 (noting also that

> the chicken-processing company apparently had little interest in employee safety: It had no fire-prevention equipment, conducted no fire drills and lacked an evacuation plan. Moreover, the company was in the residual workers' compensation market—it was unable to find an insurer willing to underwrite its coverage. By being in the residual market, this unsafe employer got the insurance industry and, indirectly, other employers to subsidize its risk.)

351. Refer to notes 89-93 *supra* and accompanying text.

the injury themselves.[352] Obviously, costs associated with uncompensated occurrences are entirely externalized; workers or other social benefit programs absorb these costs.

Second, even for those injuries and illnesses which are compensated, a worker's full pecuniary losses are not replaced by compensation benefits.[353] To the extent that compensation is inadequate, and higher wages have not already provided compensation for the risk of injury at work, injured workers themselves absorb the costs of injuries.[354] Although wage

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352. Refer to note 101 *supra*. The general issue of underreporting of claims is discussed in part III.C *infra*.

353. Workers' compensation provides partial wage replacement plus medical costs. Lost income itself only constitutes slightly over half of a worker's pecuniary losses. Priest, *supra* note 12, at 1654.

354. To the extent that workers' wages are reduced when employers assume the costs of compensation, workers always pay, indirectly, for the cost of workers' compensation benefits; therefore, employers only nominally pay for the system. The theoretical basis for the argument that workers actually benefit only minimally (if at all) from compensation benefits lies in an analysis of market equilibrium. To the extent that wage levels reflect hazards and costs of injuries, then compensation for injuries may have been provided on an *ex ante* basis to workers. In the perfect world, alteration of the liability scheme should cause a renegotiation, in this case of wage rates, which will yield an equivalent equilibrium without an increase in costs to either participant in the bargain. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960) (stating Coase's original theorem that, in the absence of transaction costs, changes in liability schemes should not result in a change in the underlying bargain). However, transactional costs generally overwhelm this equilibrium; the task then becomes to identify and analyze these costs. *See generally* Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989) (noting the operation of transaction costs in the context of employment).

In the context of workers' compensation costs, the role of compensating wage differentials which may be paid for hazardous work becomes a central concern. *See* MOORE & VISCUSI, *supra* note 258, at 60-68, 162 (concluding that a substantial wage offset is generated by the provision of benefits and that wage offsets exceed premium costs so that the workers' compensation system "does not place a financial burden on firms"); Smith, *supra* note 7, at 572 (noting studies which question whether *ex ante* payments fully compensate for *ex post* losses). "For purposes of analysis, an employee's wages in a particular job can be thought of as the sum of the wage that would prevail for that job if there was no danger and a premium which compensates for the danger associated with the job." James R. Chelius, *Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems*, 5 J. LEGAL STUDIES 293, 295 (1976). To the extent that the wage differential is assumed to compensate adequately for the level of hazard, and other forces do not interfere, the provision of compensation should result in a reduction of the hazardous work premium in the wages; therefore, the employer's costs should be unchanged. Workers then will be financing the system through reduced wages since the availability of benefits eliminates the need for the wage premium. Professor Weiler has noted this same phenomenon in another way when he points out that workers' compensation benefits are largely financed by workers, whose wages and benefits are reduced in order to finance increasing payroll-based premium costs. Weiler, *supra* note 234, at 848 n.62.

On the other hand, the economic model which concludes that wage premiums compensate workers adequately for the performance of hazardous work is subject to considerable criticism; there is a substantial question as to whether compensating wage differentials are set at the appropriate level. *See, e.g.*, Susan Rose-Ackerman,

replacement for temporarily disabled low wage workers may approach net wages in many states,[355] the adequacy of wage replacement as a percent of pre-injury earnings declines as wage rates rise. In the most common benefit structure, workers receive two-thirds of their pre-injury gross earnings up to a maximum of 100% of the state average weekly wage;[356] as a result, workers who earn more than 150% of the state's average wage will collect less than two-thirds of their own wage. The level of wage replacement is therefore least adequate for the highest wage workers, who may work in the most dangerous jobs. The traditional high risk construction and mining jobs are all in this category.[357] For example, in 1992, construction workers earned, on average, $537.70 per week[358] and miners earned $638.31 per week;[359] these workers would have collected a maximum of $400 in weekly temporary total disability benefits in Alabama, $328 in Arizona, $252 in Arkansas, $250 in Georgia, $336 in Idaho, and so on.[360] Thus, the degree of adequacy of compensation for an injury declines as the overall wage—and often the level of hazard of the industry—increases.

Moreover, despite the fact that the aggregate amount spent on permanent disability is high,[361] permanent partial disability payments rarely approximate the full amount of loss

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Progressive Law & Economics—And the New Administrative Law, 98 YALE L.J. 341, 355-57 (1988) (arguing that the differential is inadequate and that other forms of regulation of workplace hazards are needed). Certain highly hazardous industries, particularly in the agricultural sector, exhibit low wage scales despite the high level of risks for workers. Job scarcity and worker ignorance regarding hazards are primary factors which decrease the likelihood that adequate wage premiums will fully compensate for hazardous work. To the extent that combined wage premiums and workers' compensation costs fail to provide full compensation, then costs are externalized.

355. According to one study, 75% of all temporarily disabled claimants retain 80% to 100% of their regular after-tax income. Hylton & Laymon, *supra* note 255, at 175 n.276 (citing KAREN R. DEVOL, INCOME REPLACEMENT FOR SHORT-TERM DISABILITY: THE ROLE OF WORKERS' COMPENSATION xi-xiii (1985)).

356. U.S. CHAMBER OF COMMERCE, *supra* note 121, at 20-23 (showing that the maximum temporary total disability benefit ranges from 70% of the state average weekly wage in Arkansas and Oklahoma to 200% in Iowa; the majority of states cap these benefits at 100% of the state average weekly wage).

357. EMPLOYMENT AND EARNINGS 1993, *supra* note 300, at 91-93 tbl. C-1.

358. *Id.* at 91 (average weekly earnings for all construction workers nationally).

359. *Id.* (average weekly earnings for miners nationally).

360. These weekly benefit amounts have been calculated based upon information regarding percent of wages and weekly benefits limits provided in U.S. CHAMBER OF COMMERCE, *supra* note 121, at 20-23. In a few states, benefits would have been substantially higher. For example, in Iowa, the most generous state for this category, the maximum benefit is 80% of spendable (net) pre-injury wage up to a maximum of 200% of the state average weekly wage, or $755 in 1992.

361. Refer to note 67 *supra*.

in future wages.[362] Permanent total disability benefits do not come close, in some states, to compensating for a family's loss of income.[363] Fatalities are sometimes compensated least adequately.[364] In essence, this means that more serious injuries and illnesses may be compensated less adequately than less serious ones.

Thus, the level of benefits provided to injured workers, and particularly seriously injured workers in dangerous, high wage industries, does not approach the full economic loss suffered by these workers and their families. This problem is exacerbated by the fact that most states do not allow the rate of benefits in any particular award to escalate with inflationary trends;[365] in the majority of jurisdictions the benefit rate set at the time of the award applies for the duration of the award. The adequacy of compensation for more severe injuries therefore declines over time. Again, this affects high wage workers in hazardous industries most adversely. Although the National Commission in 1972 strongly recommended some escalation of

362. The permanent partial disability amount for scheduled injuries, for which statutes set a specified level of compensation, varies a great deal among states. For example, loss of a hand is "worth" $18,472 in Massachusetts but pays $193,788 in Connecticut. In contrast, the more liberal federal compensation system for federal employees pays $304,727 for loss of a hand. U.S. CHAMBER OF COMMERCE, *supra* note 121, at 24. In some states, but not others, loss of a hand may lead to a permanent total disability award if the injured worker then becomes unable to work. In many states, the amount of compensation for permanent disabilities is also tied to an individual's wage rate; statutory maximum benefit levels apply to this category of benefits as well. Therefore, high wage workers receive less adequate benefits for permanent disabilities as well as for temporary ones.

363. Permanent total disability awards are limited to amounts as low as $164,000 in Indiana; $125,000 in Kansas; $102,000 in Mississippi; $196,530 in South Carolina; $127,296 in Tennessee. *Id.* at 22-23. The majority of states do not set an absolute cap on these awards, however.

364. Fatality benefits are paid to surviving spouses and children and generally cease upon remarriage. The benefit amounts are limited to a maximum number of weeks in some states. The total benefit is also capped in many states; the amount limits range from $95,000 (spouse only) in California to $228,500 (spouse and children) in Michigan. *Id.* at 26-27.

365. *Id.* at 20-23. Although most states now tie the maximum benefit to the state average weekly wage, in order to avoid the need for legislative approval for increases, individual benefit awards themselves do not escalate in most states. States which do make at least some provision for inflation within awards include: California, Connecticut, Hawaii, Idaho, Illinois, Maine (for injuries before January 1, 1993), Maryland, Minnesota, Montana, New Hampshire, Rhode Island, South Dakota, Texas (three percent annually only for benefits given for life), Vermont, Virginia, and Washington. *Id.* Even these states limit escalation in a number of ways. For example, in some, inflation adjustment does not begin until two or more years after eligibility for benefits commences. West Virginia, which is not listed as a state with escalation in the U.S. Chamber of Commerce publication, allows benefits to escalate only after they become capped by the maximum benefit; at that point, they can move upward as the cap itself escalates.

benefits, most states have resisted this proposal because of the enormous increase in actuarially calculated incurred losses when benefits escalate annually.[366]

Third, nonpecuniary losses are never compensated by workers' compensation programs. Benefits are plainly limited to wage-loss protection, loss of earning capacity,[367] and rehabilitation costs and medical treatment.[368] Pain and suffering is noncompensable in this system. Furthermore, family members are not compensated for any of their economic or other losses associated with a worker's injuries.[369]

Fourth, workers' compensation benefits are often reduced by receipt of benefits from other sources, including both social insurance programs and private disability and sickness plans.[370] Rules of assignment and subrogation also lead to reductions in benefits when injured workers obtain recovery in civil actions.[371] Irrespective of the employer's contribution to

366. Hylton & Laymon, *supra* note 255, at 178 n.293.

367. Permanent partial disability benefits, which are calculated in a variety of different ways, are generally intended to compensate for future loss of earning capacity or loss of mobility in the labor market resulting from the injury and the ensuing permanent disability. In some states, the benefit is calculated based on loss of future earnings; in others, it is based on a quantification of functional loss (generally referred to as whole man impairment). The theoretical justification for paying this benefit, which is unrelated to actual time off work, is the same. *See* 1C LARSON, *supra* note 65, § 57.14, at 10-69.

368. SOMERS & SOMERS, *supra* note 34, at 59.

369. 2A LARSON, *supra* note 65, § 66.20, at 12-89, 12-92, 12-98, 12-103; Weiler, *supra* note 259, at 831. Moreover, until the Family and Medical Leave Act (FMLA) became effective in mid-1993, family members who cared for injured workers could be terminated from unemployment. The Family and Medical Leave Act now provides a right to a 12 week *unpaid* leave for individuals who work for employers with 50 or more employees and who must miss work in order to care for an injured or ill family member. 29 U.S.C.A. §§ 2611-2612 (West Supp. 1994). This minimal level of job security does not, however, resolve the issue of uncompensated costs for occupational injuries and illnesses.

370. For example, to the extent that injured workers become unemployed or unemployable as the result of permanent disabilities, other social insurance and social welfare systems provide alternative sources of non-wage income. These benefits may be offset against a workers' compensation award, if one was received, resulting in a lower benefit to the injured worker. *See, e.g.*, W. VA. CODE § 23-4-23(b) (Supp. 1993) (reducing workers' compensation permanent total disability benefits when Social Security old-age benefits, wage continuation, or private disability benefits are received); GA. CODE ANN. § 34-9-243 (Michie 1992) (reducing workers' compensation benefits by the employer funded portion of a disability or other wage contribution plan); MICH. COMP. LAWS ANN. § 418.354 (West 1993) (reducing workers' compensation benefits by employer funded portion of a self-insurance, wage contribution, or disability plan, and one-half of old age social security benefits); OR. REV. STAT. § 656.240 (1991) (deduction for sick leave payments only).

371. Rules governing recovery in third party civil actions brought by workers, most commonly against manufacturers of equipment or toxic substances used in the workplace, almost universally provide for subrogation. Except in Ohio, Georgia, and West Virginia, the employer or insurer is given a statutory lien against the

the harm, the employer's costs are thus reduced by the injured worker's ability to obtain alternative sources of income or damages.[372]

To the extent that full internalization of costs increases any incentive effects of compensation systems, workers' compensation plainly does not maximize this effect. The process of cost spreading in workers' compensation is a fundamental reflection of the underlying workers' compensation paradigm, which presumes that employers are not to blame for occupational injuries. The goal in designing the distribution of costs in workers' compensation is to create an efficient system which *limits*, but does not obliterate, the adverse impact of the injuries on any of those involved. The decision to have employers pay for the cost of compensation but to limit the amount of that compensation, serves this function. Within this framework, workers' compensation has been successful in meeting its goals.

The substantial increase in aggregate costs paid by employers has resulted in increases in cost for individual employers and engendered a concern which tends to focus on the distribution of costs. When employers argue that benefits should be decreased, they are in effect arguing in favor of a system which would decrease their internalization of costs and, symmetrically, increase workers' contribution. This argument is bolstered by the view that workers are responsible for increasing costs.

employee's tort rights to secure reimbursement of workers' compensation benefits. Weiler, *supra* note 259, at 836. As a result of these subrogation rights the self-insured employer or the workers' compensation insurer will recoup their costs associated with the workplace injury from the worker's recovery in the third party litigation, irrespective of the employer's contribution to the harm. This is true despite the fact that a federal study of product liability in the mid-seventies found that employer negligence was present in one quarter of all product liability suits brought by injured workers. *Id.* at 837 (citing Jonathan M. Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035, 1039; W. Kip Viscusi, *The Interaction Between Product Liability and Workers' Compensation as Ex Post Remedies for Workplace Injuries*, 5 J.L. ECON. & ORG. 185 (1989)). These rules are designed to prevent double recovery by the worker but may, instead, prevent full recovery. Workers, having been inadequately compensated by workers' compensation, are often also not fully compensated for losses in this third party litigation; this may be particularly true when these suits are settled prior to trial. The absolute right of subrogation that prevails in most states therefore prevents full recovery by workers.

372. As Professor Paul Weiler has noted, these subrogation rules "make little sense" when they effectively insulate an employer who is culpable of grossly negligent or reckless behavior. *Id.* at 854. Furthermore, the success of third party litigation has taken pressure off employers and the workers' compensation exclusivity doctrine. *Id.* at 828-29.

C. *The Effect of the Employment Relationship*

The no-fault workers' compensation system, which insulates employers from recognition of their responsibility for workplace safety, also engenders claims that worker behavior is the primary cause of skyrocketing costs. The resulting worker-at-fault paradigm further confounds any discussion of the relationship between costs and prevention of injuries, as prevention becomes equated with cost containment and cost containment efforts focus on worker, rather than employer, actions.[373]

Injured workers are not victims of torts committed by strangers; instead, workers are caught within an unequal employment relationship which influences their decisions regarding when, or whether, to file workers' compensation claims. The nature of the employment relationship itself therefore has a significant influence on the ability of workers' compensation costs to encourage primary prevention of injuries.

1. *Roots of the Worker-at-Fault Paradigm.* The argument that worker, rather than employer, behavior is the primary cause of cost escalation has its roots in the idea that the occurrence of injuries, the filing of claims, and the persistence of disability all lie within the independent control of workers. Several studies which have found a correlation between increases in claims filing activity and increases in mandated benefit levels have provided support for this view.[374]

373. We tend to assume that deterrence depends upon the internalization of cost and an accompanying understanding that primary deterrence will efficiently reduce costs. If employers can successfully force reduction in costs, by legislative action or by influencing filing of claims, then the likelihood they will pursue primary prevention of injury and disease declines. This is particularly true because claims-reducing activity may be less expensive than injury-reducing activity in many instances, especially if no economic value is placed upon the animosity that grows between employers and employees as a result of aggressive scrutiny of claims by employers.

374. Refer to note 18 *supra* for a list of these studies. All of these studies show that increases in filing of claims occur when benefits are increased. The studies conclude, based on this evidence, that increased benefits *cause* increases in claims filing. This conclusion regarding causation is not directly supported by the evidence in the studies.

As noted above, several studies also conclude that, although incentives to reduce injury rates do exist in the system, any actual reduction in injuries is obliterated by the increases in claims filing. *See, e.g.*, Ehrenberg, *supra* note 18, at 71, 95 (noting "[t]hat a positive relationship between frequency and benefits is observed implies that employees' responses to higher benefits dominate, on balance, over employers' responses"); Butler & Worrall, *Moral Hazard*, *supra* note 15, at 201-02 (concluding that real injuries do not increase but that the moral hazard effect is predominant).

Commentators have proposed two different explanations for this apparent relationship: that increased benefit levels lead to decreased attentiveness to safety and therefore increased rates of injury; and that increased benefit levels simply encourage the filing of more claims.

a. Workers-at-fault I: Unsafe worker behavior. The first explanation (that increases in benefits lead to increases in injury rates) assumes that higher disability payment levels tend to remove workers' economic incentive to prevent injuries. According to this view, workers suffer more injuries (and more severe injuries) because higher benefits diminish the economic risk associated with injury and result in lowered vigilance against injury. There are, therefore, more true injuries due to relaxation of worker attentiveness as a result of benefit increases.[375] This conclusion, drawn from the observed increases in compensation claims associated with increasing benefits levels in the 1970s, led the authors of the 1987 *Economic Report of the President* to conclude that "workers' compensation benefits have unfavorable effects on safety."[376] Thus, in this model, investigators (and employers) point to worker carelessness or lack of risk aversion as a primary cause of injuries and, therefore, claims. These investigators therefore

375. *See, e.g.*, Butler, *supra* note 18, at 61, 86 (concluding "accident rates do appear responsive . . . to changes in the structure of benefits"); Chelius, *Incentive to Prevent Injuries*, *supra* note 18, at 154, 158-60 (observing that claims rise as benefits rise and concluding that higher benefits are associated with higher injury rates); Ehrenberg, *supra* note 18, at 86 (summarizing other studies as "strongly suggest[ing] that increases in workers' compensation benefits are associated with higher injury and claim rates, with at least some fraction of the increase being a pure 'reporting' or 'classification' effect"); Worrall, *supra* note 18, at 11 (noting that the "message of a growing body of research is that higher benefits will bring not only greater costs for the cases already being compensated but also more claimants and, perhaps, more work injuries . . . ."). Chelius states that "[w]hile it is obviously a value judgment as to how much weight to place on the prevention goal as opposed to the income security goal of workers' compensation, it is important to recognize that there is a conflict between them." Chelius, *Incentive to Prevent Injuries*, *supra* note 18, at 154, 158-60. In other words, Chelius is arguing that workers may be better off with lower levels of benefits because they will injure themselves less frequently. At least one recent study indicates that real injury rates do not rise. Butler & Worrall, *Moral Hazard*, *supra* note 15, at 201.

The investigators who conclude that injury rates (as opposed to claims filing rates) rise in this situation ignore the strong economic disincentives for workers to incur injuries, in view of the lack of complete compensation, including inadequacy of weekly benefits for high wage workers. They also ignore the non-economic disincentives for all workers to be injured or disabled. *People in general, I think,* dislike being hurt, dislike staying home when they are accustomed to going out, and dislike the psychological stress that temporary or permanent disability imposes on the family.

376. ECONOMIC REPORT OF THE PRESIDENT, *supra* note 18, at 197.

lend support to the view that improvements in occupational safety hinge upon changes in worker behavior.

This focus on worker-causation of injuries has interesting historical roots. Although the safety movement which emerged early in this century initially targeted changes in industrial process,[377] by the late 1940s this approach was overtaken by the view that further cost effective engineering improvements were not possible.[378] This change in prevention strategies is, of course, inconsistent with the views of most modern safety experts;[379] it nevertheless haunts current discussions of workers' compensation cost containment, which often focus on worker rather than the employer behavior in the prevention of injuries.[380] Successful loss control firms[381] direct their attention to "unsafe acts rather than unsafe conditions."[382] The frequently expressed frustration of managers that workers are inadequately safe, and the continuous exhortations in industrial workplaces for workers to act safely, are a reflection of this

377. Refer to part III.A *supra*.

378. SOMERS & SOMERS, *supra* note 34, at 202-05 (concluding that the possibilities of improving prevention through engineering change had been exhausted by the 1940s).

379. Refer to notes 9-10 *supra*. Notably, in contrast with the Somers' assessment of prevention opportunities, in 1949 Dr. John E. Gordon suggested that injuries behaved like classic infectious diseases and were therefore amenable to primary prevention strategies. NAT'L COMM. FOR INJURY PREVENTION AND CONTROL, INJURY PREVENTION: MEETING THE CHALLENGE 7 (1989). His contribution and that of others shifted injury prevention away from an "early, naive preoccupation with distributing educational pamphlets and posters and toward modifying the environments in which injuries occur." *Id.* "The last folklore subscribed to by rational men is the belief that injuries are accidents." *Id.* at 12. As noted in Part II *supra*, modern public health approaches attempt to remove human error as a factor in causation. This approach is also consistent with the findings of the Upjohn Report, *supra* note 7, at 9, 14, and the California Insurance Study, *supra* note 7, at 97, 100-02, both of which indicate that a *considerable number of serious hazards which result in costly workers'* compensation claims can be eliminated through engineering controls on a cost effective basis.

380. According to the CDC's Occupational Injury Panel, "[T]here has been much emphasis on workers' behavior as the cause of injury and a corresponding tendency to blame the worker, often incorrectly." CDC Injury Report, *supra* note 9, at 344.

381. These firms offer consultative services to employers and insurers which are designed to reduce the number and size of an insureds' claims. In the workers' compensation context, loss prevention or loss management firms offer services relating to primary prevention or to claims cost containment (such as medical cost containment or early return to work programs), or both. The goal of these services is a reduction in claims *costs*; this is not *necessarily* associated with a reduction in injuries. Thus, "because the workers' compensation market is a nightmare for many insurers, anything an agency can do to improve the risk profile of clients helps." Novak, *supra* note 53, at 32.

382. *Id.*

view.[383] According to one industry representative, "Unsafe acts carried on by employees statistically cause 96% of all industrial accidents."[384] Thus, in this paradigm, the workers' compensation crisis could be solved, if only workers would be more careful.

b. Workers-at-fault II: Claims filing behavior. The second explanation offered for the correlation between increased benefits and increased claims filing activity is simply that the number of claims (i.e., reports of injuries) rises when benefits rise: that is, the number of claims filed may be dependent on the number which workers *choose* to file (a reporting effect), not

383. Psychological theory provides a partial explanation for this. In exploring "irrational" behavior in safety and health, William T. Dickens identified several psychological sources for apparent irrational behavior. William T. Dickens, *Occupational Safety and Health and "Irrational" Behavior: A Preliminary Analysis*, *in* WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY, *supra* note 29, at 20-21. Dickens observes that people have both a tendency to attribute more control over a particular event to other people involved than they see themselves as having ("the fundamental attribution error") and a tendency to interpret events as having a single cause. *Id.* at 27. He then notes, "[t]ogether, these two tendencies may lead individuals to see accidents as being primarily the fault of the person who has the accident, rather than being, at least in part, a result of the working conditions at a plant." *Id.*

384. Novak, *supra* note 53, at 35. *Needless to say*, this statistic is pure fantasy; there is no way this fact can be statistically proven. The quotation is simply offered here as an example of rhetorical hyperbole. The quote is attributed to Robert Seltzer, president and chief executive officer of Cohen-Seltzer, a loss prevention agency with more than $3 million in annual revenues.

This is not a new idea. The Somers relied on similar numbers to reach their conclusion that the possibilities for engineering controls had been exhausted. SOMERS & SOMERS, *supra* note 34, at 202. "H.W. Heinrich, one of the most prominent safety engineers in the country, maintained as early as 1931 that 88 *per cent [sic] of all accidents* were caused primarily by the unsafe acts of persons. . . ." *Id.* at 203. Heinrich's research was based on an analysis of 75,000 cases but "is still a point of heated debate among safety experts." *Id.* at 203 n.12. The same research is referred to in a congressional report issued in 1985. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 19, at 7. "In the 1920s, a researcher concluded that nearly 90 percent of injuries were due to workers' 'unsafe acts' and 10 percent to 'unsafe conditions.' Although this ratio of 'unsafe acts' to 'unsafe conditions' is often referred to, it is not supported by other research." *Id.*

In contrast to this view, the current systems approach to management focuses on workplace conditions, not individual acts. A "systems approach has gained renewed emphasis with companies looking to emulate the success of many Japanese companies by adopting a Total Quality Improvement system based on the principles of Dr. W. Edwards Deming." California Insurance Study, *supra* note 7, at 99. "Dr. Deming noted that 'approximately 94 percent of incidents can be related to deficiencies in the overall working environment, which is the responsibility of management.'" *Id.* This statement is also impossible to prove. The question is, of course, one of emphasis; although worker error certainly may contribute to the occurrence of some injuries, the systemic approach would create an environment in which human error is less likely to result in injury.

on the number of injuries which actually occur.[385] This flexibility in the filing of claims tends to be viewed in one of two ways.

First, political critics of workers' compensation programs often argue that increases in benefit levels simply encourage worker to file fraudulent[386] or frivolous claims. Some commentators therefore suggest that benefit adequacy should be tempered to avoid this moral hazard.[387] To the extent that an increase in claims filing is viewed as a reflection of an increase in the filing of unnecessary claims,[388] employers are encouraged to reduce costs by discouraging their employees from filing these claims or by challenging them through aggressive litigation once they are filed.

Of course, allegations of fraud are "long on anecdotes but

385. In this view, workers are simply more likely to seek benefits when the benefits are larger. *See, e.g.*, Butler & Worrall, *Moral Hazard*, *supra* note 15, at 201 (concluding that "rising benefits may lead to more claims at the same time that they lead to fewer injuries"); Ehrenberg, *supra* note 18, at 82-84 tbl. 4.1 (summarizing prior studies and noting that it is impossible to separate out a reflection of increase in injury rates and how much is merely a reporting effect); Smith, *supra* note 7, at 573-79 (summarizing various studies that show a relationship between increases in benefits and in numbers of claims filed and noting the elasticity in employee claims for benefits).

386. Fraud in this context means the filing of claims which involve lies. *See* Burton (1993), *supra* note 2, at 9 (stating that fraud involves schemes whereby uninjured workers collect workers' compensation benefits by concocting evidence or by fabricating medical evidence). For example, workers may claim they have disabilities that in fact do not exist, or that their disabilities were caused by injuries at work when in fact the injuries occurred at home. This is different from claims involving real injuries and real disabilities for which a worker may choose whether or not to file for benefits, depending on the circumstances.

387. *See* Chelius, *Control of Industrial Accidents*, *supra* note 18, at 700, 717; Ehrenberg, *supra* note 18, at 95 (suggesting that employer incentives can be improved without increasing moral hazard by increasing employer costs but not the level of benefits, and using the excess revenue to fund safety and health programs). These commentators do not focus primarily on the adequacy of benefits for injured workers, of course.

388. In keeping with the studies that regard the increased frequency of claims filing as a manifestation of moral hazard (which is presumptively to be avoided), claims that appear ambiguous are unwelcome in the system. To the extent that a worker is, in truth, eligible but not "needy"—at least in the eyes of the insurer or employer—any claim filed may be viewed as a reflection of moral hazard which needs to be corrected. Of course, need in the context of disability is often ambiguous. *When the need for a job outweighs the need for benefits, workers may fail to* file legitimate claims. As benefits rise, workers may assess these risks differently. These claims are not fraudulent: they do not involve the manufacturing of disability where none exists or the inappropriate linkage of disability to occupational etiology. These "excessive" numbers of claims may involve workers' assessments that it is worth filing claims for disabilities which are legitimately eligible for compensation.

virtually devoid of verified data."[389] It is certainly possible that improved levels of current benefits, and the availability of medical benefits without deductible or co-insurance costs, may increase some fraudulent behavior.[390] It is unlikely, however, that truly fraudulent behavior is sufficiently epidemic, or that it has increased so substantially in recent years, that it can provide a primary explanation for rising levels of compensation costs. Unfortunately, the fact that charges of fraud often dominate public discussions about workers' compensation tends to antagonize injured workers and their representatives and to shift the focus of employers and legislators away from underlying problems and toward creation of fraud units and benefit reduction strategies.[391]

The alternative explanation for increases in claims filing activity is that workers with compensable injuries are filing claims which they may have previously chosen not to file, particularly when benefits were low and other risks were perceived to be high.[392] The number of claims actually filed

389. Burton (1993), *supra* note 2, at 9. Arguments that fraud is ruining the system seem to have a particular attraction within the framework of workers' compensation political debates, just as they do in debates regarding social welfare programs. Attacks on benefit levels or eligibility criteria for social programs are easier to countenance if the people who are excluded from the programs are perceived to be malingerers and cheats.

390. In fact, workers' compensation experts who do not credit fraud as a primary explanation for current behavior feel compelled to offer a disclaimer: It is, of course, understood that fraudulent claims are likely to represent some component of claims. *See id.* at 8-9. I offer the same disclaimer. Nevertheless, the extent to which unquantifiable fraudulent behavior is the focus of social policy discussions about workers' compensation is, in my opinion, unjustifiable.

391. Refer to note 495 *infra* and accompanying text for a discussion of recent legislation on these issues.

392. In other words, workers who are injured have a right to benefits which they forego in certain circumstances. Obviously, the issue of entitlement is a problematic one. Entitlement programs provide certain benefits to people who have the prescribed status necessary for eligibility; eligibility does not end because budgeted funds are inadequate to provide benefits to all of those who are eligible. Welfare programs, for example, may provide benefits to people simply on the basis of need (food stamps, for example) or on the basis of need plus membership in a targeted class (such as single parent with young child to qualify for Aid to Families with Dependent Children). Workers' compensation is an entitlement program in the sense that it guarantees benefits to anyone who meets the eligibility requirements. Just as with other entitlement programs, many people publicly denounce those who meet eligibility requirements and who exercise their right to the benefits; this is largely a reflection of our societal commitment to work as the primary mechanism for redistribution of wealth and a general societal antipathy for redistribution based upon other factors, particularly need. *See* STONE, *supra* note 230, at 15-28. Stone discusses the preference for work-based redistribution modalities and notes that "[a]ll societies have at least two distributive systems, one based on work and one on need, whose coexistence is a thorny problem in social policy and political theory." *Id.* at 15. "The tension between the two systems based on work and need is the fundamental distributive dilemma." *Id.* at 17.

In the context of this discussion, it is important to remember that workers' compensation is a social insurance, not a social welfare, program; entitlement is based upon both the relinquishment of legal rights (by providing employers with a heavy mantle of immunity) and of proof of eligibility. Refer to note part III.A.4 *supra*.

for benefits may never be wholly representative of the underlying universe of true injuries: injuries and illnesses can simply go unreported. If illnesses and injuries go unreported at one benefit level, the result of an increase in benefits may be that previously unreported injuries are reported, not that more injuries occur.[393]

2. *Factors Affecting Workers' Decisions to File Claims.* It seems clear that workers themselves do make decisions regarding whether or not to file claims when they suffer compensable injuries. Reluctance to file claims may, of course, decline as benefits increase.[394] Workers' decisions are unlikely,

393. As noted in Part II *supra*, injuries are notoriously underreported by employers. Although there is a tendency to assume that a system involving self-reporting by workers will have a greater degree of accuracy, it is questionable whether workers file all claims in which they might be entitled to benefits. Refer to note 101 *supra*. In at least two specific studies involving workers who have been diagnosed with occupational diseases, the investigators found that the majority of eligible workers did not file for workers' compensation benefits. *Id.* This is consistent with findings in other compensation and social welfare systems; studies have consistently found that many people who might have reasonable claims for compensation or benefits do not institute them. For example, "[i]n 1970 only 69% of eligible families participated in Aid to Families With Dependent Children and only 38% of eligible individuals participated in the Food Stamp program." John J. Donohue III, *Diverting The Coasean River: Incentive Schemes To Reduce Unemployment Spells*, 99 YALE L.J. 549, 600 n.118 (1989) (citing Moffitt, *An Economic Model of Welfare Stigma*, 73 AM. ECON. REV. 1023, 1023 (1983)). Similarly, the Harvard Medical Practice Study found that fewer than one patient in eight who was injured by negligent medical care instituted a claim for compensation. THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK (1990) (reporting that out of 27,179 negligence injuries, only 4,000 of these generated tort claims); *see also Our Malpractice System: Money Ill-Spent*, NEWSDAY, Apr. 4, 1990, at 61 (stating that 98% of the patients who suffer negligent injury in hospitals in New York never file a lawsuit).

394. This is true whether or not high wage replacement rates affect workers' underlying work ethic. Yelin notes:

> The social policy debate . . . revolves around the question of whether, in the absence of definitive medical criteria ('absolute need'), individuals choose disability rather than work. The competing images of choice and need are rarely joined in disability research . . . . [C]hoice models will be found wanting because they postulate a set of behaviors which are risky. Individuals may not estimate their future incomes accurately when they face the decision to leave work, because disability benefits constitute an important part of their expected income and the process of filing for benefits is long and, to judge from the record, the outcome quixotic. Reasonable people would be cautious in deciding to leave work now on the expectation that they will

however, to be based exclusively on an assessment of the economic worth of benefits. Other characteristics of the workers' compensation system also influence this decision-making process. For example, both the complexity of paper work involved in filing claims[395] and the potential for not receiving benefits[396] contribute to workers' reluctance to file claims.

Ultimately, a worker's decision will be affected by that individual worker's knowledge of the availability of benefits, the severity of the injury and resulting disability, his or her assessment of the likelihood of success in litigation, and an evaluation of the additional risk entailed in filing a claim. Factors extrinsic to the workers' compensation system itself will therefore play an important role in influencing workers' claims filing behavior. Post-injury risks are not limited to the possibility of future reinjury or of losing the claim: for those individuals who hope to return to work, a *primary* risk is that of loss of respect at work, of actual job loss, or of other retaliation by the employer. Somewhat remarkably, discussions of the elasticity in claims activity have generally failed to explore the impact of the employment relationship, in particular the real or perceived risk of employer retaliation for seeking benefits, on the decision by workers to file claims. These discussions also rarely address the level of worker ignorance regarding benefit entitlement or the impact of changes in work organization on the ability of older workers to continue to work after an injury.[397]

Whether workers choose to take time off from work and for how long depends on a variety of both objective and subjective factors; disability is, to some extent, both a flexible and socioeconomic phenomenon.[398] To the extent that workers are capable of continuing to work, and to the extent that they fear adverse consequences at work, they may choose not to file

receive adequate income later. Furthermore, choice models emphasize the negative incentives of high replacement rates to the exclusion of the strong countervailing force of the work ethic. That replacement rates are easily measured, while commitment to work is not, does not excuse this oversight. Yelin, *supra* note 18, at 625.

395. Smith, *supra* note 7, at 576.

396. Yelin, *supra* note 8, at 637.

397. *But see* EDWARD H. YELIN, DISABILITY AND THE DISPLACED WORKER (1992) [hereinafter YELIN 1992] (concluding that the growth in the work disability rate and decline in labor force participation are tied to changes in the industrial structure of the advanced economies; these changes make it increasingly difficult for disabled older workers to find new jobs).

398. *See generally* STONE, *supra* note 230; RICHARD V. BURKHAUSER & ROBERT HAVEMAN, DISABILITY AND WORK (1982); ROBERT HAVEMAN ET AL., PUBLIC POLICY TOWARD DISABLED WORKERS (1984).

claims when they are injured at work.[399] In addition, claims for permanent partial disability benefits may not always involve periods of inability to perform work; many impairments, particularly those resulting from occupational illnesses, may involve progressive development of a disability without a temporary acute stage in which the worker is totally unable to work. Because these claims are intended as compensation for impairment or loss of potential future earnings, workers can often easily forego these benefits in the interests of maintaining a "good" relationship with management. "Good" workers become those employees who do not file claims, even when they meet the eligibility requirements for benefits.[400]

The law and dynamics of the specific employment relationship itself, as well as the law of workers' compensation or the levels of statutory benefits, thus directly influence the costs of workers' compensation programs. If risk of retaliation is high (or perceived to be high), and benefits are low, claims will not be filed and true injuries will not be reported. Underreporting becomes a primary characteristic of such a system.

The implications of this are three-fold. First, the economic and political equilibrium of the workers' compensation system prior to the 1970s may have been built on the chronic underreporting of claims.[401] This means, of course, that

399. This is, indeed, rational behavior on the part of workers. Similarly, when *unemployed workers in Illinois were offered bonuses as an incentive to return to the* workforce, many of those who were eligible never claimed them. Donohue, *supra* note 393, at 554. Despite noting that a bilateral monopoly relationship may be created by the employment relationship, Donohue nevertheless fails to recognize the inherent level of transaction cost in any "negotiation" between worker and potential employer. *Id.* at 555-56. In a reply, Robert Ellickson explored the problems for a worker called upon to tell a potential employer about the offer of the bonus, noting that the transaction costs in such an arrangement are high. Ellickson, *supra* note 236, at 617-18. Participants in the experiment identified stigma as the primary reason for failing to participate; the employees did not want to be identified by their employers as participants in the program. *See id.* at 625. "That many bonuses went uncollected may indicate not irrationality and inefficiency but that workers and employers responded intelligently to the reality of transaction costs." *Id.*

400. This characterization appears to be adopted in the Upjohn Report, which describes low claims employers as being "much more successful in avoiding injuries that extend into compensable claims," suggesting that these employers "manage work-related disability factors" more effectively. Upjohn Report, *supra* note 7, at III-15.

401. As noted above, underreporting is a common characteristic of liability and social welfare systems. Refer to notes 101 & 254 *supra*. Most systems which provide benefits or compensation to the injured, the disabled, or the poor appear to achieve economic equilibrium based upon an underfiling of claims. The financial equilibrium maintained prior to the 1970s in workers' compensation systems may very well have been a reflection of this underreporting phenomenon. In contrast, the current crisis

current costs may be a truer, albeit more expensive, reflection of underlying injury rates.

Second, to the extent that workers perceive the threat of retaliation to be reduced and the worth of the benefits to be increased, they will file greater numbers of claims although injury rates may remain constant or even decline. The nature of the distribution of power within the employment relationship, and the perception of this distribution of power, are therefore a secondary and inadequately evaluated variable within any discussion of workers' compensation costs. The result of increasing employee rights within the employment relationship is likely to be an increase in the filing of claims.

Third, to the extent that employers are motivated by workers' compensation costs to change their behavior, they can decrease aggregate and enterprise-specific costs by discouraging the filing of claims without improving the underlying conditions in the workplace. The employer's ability to affect claims filing behavior is directly tied to the inequality of the employment relationship. The "culture" of the workplace, as discussed in the Upjohn report,[402] and not *safety*, therefore becomes the primary, rather than a secondary, cause of workers' compensation claims and costs. As a result, employers may direct their efforts toward claims management rather than primary prevention of injuries.

3. The Influence of Employment Law on Workers' Claims Filing Activity. The history of the law governing the employment relationship gives credibility to the notion that the risk of filing workers' compensation claims has declined over the past twenty years. As noted above, the original workers' compensation compromise made no pretense of amending the legal terms of the employment relationship.[403] The employment-at-will doctrine—that peculiarly Anglo-American application of individual freedom to the contract of

in workers' compensation is similar to the crisis in medical malpractice, which *is, in part, a reflection* of an increase in claims filed; in the past, injured individuals did not pursue their remedies. The fiscal component of the welfare crisis is likewise partially a reflection of the pervasiveness of poverty and the willingness of those who meet eligibility *criteria to file for* benefits. The cost crisis in workers' compensation may thus be a result of increasing numbers of injured workers filing for benefits *to which they are entitled as the result of occupational illness and injury.*

402. Upjohn Report, *supra* note 7, at I-7 to I-8.

403. Refer to notes 228-30 *supra* and accompanying text.

employment[404]—remained in full force after the enactment of the compensation laws. The equal right of either the employer or the employee to terminate the contract resulted in the well known formulation which better mirrors the underlying power relationship: the employer was free to fire an employee for a good reason, a bad reason, or no reason at all. The employee was, of course, free to quit.[405] The employment-at-will doctrine accorded employers full autonomy over decisions regarding terms, conditions, and continuation of employment, unless explicitly limited by individual contract.

The passage of workers' compensation laws did not impinge upon the employer's control over the workplace; the obligation of the employer to the injured employee was fully discharged by the provision of social insurance. Workers who received workers' compensation benefits had no legal claim to retain their jobs.[406] Employers retained the right to determine when

404. Wood's Rule is the basis for the employment-at-will doctrine:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it a yearly hiring, the burden is upon him to establish by proof. A hiring at so much a day, week, month or year, no time being *specified*, is an *indefinite hiring*, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). Or, as stated by the judiciary, "men must be left, without interference . . . to discharge or retain employees at will for good cause or for no cause, or even for bad cause . . . ." Payne v. Atlantic R.R., 81 Tenn. 507, 518 (1884).

Much has been written regarding Woods' rule and whether it was properly rooted in preexisting employment law. Except as an academic exercise and a study of legal creativity, this hardly matters. What is remarkable, of course, is the rapidity and zeal with which Woods' rule was adopted by the judiciary.

405. As Professor Fran Ansley recently noted, this symmetry brings immediately to mind Anatole France's memorable aphorism: "The law, in its majestic equality, *forbids the rich as well as the poor to sleep under bridges, to beg in the streets,* and to steal bread." Ansley, *supra* note 242, at 1786 n.91.

406. One famous labor law case, United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960), illustrates this point well. Larry Sparks was injured at work and settled his workers' compensation claim against his employer's insurer for a 20% award for permanent partial disability. *Id.* at 566. He then sought to return to work, relying on the seniority he had accrued under a labor agreement between his employer and the United Steelworkers of America. *Id.* The company refused to rehire him and refused to arbitrate its decision with the local union. *Id.* American Manufacturing's position, in a nutshell, was that Sparks had collected compensation and was due nothing further. *Id.* at 564. The District Court held that Sparks, having accepted the settlement on the basis of permanent partial disability, was estopped from claiming any seniority or employment rights and granted the employer's motion for summary judgment. *Id.* at 566. The Court of Appeals *affirmed, holding* "the grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." *Id.* The Supreme Court, in reversing and ordering arbitration (and thus establishing the fundamental commitment to labor arbitration in American labor law), nevertheless viewed Sparks' quest for employment in this context as frivolous. *Id.* at 567. No record can be found of the final outcome of

an absence would lead to discharge, irrespective of the cause of the absence.[407] This lack of obligation to the injured *worker as worker* was consistently applied: irrespective of the length of the period of absence resulting from the disability, whether the injured employee had recovered from the injury and could perform the functions of the job, or whether the job was vacant. No public or judicial sanctions awaited employers who terminated any worker thought to be medically unfit, irrespective of the etiology of the disability. Workers could be terminated because they were injured at work or filed claims for workers' compensation. If the injury resulted in any significant permanent level of disability, workers were almost certainly excluded from the workforce. Employees' rights were exclusively limited to those benefits available from compensation programs.

Some change came with the passage of the National Labor Relations Act,[408] but the employment-at-will doctrine remained largely intact for the majority of workers.[409] Federal employment legislation has tended to provide specific protection to categories of workers or to address particular problems;[410]

Mr. Sparks' arbitration case.

407. *See* Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 552 n.7 (1986) (providing a list of cases in which the plaintiff had no cause of action after being fired for filing a workers' compensation claim prior to 1973). This is, of course, consistent with the employment-at-will doctrine.

408. 29 U.S.C. §§ 141-187 (1988 & Supp. IV 1992). Collective bargaining agreements negotiated pursuant to the National Labor Relations Act (NLRA) provided significantly improved job security for unionized workers; these agreements generally have been less aggressive in addressing health and safety hazards in the workplace. *See* BASIC PATTERNS IN UNION CONTRACTS 7, 33, 127-28 (13th ed. 1992) (showing that, out of the contracts analyzed, 98% required cause or just cause for discharge and 100% contained grievance and arbitration clauses; while 88% had some safety and health language, this language was often limited to very general statements regarding responsibilities for maintaining safe workplaces). Bargaining regarding health and safety did not become a serious component of labor negotiations until relatively recently.

409. As noted above, the courts were reluctant to approve substantive intervention into the employment relationship prior to the New Deal. Refer to notes 237-42 *supra* and accompanying text. Even the passage of the NLRA failed to provide significant protection to many workers. Collective bargaining never reached a majority of American workers; even at the post World War II peak, only 34.7% of workers were unionized. MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10 tbl. 1 (1987). As of 1990, that figure had declined to 16.1% of the total civilian workforce and only 12.4% of the private sector workforce. 38 EMPLOYMENT & EARNINGS 228-29 tbls. 57 & 58 (Jan. 1991). Moreover, most states continue to retain at least a modified commitment to the employment-at-will doctrine.

410. Prior to the 1960s, legislation which intervened directly into the employment relationship (in contrast to providing social insurance protection to workers) focused either on the creation of collective bargaining rights or on wage and hour issues. The Fair Labor Standards Act, another component of New Deal legislation, provided

these laws do not fundamentally alter the at-will relationship.

In 1973, the year after the National Commission on State Workmen's Compensation Laws issued its report, a state court for the first time endorsed the creation of a public policy against retaliatory discharge for the filing of workers' compensation claims.[411] In carving out this exception to the traditional employment at will doctrine, the Indiana court in *Frampton v. Central Indiana Gas Co.*[412] said:

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for a federal minimum wage, additional compensation for overtime work, and strict regulation of child labor. 29 U.S.C. § 201 (1988). Wage and hour laws were "aimed at the margins of economic life, setting only minimum standards for the wage contract, and not otherwise interfering with its terms." Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 591 (1992).

In the sixties, Congress confronted the specific issues of discrimination in the workplace in the Equal Pay Act, 29 U.S.C. § 206 (1988), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e to 2000e-17 (1988 & Supp. IV 1992). While these statutes demonstrated signs of a new legislative willingness to intervene directly into the employment relationship, they were also limited in scope.

Congress also responded to calls for improved workplace safety and health by passing the Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (later superseded by the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1988)), and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-78 (1988), signalling to workers that they were entitled to work in workplaces free from recognized hazards. Protection against retaliatory discharge for exercising safety rights was included in this federal legislation. 30 U.S.C. § 815 (1988) (provisions prohibiting retaliation for safety activity in the mines under the Mine Safety and Health Act); 29 U.S.C § 660(c) (1988) (prohibiting retaliatory discharge for safety activities in general industry under the Occupational Safety and Health Act). These occupational safety and health laws did not, however, provide general job security guarantees to workers.

411. Until the mid-seventies, most state courts had not adopted any general limitations on the employment-at-will doctrine. Although a California court had endorsed a public policy exception to the at-will doctrine in 1959, Petermann v. International Brotherhood of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959), few states followed immediately thereafter. Cases challenging discharges for the filing of workers' compensation claims were among the first public policy wrongful discharge torts generally endorsed by the state courts. By 1988, courts in 32 states had adopted public policy restrictions on the right of employers to dismiss at-will employees. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13-14 (1988). By 1992, that number had grown to 42; 33 states had upheld wrongful discharge actions based upon a contract theory when an employer had violated its policies, handbooks, or other representations; and 13 states recognized a cause of action for breach of the covenant of good faith and fair dealing in employment at will cases. Clyde W. Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 458 n.5 (1992) [hereinafter Summers (1992)].

412. 297 N.E.2d 425 (Ind. 1973). Dorothy Frampton had injured her arm while working. According to the court's summary of the underlying facts, her employer, Central Indiana Gas Co., and its workers' compensation insurer paid her hospital and medical expenses, as well as her full salary, during the four months she was unable to work. It is interesting to note that Indiana workers' compensation law does not require the payment of full salary. IND. CODE ANN. § 22-3-3-22 (Burns 1992). It appears from the facts that these benefits were paid to Frampton in lieu of

> [I]n order for the goals of the [Workers' Compensation] Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—*opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.*[413]

Frampton was followed by a flood of retaliatory discharge cases involving allegations of retaliation for filing workers' compensation claims.[414] Currently, virtually every state has

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workers' compensation, perhaps to dissuade her from filing a workers' compensation claim. The court notes that neither employer nor the insurer informed her that further benefits might have been available. 297 N.E.2d at 426. When Frampton did return to the job, she performed capably. *Id.* Approximately 19 months after the injury, her employer and its insurer were notified of a 30% loss in the use of Frampton's arm which entitled her to permanent partial disability benefits. *Id.* "Although hesitant to file a claim for fear of losing her job she did so, and received a settlement for her injury. About one month later she was discharged from her employment without reason being given." *Id.* In other words, it was the fact that she pursued a claim for *permanent partial* benefits that apparently precipitated her discharge.

413. 297 N.E.2d at 427 (emphasis added). It appears the motivation of the Indiana court, and the many courts that followed its lead, was not to establish vested rights to employment, but rather to defend workers' statutory rights to apply for compensation benefits. Thus, although restricting employers' control over termination of the employment relationship, the underlying principle was to guard the integrity of the compensation program.

414. *E.g.*, Gonzales v. City of Mesa, 779 F. Supp. 1050 (D. Ariz. 1991) (applying Arizona state law); Wal-Mart Stores, Inc. v. Baysinger, 812 S.W.2d 463 (Ark. 1991); Springer v. Weeks & Leo Co., 475 N.W.2d 630 (Iowa 1991); Lathrop v. Entenmann's, Inc., 770 P.2d 1367 (Colo. Ct. App. 1989); Smith v. Piezo Tech. & Professional Adm'rs, 427 So. 2d 182 (Fla. 1983); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978); Wolcowicz v. Intercraft Indus. Corp., 478 N.E.2d 1039 (Ill. App. Ct. 1985); Peru Daily Tribune v. Shuler, 544 N.E.2d 560 (Ind. Ct. App. 1989); Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 630 P.2d 186 (Kan. Ct. App. 1981); Sventko v. Kroger Co., 245 N.W.2d 151 (Mich. Ct. App. 1976); Lally v. Copygraphics, 428 A.2d 1317 (N.J. 1981); Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984); Brown v. Transcon Lines, 588 P.2d 1087 (Or. 1978) (en banc); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980); *see* Theresa L. Kruk, Annotation, *Recovery for Discharge from Employment in Retaliation for Filing Workers' Compensation Claims*, 32 A.L.R.4TH 1221 (1984) (providing a summary of state law cases in this area). In addition, 22 states enacted statutes which made it explicitly unlawful to dismiss an employee in retaliation for filing a workers' compensation claim. Van Wezel Stone, *supra* note 410, at 592; *see also* Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97, 112 (1992) (noting that the most common state anti-retaliation statutory provisions pro-

endorsed a public policy against retaliatory discharge involving workers' compensation in either case law or a specific statute.[415] These cases involve plaintiffs who want to continue to work after filing or litigating a workers' compensation claim, but who were terminated after filing claims for compensation. The courts in these cases have explicitly endorsed the idea that workers should not be forced to choose between filing for benefits and retaining their jobs. In many of these cases, plaintiffs sought to return to work while they were still receiving workers' compensation benefits;[416] this litigation belies the notion that workers prefer to choose not to work when benefits are available.

Other rights for injured or physically impaired workers have followed. After many years of political agitation by and on behalf of disabled people, the Americans with Disabilities Act (ADA)[417] substantially expanded the rights to employment and reemployment of people injured at work.[418] Now, people with serious work-induced disabilities, who are often able to

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hibit retaliation against or discharge of employees who file workers' compensation claims); Theodore J. St. Antoine, *The Twilight of Employment at Will? An Update*, *in* FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE (William F. Dolson ed., 1985) (stating "[t]he most frequent situation in which employees have been discharged for exercising legal rights involves the filing of workers' compensation claims").

Given the volume of this litigation, it was not surprising that it was in a workers' compensation wrongful discharge case that the Supreme Court held that retaliatory discharge claims arising under state law are not preempted under the labor laws if they do not involve rights which arise out of a collective bargaining agreement. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 412-13 (1988). Under the *Lingle* decision, terminated employees who were covered by collective bargaining agreements may proceed both with arbitration under their labor agreements and with their tort claims; the tort claim is not preempted. *Id.* Notably, discharge claims involving other factual patterns are often held to be preempted. *See* Van Wezel Stone, *supra* note 410, at 607-09.

Wrongful discharge claims involving workers' compensation often involve complex facts in which the claimant raises issues of disability discrimination or the employer alleges that the discharge arose from enforcement of a facially neutral absence policy which treated workers' compensation absences in a manner no different from other absences. Plaintiffs often lose these latter claims. *See* Dana S. Connell & Frederick L. Schwartz, *Effective Handling of Health-Related Leaves of Absence*, 18 EMPLOYEE REL. L.J. 103 (1992) (listing the holdings in a variety of states regarding terminations for filing workers' compensation claims or for absences related to work-related injuries).

415. *See* Rothstein, *supra* note 414, at 103; Van Wezel Stone, *supra* note 410, at 591-93.

416. *See, e.g.*, Hartlein v. Illinois Power Co., 601 N.E.2d 720 (Ill. 1992); Sventko v. Kroger Co., 245 N.W.2d 151 (Mich. Ct. App. 1976); Schubbe v. Diesel Serv. Unit Co., 692 P.2d 132 (Or. Ct. App. 1984); Wallace v. Milliken & Co., 406 S.E.2d 358 (S.C. 1991).

417. 42 U.S.C. § 12101-12213 (Supp. II 1990).

418. *See generally id.* § 12101(a)-(b).

perform the essential functions of their jobs, may not legally be denied reemployment because of their disabilities. The ADA and other disability discrimination laws prohibit the exclusion of individuals from work opportunities because they have filed prior workers' compensation claims,[419] or because of speculative concerns about future risk of reinjury[420] or increased workers' compensation costs.[421] The Family and Medical Leave Act of 1993[422] further expands the right of injured workers to reinstatement following a temporary period of disability.[423]

Increases in the filing of compensation claims appear to track the documented and publicized increases in the employment rights of work-injured people.[424] The new legal protections for injured workers, including common law public policy claims, disability discrimination laws, and expanded workers' compensation statutory protection against discharge, provide significantly increased protection for disabled workers. These legal developments remove decisions regarding medical fitness of previously injured workers from complete managerial discretion. They also expand the scope of judicial and public inquiry into management decision-making.

The thesis seems obvious, once stated: levels of filing of compensation claims reflect, at least to some significant extent,

419. An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 334, § 9.1. After an offer is made, an employer may ask about this history in the context of a medical examination which is designed to determine whether the individual is capable of performing the essential functions of the job without posing a significant risk of substantial harm to the safety of himself or herself or others. *Id.* §§ 6.2, 6.4, 9.1.

420. 29 C.F.R. § 1630.2(r) (1993) (stating that exclusion of an individual "shall be based on an individualized assessment of the individual's *present* ability to safely perform the essential functions of the job").

421. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 334, § 9.1 (stating that "[a]n employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future").

422. Pub. L. No. 103-3, 107 Stat. 6 (1993); 29 U.S.C.A. §§ 2601-2654 (West Supp. 1994).

423. Although the primary purpose of the Family and Medical Leave Act was to protect the right of workers to take time off from work to care for others, the Act also extends the right to a twelve week unpaid leave to workers who are themselves suffering from a serious health condition which incapacitates them from performing their jobs. *See* 29 C.F.R. §§ 825.112(a)(4), .200(a) (1993).

424. In 1983, Professor Clyde Summers reviewed the changes in the employment-at-will doctrine over the preceding ten years and declared, "[t]he forgotten men and women are no longer forgotten." Clyde Summers, *Individual Rights in the Workplace: The Employment-at-Will Issue: Introduction*, 16 U. MICH. J.L. REF. 201, 202 (1983). It seems, however, that the rapid erosion of the employment-at-will doctrine has slowed considerably after this initial decade of change.

actual or perceived levels of job security for injured workers. If benefits are low and job security is minimal, workers are unlikely to file for benefits. As employees perceive both job security and benefit levels to increase, claims are likely to increase and more closely reflect the true injury rate.

This thesis is supported by evidence that more compensation claims are filed in unionized than in similar non-union workplaces.[425] Some commentators believe this phenomenon is due to the fact that more dangerous companies may be more likely to be unionized.[426] This explanation ignores two essential differences between unionized and non-union workplaces. Unionized workers are likely to have a knowledgeable representative who can advise them on their rights to compensation, reducing worker ignorance.[427] Perhaps more importantly, unionized workers have substantial job security under enforceable provisions against unjust dismissal which appear almost universally in collective bargaining agreements.[428] Unionized workers can therefore file compensation claims with significantly less fear of retaliation.

Despite expansion in legal protection, however, non-union at-will employees continue to be subject to retaliatory actions by employers. Inequalities of power in the employment relationship continue to discourage workers from reporting safety hazards or injuries.[429] Workers continue to work in

425. *See, e.g.*, Butler & Worrall, *Workers' Compensation: Benefit and Injury Claims Rates in the Seventies*, *supra* note 18, at 586-87.

426. Evidence indicates that there is greater activity around safety in unionized workplaces. David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20, 26-27 (1991) (noting that unionized workplaces are more likely to receive safety and health inspections by agencies such as OSHA). Weil concludes that "[i]mplementation of OSHA therefore seems highly dependent upon the presence of a union at the workplace." *Id.* at 20. On the other hand, a business executive from Michigan has noted that outside regulatory agency activity is a

> measure of employees' attitudes . . . . If you have a lot of employees calling MIOSH [Michigan OSHA], the Department of Health, the Bureau of Workers' Disability Compensation, and the civil rights agencies, or you have a lot of inspections other than routine walkarounds, I think you can assume there is something wrong, there is some attitude problem out there. Most organizations, whether they are union or non-union, are going to set up a system to prevent outside intervention.

Meade, *supra* note 144, at 76.

427. See Weil, *supra* note 426, at 22 for a discussion on the more highly informed nature of workers in unionized job settings.

428. Refer to note 414 *supra*.

429. The story surrounding the fire at the Imperial Foods chicken processing plant in Hamlet, North Carolina, although perhaps an extreme case, provides a troubling illustration of this phenomenon. The fire that swept through the Imperial plant on September 3, 1991, left 25 dead and 56 injured and the remaining 164 employees without jobs after the plant closed. Kilborn, *supra* note 76, at A1. The

dangerous jobs, often because they lack options.[430] Despite specific legal protections available to at-will employees, employers can still legally discharge injured workers who are unable to perform their jobs because of a work-related illness or injury.[431] Courts have upheld the right of employers to

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deaths and injuries were directly related to the fact that the doors to the plant were kept locked; the workers could not get out as the fire spread. *Chicken Plant Owner Gets Jail for Fatal Blaze*, L.A. TIMES, Sept. 15, 1992, at A16.

Imperial, an Atlanta-based firm, was Hamlet's largest industrial employer. The workers knew that the jobs were dirty, dangerous, and low paid; the wage was $5.50 per hour. Kilborn, *supra* note 76, at D11. Nevertheless, no complaints about conditions at the plant were made by the workers. *Id.* "Workers said they did not raise complaints about safety because they wanted to keep working. 'People kept quiet for fear of their jobs,' said the Rev. Harold C. Miller, pastor of the First Baptist Church in Hamlet and president of the ministerial alliance." *Id.* Despite two previous fires, the plant was never inspected by any agency responsible for the workers' safety. *Id.*

According to government inspectors who investigated, the fire was the result of the plain failure of the company to provide a reasonably safe working environment for its employees. *Chicken Plant Owner Gets Jail for Fatal Blaze*, *supra*, at A16 (noting the plant manager's mandate that several plant doors and exits be padlocked or blocked shut). An investigation by the U.S. House of Representatives Labor Committee found that the company was preoccupied with profits and productivity and "appears to have recklessly violated a host of OSHA regulations."

Nevertheless, workers were publicly blamed for their own deaths. One state safety official, Bradford Barringer, member of the North Carolina Occupational Safety and Health Advisory Council said, "I imagine they stole chickens just as fast as they could go. . . . If there had been more honest employees, those doors probably wouldn't have been locked." *Official Accuses Workers in Doomed Plant of Theft*, ORLANDO SENTINEL TRIB., Nov. 22, 1992, at A10.

Ultimately, the plant was shut down. *Owner of Chicken Plant That Burned Balks at Fine*, ORLANDO SENTINEL TRIB., Jan. 24, 1990, at A10. Following the imposition of fines in excess of $800,000, Imperial filed for bankruptcy. *Id.* The company's president denounced the imposition of the 59 willful health and safety violations that resulted in these fines as "simply absurd." *Id.* The workers and their families did ultimately settle with Imperial's three insurers for $16.1 million. *Tentative Plant Fire Settlement*, WASH. POST, Nov. 7, 1992, at A2. Just six weeks after the fire, the North Carolina Supreme Court expanded the availability of civil damages for intentional torts to situations in which the outcome is "substantially certain" to have occurred. Woodson v. Rowland, 407 S.E.2d 222, 228-30 (N.C. 1991); refer to note 247 *supra*. The plant owner, Emmett Roe, ultimately pleaded guilty to 25 counts of involuntary manslaughter and was sentenced to a 19 year, 11 month prison term. This post-catastrophe legal outcome is significantly different from the result reached in the case involving Pymm Thermometer. Refer to note 216 *supra*.

430. Increasingly few options exist for industrial and mine workers in the face of global competition. *Cf.* Ansley, *supra* note 242; YELIN 1992, *supra* note 397. As Nicholas Ashford notes, "[w]orkers often do not know of the hazards they face, or are too weakly organized to take action, or are afraid of losing their jobs in a world of high unemployment." ASHFORD, *supra* note 9, at 391.

431. Neither state retaliatory discharge law nor disability discrimination law at the federal or state level provides a universal prohibition on discharge of injured employees. For example, in most states, absence associated with a work-related injury can lead to discharge if the employer is utilizing a "neutral" absence control policy in making the termination decision. *See, e.g.*, Chiaia v. Pepperidge Farm, Inc., 588 A.2d 652, 656 (Conn. App. Ct. 1991); Pericich v. Climatrol, Inc., 523 So. 2d 684,

relocate or close a plant, or threaten to do, in order to avoid workers' compensation costs.[432] Moreover, cases involving

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685 (Fla. Dist. Ct. App. 1988); Hess v. Clarcor, Inc., 603 N.E.2d 1262, 1273 (Ill. App. Ct. 1992); Slover v. Brown, 488 N.E.2d 1103, 1105 (Ill. App. Ct. 1986); Kern v. South Baltimore Gen. Hosp., 504 A.2d 1154, 1159 (Md. Ct. Spec. App. 1986); Clifford v. Cactus Drilling Corp., 353 N.W.2d 469, 471 (Mich. 1984); Johnson v. Moog, Inc., 494 N.Y.S.2d 152, 154 (App. Div. 1985); Metheney v. Sajar Plastics, Inc., 590 N.E.2d 1311, 1313-14 (Ohio Ct. App. 1990); Pierce v. Franklin Elec. Co., 737 P.2d 921, 924-25 (Okla. 1987); Johnson v. Saint Francis Hosp., Inc., 759 S.W.2d 925, 926-29 (Tenn. Ct. App. 1988); Palmer v. Miller Brewing Co., 852 S.W.2d 57, 62 (Tex. App.—Fort Worth 1993, writ denied); Wilmot v. Kaiser Aluminum & Chem. Corp., 821 P.2d 18, 31-32 (Wash. 1991); Yoho v. Triangle PWC, Inc., 336 S.E.2d 204, 210 (W. Va. 1985). *See generally* Connell & Schwartz, *supra* note 414 (providing a summary of the law in this area).

The legal protection provided to injured workers under the Americans with Disabilities (ADA) is also limited. Those workers with serious injuries resulting in disabilities which require more accommodation than is deemed 'reasonable' may receive no protection under the disability discrimination laws. *See* 29 C.F.R. § 1630.2(o) (1993) (defining "reasonable accommodation"). Workers whose injuries are not sufficiently severe may also not receive any protection: an employee must have an impairment which "substantially limits" his or her ability to perform a "major life activity," or be regarded as having such an impairment, in order to be considered disabled within the meaning of the ADA. 29 C.F.R. § 1630.2(g)-(j) (1993). A worker who is off work due to an occupational injury for a short period of time is not disabled within the meaning of the Act. *See id.* § 1630.2(m). Injuries or illnesses which result in an inability to perform the worker's own job, but not a broad class of jobs, also may not be considered disabilities. *Id.* § 1630.2(j). In its Interpretive Guidance to this rule, the Equal Employment Opportunity Commission notes:

> For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, *e.g.*, the class of semi-skilled jobs.

EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R. § 1630.2(j), at 404 (1993).

Before the passage of the disability discrimination laws, employers were also free to deny employment to applicants upon learning of past or pending workers' compensation claims. *See, e.g.*, Stoker v. Furr's, Inc., 813 S.W.2d 719, 723-24 (Tex. App.—El Paso 1991, writ denied) (holding that neither a wrongful discharge suit nor an employment discrimination suit can be brought under the Texas Workers' compensation statute in the absence of an existing employer/employee relationship); Rothstein, *supra* note 414, at 112 (noting that most states' proscriptions against retaliation against employees for filing workers' compensation claims apply only to current employers and do not extend to subsequent employers).

432. Unida v. Levi Strauss & Co., 986 F.2d 970 (5th Cir. 1993). According to the court, the plaintiffs in this case argued:

> Levi Strauss' decision to close the plant was partly motivated by high workers' compensation costs at the San Antonio plant. They argue that this evidence, if it had been properly considered by the district court, raises a genuine issue of material fact. Again, we disagree. Levi Strauss concedes that its decision to close the San Antonio plant was due to high costs that included high workers' compensation costs. This *undisputed* fact, however, is immaterial to the question of whether the subclass of terminated employees who had engaged in workers compensation activities was somehow discriminated against by Levi Strauss' decision to close the entire plant and dis-

individual claims of discriminatory or retaliatory action are difficult to prove. Workers, as plaintiffs, have the burden of proof; proof of intent, even if derived inferentially, is not always easy to obtain.[433]

Legal protection for individual non-union workers is, therefore, still limited in scope. Despite the increases in compensation claims filed in recent years, workers are still vulnerable to pressure not to file claims for compensable injuries and diseases.[434] Prospects for successful reinstatement in unorganized workplaces, even with expanded employee rights, are notoriously bleak.[435] Retaliatory discharge lawsuits are a useful tool primarily for professionals, managerial, and other upper income workers.[436] Thus, common law procedures and

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> charge all employees. At most, the Plaintiffs have demonstrated that they were treated differently because they worked at the San Antonio plant.

Id. at 979 n.6. The court also states:

> [A]n employer cannot, in our view, engage in discrimination . . . merely by closing an entire plant and discharging all employees—including those who have not engaged in any of the activities protected by [the workers' compensation discriminatory discharge statute]. After all, the word "discrimination" denotes a "failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." BLACK'S LAW DICTIONARY 467 (6th ed. 1990). We fail to see how an employer is discriminating against, or treating unequally, employees who have engaged in workers' compensation activities when the employer is similarly discharging employees who have not engaged in such activities.

Id. at 978-79.

433. *See, e.g.*, Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717, 721 (W. Va. 1991) (applying inferential proof pattern developed in cases arising under laws prohibiting discrimination based on race and gender to workers' compensation discriminatory discharge claim).

434. *See, e.g.*, Slover v. Brown, 488 N.E.2d 1103, 1104 (Ill. App. Ct. 1986) (reiterating testimony by an employee that her employer terminated her upon finding out she had filed a workers' compensation claim); Willoughby v. Gencorp., Inc., 809 S.W.2d 858, 859-60 (Ky. Ct. App. 1990) (noting a threatening conversation between an employee who had filed a workers' compensation claim and that employee's boss).

435. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 86-87 (1990). Statistics indicate that workers who have been discharged rarely achieve successful reinstatement as a result of litigation. Summers (1992), *supra* note 411, at 477-78. Summers notes two factors which deprive reinstatement of practical value for employees. First, there is excessive delay in resolution of claims, during which most discharged employees will find alternative employment. *Id.* Second, employees fear retaliation by their employer. *Id.* at 478. "The employer perception is that returning to the old job will not work out and the employer will find or manufacture some nondiscriminatory reason for dismissal or will make life on the job intolerable". *Id.* As a result, only 5% of those offered reinstatement through NLRB proceedings after six months returned to their old jobs. *Id.* at 477.

436. Summers (1992), *supra* note 411, at 467-68 (noting with regard to wrongful discharge cases that, "[b]ecause of litigation costs, all but middle and upper income employees are largely foreclosed from any access to a remedy for wrongful dismissal. This is apparent from the reported cases. Relatively few plaintiffs are hourly wage or clerical workers; the large majority are professional employees or are in middle

remedies rarely establish on-going job security for non-union workers in hazardous jobs.

The continuing flood of wrongful discharge litigation involving termination of people who have been injured at work reinforces the suspicion that retaliatory action against employees who file workers' compensation claims continues to be commonplace. Perhaps in reaction to the sheer quantity of retaliation suits, recent amendments to state workers' compensation laws have focused on improving the job security of injured workers.[437] Anecdotal evidence of retaliatory actions by employers also supports the view that employers still view the filing of claims or reporting of injuries as disloyal behavior by employees. *Workers, therefore, must evaluate the hazards of claims filing as well as the hazards of working.* Given the fundamental inequality of the relationship between employers and employees, workers cannot look only at the potential economic benefits of filing a workers' compensation claim in order function as rational economic beings within this relationship:[438] pursuit of short-term economic gain may result in long term economic and other loss.[439]

4. The Ability of Employers to Influence Workers' Decisions. It is no secret that employers want to reduce the costs associated with the provision of both mandated and voluntary insurance to workers. Inexpensive cost containment

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and upper management. Middle income employees with contract claims or modest tort claims who cannot make a substantial payment in advance will be discouraged by lawyers from pursuing their claims. Lower income employees without substantial tort claims will have difficulty finding a lawyer.").

437. For example, statutes requiring the rehiring of occupationally injured workers have been passed in Connecticut, CONN. GEN. STAT. ANN. § 31-313 (1987); Hawaii, HAW. REV. STAT. ANN. § 386-142 (1988); Montana, MONT. CODE ANN. § 39-2-901 to -914 (1993); Oregon, OR. REV. STAT. ANN. § 659.415, .420 (Supp. 1992); Wisconsin, WIS. STAT. ANN. § 102.35 (West 1991); and West Virginia, W. VA. CODE § 23-5A-3 (Supp. 1993). These legislative actions reflect underlying concern by groups who represent injured workers in the political process that job security has proven to be inadequate.

438. For an example of the description of this theoretically rational worker, see Butler & Worrall, *Workers' Compensation: Benefits and Injury Claim Rates in the Seventies*, *supra* note 18, at 586-89 (arguing that we can capture the essence of the employees' behavioral response by looking at a utility maximizing model in which employees weigh the utility of income received when they have an accident with the utility of income when they do not). As benefits increase or as wages decrease, the relative utility of being injured increases and the number of reported injuries should rise in this model of employee behavior. *Id.*

439. Workers may, therefore, be making perfectly rational decisions regarding both preferred economic and psychological outcomes. See Ellickson, *supra* note 236, at 621-24 (noting, with regard to the Illinois study, that the rejection of a cash bonus by soon-to-be-employed unemployed workers may have been a rational act).

(or, in insurance parlance, loss prevention) efforts often focus on the elimination of claims costs, not on injury prevention. Employers' ability to influence claims costs, independent of primary prevention, is dually rooted in the nature of the employment relationship and in the basic workers' compensation paradigm.

In this paradigm, the price that workers have paid for the availability of compensation is the loss of the right to bring common law suit.[440] This price is unvarying, cannot be quantified, and tends to be invisible. Workers are therefore generally viewed as having paid nothing for their compensation. The price paid by the employer, on the other hand, is contingent not upon the occurrence of injuries but rather upon the filing and resolution of claims; that is, it is determined by the activity of the employees in that enterprise and of the employees in similarly situated firms.[441] The benefit which the employer derives from this arrangement is immunity from suit. The employer, therefore, does not benefit from the increased costs which may result from increasing numbers of claims filed by its workers: that is, the employer does not buy more for the higher price.[442]

The employer's quest for decreased costs is therefore not tempered by the potential loss of some benefit. Because workers' filing of claims exhibits some elasticity, employers can save money by discouraging claims as opposed to preventing injuries. Costs would generally not increase without the occurrence of injuries; but cost escalation can be avoided without avoiding injuries. Prevention becomes equated with the prevention of *claims* (or the reduction of costs associated with claims) rather than the prevention of injuries. To the extent that workers are perceived to file excessive numbers of claims, it appears appropriate to discourage this behavior. Employers are therefore encouraged to defeat workers' compensation costs

440. Refer to part III.A.4 *supra*.

441. Refer to part III.B. *supra* for a discussion of the specific mechanisms for the distribution of price and cost in workers' compensation.

442. One caveat must be offered here. To the extent that any compensating wage differential resulting from hazardous work is reduced by the improved availability of compensation, employers' costs will decrease with improved availability of compensation benefits. I find this argument unpersuasive. The evidence regarding compensating wage differentials is by no means conclusive; there is no strong evidence that such differentials adequately compensate for increased risk in hazardous industries or jobs. Refer to note 354 *supra*.

by challenging all ambiguous or frivolous claims.[443]

The inequality of the underlying employment relationship enhances the ability of employers to influence claims filing activity. Employees rarely pursue litigation (other than union grievances) against employers while they remain employed. The intimacy of the relationship and the necessity for the appearance of trust, as well as the possibility of arbitrary exercise of power by the employer, tend to discourage the bringing of lawsuits. Workers' compensation forces the pursuit of litigation during the existence of this relationship; it is perhaps not surprising that claims for compensation often result in a breakdown of trust and an increase in suspicion between the parties. The more workers perceive loss of trust or of job as one possible outcome of pursuing compensation claims, the lower the likelihood they will pursue claims for compensation before they are terminated.

In view of this, employers can utilize a variety of means to discourage the filing of claims. These include, but are certainly not limited to, overt intimidation. Professor Terence Ison has pointed out that the more closely an employer's cost reflects its own experience, the more likely the employer will have an incentive to discourage claims.[444] Ison believes the rate-making process primarily encourages employers to oppose and

443. As a former workers' compensation administrator and a teacher of labor and employment law, I receive many solicitations for workers' compensation publications. A recent and typical one began as follows:

> Dear Colleague:
>
> The only way to control runaway workers' compensation is to challenge—and defeat—all claims that are
>
> * not work-related
> * frivolous
> * fraudulent
>
> Just letting one minor claim get through will result in an increase in insurance premiums that will cost you thousands of dollars.

Flyer from Quinlan Publishing Co. promoting WORKERS' COMPENSATION LAW BULLETIN to "business executives like yourself" received by the author September 26, 1993 (on file with author).

Professor Terence Ison notes that the workers' compensation insurance system often leads employers to challenge claims on the legally irrelevant basis that the disability resulted from the fault of the worker or that it resulted from circumstances outside the control of the employer. Ison, *supra* note 20, at 736. His views are echoed in the strategies proposed by loss control consultants.

444. Ison, *supra* note 20, at 727 ("It is assumed and asserted that the variation of assessment rates by reference to the safety performance of the firms concerned will create an incentive to improve the safety performance. Of course if the rates really were being varied by reference to safety performance the conclusion would follow; but . . . that is not the case. Rates are varied by reference to claims cost experience and other claims data, and variations in these figures will commonly have nothing to do with safety performance.").

discourage claims, rather than to promote safety.[445] He lists a variety of unintended and "nefarious"[446] consequences he believes will result from attempts to use the rate-making process to promote safety:

> 1. Discouraging workers from reporting claims.
> 2. Refusing to complete [the employer's report of injury] when requested to do so . . . .
> 3. Adopting a gimmick type of safety program which creates incentives for lower levels of management, or perhaps even for workers, to reduce recorded claims, possibly by creating peer group influence not to make a claim.
> 4. Delaying the completion of forms or omitting relevant information, thereby causing delays in the processing of a claim, perhaps causing the worker to turn to other sources of income . . . .[447]

This is not an exhaustive list. Other strategies include deliberately withholding information regarding a diagnosis of an occupational disease,[448] or otherwise hindering the diagnosis of these diseases;[449] the subcontracting out of hazardous work

445. *Id.* at 736 ("If an experience rating plan has any downward influence on costs, it is likely to be through the discouragement of claims, opposition to claims, and the confinement of benefits.").

446. *Id.* at 726.

447. *Id.* Professor Ison also notes: "Of course the monitoring of claims by employers is not always injurious. Like so many things in life, a certain amount of it can be beneficial while too much of it can be damaging. The problem with current systems of experience rating is that they promote the monitoring of claims by employers without creating any incentive to stop at the right amount." *Id.* at 725-26. But, he points out, "there is no way of measuring the harm that is done by experience rating." *Id.* at 738.

448. At least three states have removed the mantle of immunity from employers who have engaged in the fraudulent practice of hiding occupational disease diagnoses from workers whose disease is aggravated by continued exposure. Johns-Manville Products Corp. v. Contra Costa Superior Court, 612 P.2d 948, 950 (Cal. 1990) (holding that employee whose employer intentionally concealed the fact that he had contracted an industrial disease did have a cause of action for aggravation of his disease, although workers' compensation laws bar his common-law claim as to his initial injury); Millison v. E.I. duPont De Nemours & Co., 501 A.2d 505, 507 (N.J. 1985) (allowing an employee to recover for work-related injuries aggravated by continued exposure to asbestos when the employer deliberately concealed the risks of asbestos exposure from its employees); Martin v. Lancaster Battery Co., 606 A.2d 444, 446 (Pa. 1992) (holding that an employee of a battery manufacturer, whose blood test results were intentionally altered by his employer, resulting in more severe injuries to the worker due to continued exposure and lack of treatment, was not limited to a workers' compensation claim against his employer).

449. Employers have considerable control over information regarding occupational diseases. "[E]mployers have traditionally had almost exclusive access to medical and scientific data. In order to recognize that a certain disease is occupationally related, one must know both the medical histories of workers and the hazards they face. Without both sets of facts, it is generally impossible to draw conclusions about the etiology of disease. Employers have been in the best position to detect and publicize

to "independent contractors";[450] employee leasing schemes in which an employer's own employees may be converted into employees of legitimate, or fraudulent,[451] external entities; institution of programs which give bonuses either to individual workers who remain "accident-free"[452] or to departments or plant managers which "charge back" savings from reduced

many disease problems. However, such publicity might well leave the employer open to substantial workmen's compensation claims and to new demands by labor. Thus, the employer's liability may lead to the suppression of information crucial to the detection and prevention of disease." ASHFORD, *supra* note 9, at 408.

Workers currently have the right to information regarding occupational hazards under the OSHA Hazard Communication Rule. 29 C.F.R. 1910.1200 (1993). The effectiveness of this rule is limited by several factors, however. Nonunion workers often lack the technical assistance necessary to interpret environmental studies. Data generated in large plants are voluminous and difficult for local unions to interpret without substantial professional assistance (which is rarely available at a price they can afford). Employers are only required to create relevant information which is required by OSHA standards. Workers' access is guaranteed only to information that is generated as a result of compliance with these rules or information which is voluntarily produced.

450. Ison, *supra* note 20, at 728-29. In West Virginia, many petrochemical plants subcontract a substantial amount of dangerous work. A story will best illustrate the result of this process. Some years ago, when I was teaching an evening class on occupational safety and health to industrial relations students at a state college in Southern West Virginia, I assigned groups of students to research a number of the large petrochemical plants in the Kanawha Valley of West Virginia. One group, which was assigned to the local DuPont facility (a company which is nationally renowned for its successful safety program), interviewed the plant manager who, proud of his safety record, reported that no serious lost time injuries had occurred there in a substantial period of time. Their report was challenged in class by an older student who was a member of the Laborers Union and who worked at the DuPont facility for a subcontractor. He said that a worker had been killed at the plant and that other serious injuries had occurred, all within the prior year. These injured workers were, however, employees of the subcontractor, not of DuPont. The death and injuries therefore did not appear in DuPont's statistics. This practice of subcontracting is commonplace. It is generally justified on the basis that the subcontracted jobs require special expertise which the company lacks. DuPont itself maintains that subcontractors are informed regarding DuPont's health and safety practices and are told to conform to them.

451. In some cases, employee leasing firms seem to have been designed solely to exploit rate-making rules. For example, "an employer forms an employee leasing firm, assigns all his employees to it and then leases them back again. This usually occurs when the experience modification of the principal firm soars well above unity. Through this accounting maneuver, the experience modification drops back to 1.0, even though nothing else has changed." Hager, *supra* note 13, at 122. This occurs because new firms are always assigned a modification factor of 1.0. *Id.*; *see also* Barry Meier, *Some 'Worker Leasing' Programs Defraud Insurers and Employers*, N.Y. TIMES, Mar. 20, 1992, at A1 (describing how a number of employee leasing firms have become defunct, owing injured workers millions in compensation benefits).

452. This practice is becoming more commonplace. One example is given in the California Department of Insurance report: "Western Parcel Express places drivers on a bonus system to receive $125 for each month they are accident free." California Insurance Study, *supra* note 7, at 60. The report suggests this as a positive approach to safety. *Id.*

compensation costs to specific departments or operations within corporations;[453] disciplinary programs for workers who are involved in accidents;[454] threats to close a plant if workers' compensation claims costs do not decline, or closing a plant for this reason;[455] or simply increasing the level of litigation in challenging the filing of claims.[456] Many of these approaches

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453. For example, charge-back programs are used in grocery store chains to allocate to stores or divisions the costs of occupational injuries. "Grocery store executives claim this has been effective in focusing attention on safety considerations and perhaps in reducing the number of accidents. At Safeway Stores, the 'charge-back' program is credited with reducing the incidence rate of injuries by 40% between 1987 and 1991." *Id.* at 90.

454. For example, in 1988, Consolidation Coal Co., a major U.S. coal producer, established a "safety program" which informed workers that, if they were involved in repeated accidents, they would be subject to discipline. Consolidation Coal Co., Internal Memorandum, Safety Approach to Accident Prevention for High Experience Employees (on file with author). Employees with two or more *recordable* accidents during an 18 month period would be counseled:

> A meeting will be held with the Mine Communication Committee to advise them of the following:
>
> . . . .
>
> E. We will advise them [high experience individual workers] that their continued poor safety performance will not be tolerated . . . .
> F. We will be looking very closely at each new accident with all employees.
> G. Based on circumstances of each subsequent accident after counseling the high experienced people, action ranging from 2-4 hours of retraining to suspension and/or discharge may occur.
>
> . . . .
>
> I. This is a new approach to safety and preventing accidents by making high experienced employees more aware of working safely . . . . Our intent and purpose is to help correct poor safety performance, *not to punish.*

Id. In the introduction to another related memorandum, the Senior Vice President wrote, "Today I want to share my concern and take a close look at the accidents you have suffered. While there may be some things that we can do, I want you to review your own accidents to see what you could have done to prevent your accident. Also, what you are going to do to prevent a reoccurrence." Consolidation Coal Co., Internal Memorandum, Training for High Experience Employees (on file with author). In the enclosed counseling session guidelines, the supervisor was instructed to ask the following questions: "Do you think you will beat the odds? What are your odds of being killed? Do you want to be killed? What can you do about it?" *Id.* This particular policy was ultimately withdrawn after a legal challenge which argued that it would subject the employees to discipline for reporting safety problems or filing workers' compensation claims, in violation of West Virginia law. UMWA Dist. 31 v. Consolidation Coal Co., Civ. No. 88-C-391 (Cir. Ct. Mon. Co., W. Va. 1988).

455. A plant closure blamed on excessive workers' compensation costs was unsuccessfully challenged by the workers in Unida v. Levi Strauss & Co., 986 F.2d 970, 977 (5th Cir. 1993) (holding that an employer who closes a plant because of high costs, including workers' compensation costs does not violate article 8307c of the Texas Workers' Compensation Act, which provides that an employer may not discharge an employee simply because that worker has filed a good faith workers' compensation claim).

456. This reaction is commonplace and the growth of litigation on claims is discussed in Part II. As Nicholas Ashford observed, "High benefits mean high costs to employers, and thus incentives to find ways to reduce these costs. One way to reduce costs is, of course, to provide a less hazardous workplace. But, unfortunately,

to cost containment are undoubtedly introduced with the intention of stimulating greater worker vigilance regarding safety;[457] if this is the case, their unintended consequences are that they also increase the likelihood that injuries will not be reported.[458] All of these strategies, whether they involve inducements to safety or threats of retaliation, reflect the employer's ability to control the workplace in order to manipulate claims filing activity.

With the exception of wrongful discharge litigation and the occasional lawsuit involving an employer's grossly negligent or intentional misconduct,[459] there is remarkably little litigation which challenges employer (mis)behavior in discouraging claims. Current commentary draws little distinction between efforts to prevent hazardous conditions and efforts to reduce costs through discouraging claims.[460] In fact, it is often impossible, from the outside, to discern the difference between the two. Of course, looked at from the vantage point of injured workers, there is a world of difference.

The fact that employers can exert managerial pressure in order to affect workers' compensation costs without decreasing underlying rates of injury and illness has a tendency to confuse our understanding of prevention. If the goal is simply to decrease workers' compensation costs to employers, this behavior is laudable. If there is genuine interest in achieving decreases in occupational morbidity and mortality (whether as a public health goal or out of concern for total costs), these apparent decreases in costs serve only to obscure the picture. It is the injured worker and other social insurance programs that in fact absorb the costs of uncompensated occupational injuries. Determining the true injury rate and the true degree of workers' suffering becomes difficult within the framework of such elasticity.

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there are others. When claims are likely to be high, litigation becomes more profitable." ASHFORD, *supra* note 9, at 417.

457. It is true that many genuine and aggressive safety programs have an economic incentive component which is, I believe, designed to get the attention of both hourly and managerial employees and involve them in safety efforts.

458. Professor Sugarman notes the same phenomenon with regard to small automobile accident claims and concludes that "perverse" actions, which involve the concealing of bad conduct or fighting of claims, appear to predominate. Sugarman, *supra* note 19, at 585. "This concern about higher rates does cause nonreporting and private settlement of small accident claims once crashes occur. But this is hardly the same thing as driving safer in the first place." *Id.* at 578.

459. Refer to note 247 *supra*.

460. In the Upjohn study, no distinction was made between cost containment based upon successful discouraging of the filing of claims and cost containment achieved through hazard reduction. *See* Upjohn Report, *supra* note 7, at III-5.

D. *Ignorance, Doctors, Lawyers, and Other Transaction Costs*

An employer can respond to rising workers' compensation costs in three enterprise-specific ways: by doing nothing to change internal practices; by reducing costs through cost containment on claims without directly addressing the need for prevention of injuries and illnesses; or by engaging in primary prevention. The likelihood that employers will work actively to prevent injuries is diminished both by the availability of the apparently efficient response of claims cost containment[461] and by the substantial transaction costs inherent in the workers' compensation system.

Economists refer to those factors which tend to prevent individuals or firms from acting in an economically efficient manner as transaction costs.[462] In the workers' compensation context, transactions costs create considerable friction. In fact, it is difficult to imagine a system which is less likely to generate the level of information and understanding that would be necessary to encourage economically and socially efficient behavior. Ignorance, psychological factors, fundamental inequality of the employee-employer relationship, distribution of costs, and the underlying structure of the workers' compensation system all generate transaction costs which obstruct an optimal outcome.

As an initial problem, as discussed above, costs are not distributed among employers in a manner likely to promote aggressive safety practices.[463] Moreover, employer ignorance regarding the methodology used for experience rating is itself a significant impediment to achieving this outcome;[464] the distribution of costs is irrelevant if those who pay them have no comprehension as to the manner of their distribution. The

461. This approach may result in an economically efficient outcome from the standpoint of the employer; the resulting bargain, which transfers the costs of injuries directly to workers or other social insurance programs, may not be optimally efficient from a social point of view, however.

462. *See* Coase, *supra* note 354, at 15 (pointing out that economic theories which assume away transaction costs fail to predict accurately how rational persons will behave because transaction costs, including information, negotiation, and inspection costs, are often very costly and thus prevent people from entering into many arrangements that would seem profitable in a no-transaction-costs world). To the extent that transaction costs impede efficient results, economic incentives become irrelevant and the bargain that is ultimately struck may not be the optimal one.

463. "One fly in the Coase ointment is the existence of an imperfectly experience-rated system of no-fault insurance, mandated by the government." Butler & Worrall, *Workers' Compensation: Benefits and Injury Rates in the Seventies*, *supra* note 18, at 587.

464. Refer to notes 323-28 *supra* and accompanying text.

rate-making system is particularly confusing for small and medium-size employers, whose injury rates tend to be worse than large employers. Even in companies large enough to have both risk managers and engineering design departments, there is surprisingly poor communication between the two.[465] The lack of information which is readily available to both employers and workers,[466] and the high costs of obtaining better information, exacerbate the problem. The costs of information transfer are a separate impediment to economic efficiency.[467]

As a result, despite evidence that enterprise-specific behavior generates significant cost savings, the public debate over workers' compensation has often been framed around secondary issues which reflect these impediments. Employers publicly blame the cost of workers' compensation on a raft of problems all of which are outside the direct control of the enterprise, while perceiving themselves as victims of a system which they have no capacity to influence. They tend to see the causes of high costs in the actions of workers (who file unnecessary claims), outsiders (such as doctors and lawyers who benefit financially from the system), the state legislature (which perpetuates a program which is somehow always more expensive than that in a neighboring state), or state administrative bodies (which are perceived as agencies which delay resolution of claims and find marginal claims to be compensable).

People tend to pay a lot of attention to anecdotal information, to ignore data when forming opinions, to take

465. *See* GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION (Rand Report) 60 (1983) (noting that there was poor communication between in-house risk managers and engineering design departments with regard to product safety issues).

466. *See* ASHFORD, *supra* note 9, at 19.

The imperfections in the market approach are inherent and severe:

> . . . The deficiencies in the knowledge of the nature and severity of health hazards are the most serious imperfections. . . .
>
> . . . There are serious reasons for questioning the notion that the existing level of workplace hazards represents working people's free market choice regarding the assumption of job-related risk. Beyond important informational problems, a wide variety of other forces—including social, cultural, psychological, and environmental factors—influence workers' decisions regarding the assumption of job-related risks. An inability to assess or relate to low-probability, large-harm contingencies is a behavioral trait common to many, if not most, individuals. Further, many workers are socialized to accept the hazardous nature of certain jobs and are convinced of the necessity of performing them . . . .

Id.

467. *See* Coase, *supra* note 354, at 15 (including the cost of gathering and analyzing information among transaction costs).

extreme outcomes as being representative, and to attribute more control over a particular event to the people involved than they see themselves as having.[468] These psychological attributes inhibit "rational" behavior[469] as well as contributing to the underlying tension between employees and employers. They also cause employers to generalize from isolated experiences of worker abuse of the workers' compensation system to a general belief that fraud and abuse *cause* workers' compensation cost escalation; they encourage a belief in the worker-at-fault paradigm.

These psychological tendencies are reinforced both by the underlying workers' compensation compromise, which appears to eliminate employer fault and blame as a factor, and by the general state of labor-management relations. The bilateral monopoly relationship between workers and employers vastly increases transactional costs.[470] Neither the currently popular "total quality management," a process of involving workers in decision-making in order to achieve continual improvements in quality,[471] nor more traditional collective bargaining, have extinguished the fundamental distrust that pervades worker-employer interactions. Because of this suspicion, workers' compensation claims filed by individual employees are subject to significant and suspicious scrutiny by employers. Both the fundamental legitimacy of the claim and the costs which are incurred after the claim is found to be compensable come under attack.

Because employers often perceive themselves as having less influence over the occurrence of injuries than they in fact have, they concentrate on discouraging the filing of claims or on post-injury claims management instead of on injury prevention. Insurers and employers often focus particular attention on the behavior of health care providers and lawyers who provide services to injured workers and on the length of time that an injured worker remains off work.[472]

468. Dickens, *supra* note 383, at 26-27.

469. *See* Ellickson, *supra* note 236, at 40 (noting that people often ignore or otherwise fail to respond to law or misconstrue legal signals).

470. The Coase theorem assumes equality of bargaining power, which is patently lacking in the employment relationship. "[I]f the parties are locked in a bilateral monopoly, where neither party has alternatives to dealing with the other, transaction costs will be sharply elevated." Donohue, *supra* note 393, at 556.

471. *See generally* WARREN H. SCHMIDT & JEROME P. FINNIGAN, THE RACE WITHOUT A FINISH LINE: AMERICA'S QUEST FOR TOTAL QUALITY (1992).

472. Employers sometimes respond to escalating costs by attempts to improve return-to-work and rehabilitative programs. While many of these programs are laudatory both in their goal and function, others shortsightedly force workers to return

There is no question that doctors and lawyers can manipulate workers' compensation to their own advantage. As the state- appointed gatekeepers to most disability programs,[473] doctors in particular have a profound influence on the cost of both medical treatment and workers' benefits. As a result, physicians are painted (sometimes accurately) as professionals who tend to overtreat, overcharge, and offer opinions which are influenced more by the source of the payment than by the actual condition of the patient.[474] Some employers and insurers now view medical costs as the primary cause of workers' compensation problems and therefore put considerable energy into health care cost containment strategies.[475] The alarming escalation of the medical component of workers' compensation costs makes this a legitimate concern; it nevertheless also draws attention toward a component of cost and away from the underlying cause of the cost.

Concern has also mounted regarding the activities of claimants' lawyers who advocate expansion of benefits and encourage the filing of claims by their individual clients.[476] The self interest of these attorneys, whose fees rise with increases in benefits, tends to tarnish their image. Employers view them as a cause of the escalation of costs. They are believed to instigate the filing of fraudulent, weak, or unnecessary claims and to organize inappropriate screenings to locate workers with claims which might not otherwise be filed.[477] This view has recently led to the exclusion of attorneys

to work prematurely. There is, nevertheless, a need for aggressive programs which enable workers to return to work after an injury. *See* Spieler, *supra* note 252, at 465 n.452.

473. *See* STONE, *supra* note 230, at 108 (noting that "all disability benefits rely to a greater or lesser extent on the medical evaluation of impairment" giving doctors a very significant role in the program).

474. *See* TRAMPOSH, *supra* note 120, at 53 ("[T]here are physicians that have 'sold out' to employers. They may care about the workers, but they know which side their bread is buttered on, and they do not want to alienate their customers: the employers.").

475. *See generally* Greenwood & Taricco, *supra* note 68.

476. *See* David O. Weber, *The Comp Crisis*, INS. REV., Oct. 1990, at 30 (stating that employers often point to lawyers as one of the major abusers of the workers' compensation system).

477. Medical screenings of workers who have been exposed to occupational disease-causing agents became commonplace during the 1980s. Often, these were sponsored by labor unions; sometimes claimants' attorneys or occupational health physicians were the initiators. Claimants' attorneys, physicians, and labor union representatives maintain that these screenings merely identify individual workers who suffer from compensable diseases and assist them in receiving benefits for which they are eligible. But for these screenings, it is likely that many of these workers would never seek compensation. Not surprisingly, this process is viewed with hostility and suspicion by employers and insurers. Again, this is an example of the fact that the

from discussions regarding reform of state workers' compensation systems as well as to legislated restrictions on the activities of lawyers in the system.[478]

Further, interstate variability in costs encourages the belief that the root cause of escalating and excessive costs is the legislative design of the program in each state. Employers insistently point to neighboring states in which they allege workers' compensation costs less for equivalent employers.[479] In fact, interstate variability has grown over the past two decades, despite the efforts of the National Commission on State Workmen's Compensation Programs to establish greater uniformity.[480] As a result, employers often launch political

system is dependent on the underreporting of claims in order to maintain economic equilibrium. Medical screenings which expand the number of claims which are filed, even if the claims are filed for legitimate, compensable, disabling medical conditions, are unwelcome in a system facing escalating costs.

478. Ken Myers, *Less Workers' Comp Work Ahead*, NAT'L L.J., June 7, 1993, at 1 ("In [legislative] reform packages, one of the first proposals is usually the elimination of lawyers.").

479. Spieler, *supra* note 252, at 359 & n.89.

480. Differences among states (when costs were measured both as a percent of payroll and as insurance premium per worker and were corrected for interstate variations in wages and industrial mix) grew significantly between 1972 and 1983. John F. Burton, Jr., *Interstate Variations in the Employers' Costs of Workers' Compensation, with Particular Reference to Connecticut, New Jersey, and New York*, in CURRENT ISSUES IN WORKERS' COMPENSATION, *supra* note 274, at 111, 112-13. Differences among states continued to widen in subsequent years, although a state's relative position is not immutable. For example, while California has been a consistently high cost state and Indiana a consistently low cost state, rankings of other states, including Michigan, have varied substantially. Burton & Schmidle, *supra* note 25, at 11. Burton and Schmidle go on to observe, "Data on interstate differences in workers' compensation costs may also be used to assess the need for national workers' compensation standards . . . . The widening difference among states in their costs of workers' compensation . . . appear [sic] to increase the threat of runaway employers and thus strengthens the case for federal standards. *Id.* at 13.

In addition to comparisons based upon premium rates charged to employers, interstate comparisons are also drawn from the dollar amount of workers' compensation benefits paid per 100,000 active workers. John F. Burton, Jr & James W. Gasaway, *Workers' Compensation Benefits Paid to Workers: Interstate Differences Substantial, National Averages Accelerate*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Sept.-Oct. 1992, at 1. Again, the variation among states is substantial. The highest cost state, Maine, paid $121.1 million in benefits per 100,000 workers in 1992. *Id.* fig. A. The lowest, Indiana, paid $16.2 million per 100,000 workers in the same year. *Id.* The average for 43 states was $43.0 million per 100,000 workers. *Id.* The use of this particular comparison is somewhat misleading, however. These figures appear to represent benefits paid, not incurred, during the year in question. *See id.* at 2. Current payments on claims reflect payments on both new as well as old claims involving more severe injuries. Therefore, states with hazardous industries (and therefore larger numbers of severe claims) and declining employment (and therefore a declining number of active workers) will show high costs in this comparison even if their workers' compensation system is not comparatively generous. The comparison is, however, useful in demonstrating the large differences among states in the liability to injured workers.

assaults against state programs under the banner of "economic development." During the ensuing battles, employers point to the possible demise or relocation of a particular firm or enterprise as proof that workers' compensation costs are, or will become, excessive.[481] In the course of these confrontations, it is often implied that legislators in the home state are more profligate, that home state workers are greater abusers, or that the state's administrative body is particularly lax in the granting of claims. This occurs even in those states in which employers' insurance premium rates are relatively low.[482]

Thus, the impediments to effective deterrence that have been noted by other commentators with regard to tort liability systems are magnified in the workers' compensation program. The general design of workers' compensation has not historically encouraged many employers to believe that their own efforts at safety would yield significant cost savings within their own enterprises. The combination of civil immunity, no-fault payments, limitations on benefits, and insurability of the risk all contribute to this overall view.

Employers' failure to perceive safety as connected with costs is further fed by their ability to focus on worker behavior and to reduce costs by discouraging the filing of claims or limiting costs incurred within claims. The ability to blame workers as well as other parties who are external to the employment relationship for increasing costs discourages employer self scrutiny, even when such scrutiny might yield economically advantageous decisions for the firm. Thus, both ignorance regarding the actual relationship between cost and safety and objective aspects of the system which do not reward safety have reduced the likelihood that primary preventive activities will result from increasing compensation costs. As long as costs are not, or are not perceived to be, related to internal firm choices, the ability of workers' compensation to provide effective leverage to make employers improve underlying safety practices is

481. *See* COMMISSION REPORT, *supra* note 32, at 125 (noting that "legislators likely will hear claims from some employers that the increase in costs will force a business exodus. It will be virtually impossible for the legislators to know how genuine are these claims." The Report terms this "the spectre of the vanishing employer.").

482. For example, between 1985 and 1989, premium rates in West Virginia were artificially depressed to a very low level as a result of political manipulation. The articulated reason for the depressed rates was that the Governor at that time wanted to promote economic development. This development did not occur. At the same time, during this period, employer groups approached the legislature to complain about what they perceived to be excessively high rates. *See* Spieler, *supra* note 252, at 345-48.

limited.

IV. SOLVING THE PARADOX? THE NEW SAFETY RHETORIC

Costs, not injury rates, drive the workers' compensation political debate.[483] The explosion of costs over the past twenty years has heightened the chronic tension that characterizes the program. On the one hand, workers are accused of taxing the system through excessive filing of claims; as is often the case when the expansion of an entitlement program results in unanticipated levels of costs, applicants for benefits are blamed for ensuing financial woes.[484] On the other hand, workers charge that the system still fails to provide adequate compensation to many injured workers. The three way tug-of-war among insurers (seeking rate adequacy), employers (seeking cost reductions), and workers and unions (seeking benefit adequacy) has made workers' compensation into the politicians' most insoluble political conundrum.[485] Workers' compensation

483. This is, of course, not a new phenomenon. For example, failure to provide compensation for occupational disease was, in part, a result of concerns about costs. Refer to note 101 *supra*.

484. STONE, *supra* note 230, at 170. Stone notes that when costs rise:

> [t]he explanations are always the same: the program encourages abuse because of the structure of its incentives, and the administration of the program is in need of coordination and better management to curb individual abuses.
>
> . . . Analyses of these programs are usually permeated with a deep belief that the individual citizen is first and foremost a 'welfare maximizer'. [I]nevitably, the critics of the program in crisis do attach a moral judgment. The explanation based on rational motivation becomes inextricably bound up with one based on laziness and fraud. It is assumed that many users of the program do not really need it, and that they are receiving benefits they do not deserve.
>
> Thus, rapid growth in the disability insurance program is attributed primarily to an increase in *use* of the program, and the main reason for that increase is thought to be that benefits are too generous.

Id.

485. The problem of the failure of workers' compensation to provide the hoped-for deterrence, so that safety and prevention would produce systemic savings, has led commentators to propose a variety of solutions. The question is, in essence, how should the system be changed in order to increase its deterrent capabilities? For example, Deborah Stone has proposed that the no fault model be abandoned in favor of tort liability, arguing that "[t]he physical conditions of work that contribute to injury are eminently changeable" and, therefore, employers should not be allowed to hide behind the no-fault shield. STONE, *supra* note 230, at 191. On the other hand, fearing that any increase in compensation to workers will result in a proliferation of unjustified claims, Ronald Ehrenberg has suggested that the payroll tax be increased but that compensation remain static; he has recommended that any resulting increase in revenue be used to fund other safety and health activities. Ehrenberg, *supra* note 18, at 94-95. Focusing on the design of insurance coverage, Kenneth Abraham has suggested that we "invalidate policy exclusions as between the insurer

"reform" is an annual exercise in political frustration in many states.[486]

There is some sign of change, however. The political realities of workers' compensation require that its fundamental characteristic of compromise be maintained. Organized labor, as the putative voice of injured workers, therefore finds itself at the bargaining table when legislators debate mechanisms for decreasing cost. But political realities constrain labor's usual bargaining stance: the apparent consensus that costs are excessive has made the expansion of benefits in most states a politically untenable proposition.[487] Faced with persistently high rates of injury despite rising costs, organized labor has therefore shifted its focus to prevention within the workers' compensation debates.[488]

and its insured's victims, but allow such exclusions to be effective as between the insurer and the insured. In effect, when the insured has violated safety standards that are conditions of coverage, the insurer would serve only as a guarantor of its insured's liability rather than as an indemnifier." ABRAHAM, *supra* note 269, at 61. Each of these proposals assumes, perhaps incorrectly, that increased costs to employers will yield increased attention to safety. Sugarman, in contrast, favors limiting compensation to its distributional role, and increasing other enforcement efforts in order to promote safety. Sugarman, *supra* note 19, at 590-91, 664.

486. James Chelius, of Rutgers' Institute of Management and Labor Relations, has noted that each year virtually every state amends its workers' compensation law. "The difference between reform and tinkering seems to depend on whether one is for or against the changes." James R. Chelius, *The Status and Direction of Workers' Compensation: An Introduction to Current Issues*, *in* CURRENT ISSUES IN WORKERS' COMPENSATION, *supra* note 274, at 1, 3-4.

The Insurance Information Institute has estimated that between 1982 and 1988 legislators nationwide enacted at least 1050 amendments to state workers compensation laws. David O. Weber, *The Comp Crisis: A Special Report*, INS. REV., Oct. 1990, at 27, 34 [hereinafter *Comp Crisis*]. Former general counsel for the National Commission, John Lewis has warned that "no reform effort works as intended. You're lucky if the result is even close to the intention." *Id.*

487. Fearing that reforms designed to reduce system costs would mean a reduction in benefits as well, unions have traditionally opposed such changes. Discussing the Minnesota experience, however, Michael Staten has asserted that reform "does not have to be a zero-sum game which precludes everyone from gaining." Michael Staten, *Discussion of Papers on Recent State Reforms*, *in* CURRENT ISSUES IN WORKERS' COMPENSATION, *supra* note 274, at 105, 106 (reviewing Steve Keefe, *The Minnesota Experience with Workers' Compensation Reform*).

488. James Ellenberger, Assistant Director, Occupational Safety and Health, AFL-CIO, summarizes the labor position this way:

> The [Bureau of Labor Statistics] Annual Survey for 1988 indicates some very troubling trends in workplace injuries and illnesses . . . .
>
> The response to these horrible statistics, regrettably, has not been a renewed effort by policymakers, employers and insurers to reduce accidents and injuries on the job.
>
> The victim of the job injury or illness frequently becomes the target of those concerned with runaway costs. Instead of focusing corrective action aimed at stopping accidents and creating safer work sites, all too often efforts are made to lower workers' compensation benefits or to change the

A. *Legislative Responses to Rising Workers' Compensation Costs*

Confronted with high costs and unwieldy administrative structures, and mindful of the need to maintain the compromise nature of these programs, state legislatures are responding to the workers' compensation dilemma in a number of ways.[489] First, in apparent exasperation at the continual and high pitched level of political confrontation over these issues, new legislation pulls the workers' compensation debate away from the open political arena by establishing labor-management groups to provide guidance in the administration of the state system or in the development of new legislation or standards.[490] These groups are governing, not advisory, commissions or boards which are generally comprised of

definition of injures or illnesses . . . .

> The workers' compensation 'crisis' is likely to continue until we drastically reduce the needless human suffering and economic costs of job injuries, illnesses and death. This will require . . . making safe and healthy workplaces our top priority.

James N. Ellenberger, *Troubling Trends in Workplace Injuries, Comp Crisis*, *supra* note 486, at 32 (sidebar).

489. The examples given in this section are limited in several ways. First, the primary health and safety enforcement activities of the twenty-three states with approved state plans for enforcement of OSHA standards are not the focus of this discussion. Many of these states have substantially expanded and improved their safety initiatives. Although some of these efforts have been in reaction to concerns regarding workers' compensation costs, they are mentioned only tangentially here; the safety initiatives discussed here are those which have been undertaken as part of workers' compensation reform. Second, a number of states have enacted provisions governing imminent danger situations; these are not included in this summary. Third, workers' compensation reform legislation is so widespread that it is impossible to include every example of change here. The following discussion provides only a brief overview.

490. *See, e.g.*, ME. REV. STAT. ANN. tit. 39-A, § 151 (West Supp. 1993) (establishing, as part of the Maine Workers' Compensation Act of 1992, a Workers' Compensation Board composed of four representatives of management chosen by the Governor from a list provided by a bona fide employers organization and four representatives of labor chosen from a list provided by a bona fide labor organization representing at least 10% of the Maine work force; members of the board select the chair, which must alternate annually between labor and management representatives); OR. REV. STAT. ANN. § 656.712 (1989 & Supp. 1992) (providing as of 1990 for an impartial three member workers' compensation board; "inasmuch as the duties to be performed by the members vitally concern the employers, the employees, as well as the whole people, of the state, persons shall be appointed as members who fairly represent the interests of all concerned."); W. VA. CODE §§ 21A-3-1, -3, -7, 23-1-1 (Supp. 1993) (establishing in 1993, a compensation programs performance council, composed of four labor and four business representatives plus the Commissioner as ex officio chairperson; the Council is charged with development and approval of vocational standards for permanent total disability and all rule-making authority under the Workers' Compensation Act). Many other states have enacted similar provisions.

representatives of employers and employees or unions; they are intended to remove much of the rancorous disagreement from the legislative arena, to allow the development of expertise by the participants, and to encourage the growth of consensus without the threat of continuous public scrutiny.

Second, state legislatures are attempting to reduce the amount of delay and friction in the adjudicative system, to increase the speed with which injured workers with legitimate claims receive benefits, and to reduce the role of attorneys in the litigation of claims.[491] Improved administration of claims has been a goal since before it was advanced by the National Commission on State Workmen's Compensation Laws over twenty years ago.[492] Of course, there is not always consensus regarding the appropriate way to achieve administrative efficiency.[493]

Administrative streamlining and improved labor-management cooperation are, at least theoretically, consensus goals which promise to reinforce the atmosphere of political compromise. Although laudable, however, neither of these strategies directly addresses the critical problem of high workers' compensation costs and persistent rates of occupational injuries. States are responding to high costs in two ways. First, in reaction to employers' demands, legislatures have tightened the availability of benefits,[494] heightened the consequences for

491. These provisions all address very specific shortcomings in each state's administrative processing of claims and are quite state-specific. Examples of such changes include: Oregon established penalties for unreasonable delays in payment of benefits, OR. REV. STAT. ANN. § 656.262(10) (Supp. 1992); the Texas Labor Code eliminated de novo trials in court after administrative processing of workers' compensation claims, TEX. LAB. CODE ANN. §§ 410.301-.308 (Vernon Supp. 1994); Kansas set new limitations on attorneys fees to be charged claimants, limiting fees to a reasonable amount or a maximum of 25% of any compensation up to $10,000, 20% of any award from $10,001 to $20,000, and 15% for any amount over $20,000, and prohibiting attorneys fees on medical and rehabilitation benefits, KAN. STAT. ANN. § 44-514 (1993).

492. COMMISSION REPORT, *supra* note 32, at 99-114.

493. For example, the Texas Workers' Compensation Reform Act of 1989, which limited de novo jury trials after administrative resolution of claims, has been challenged successfully by claimants and unions as an unconstitutional abridgement of access to the courts under the Texas constitution. Texas Workers' Compensation Commission v. Garcia, 862 S.W.2d 61, 103-04 (Tex. App.—San Antonio 1993, n.w.h.) (holding the entire workers' compensation reform legislation, passed in 1989, unconstitutional because the unconstitutional portions could not be severed from the Act in its entirety).

494. For example:

- The burden of proof to establish work-relatedness has been increased for claimants in some states. Oregon provides a good illustration of this. *See* OR. REV. STAT. ANN. § 656.266 (1989 & Supp. 1992) (1987 revision requiring that worker carry burden of proof to show an injury or occupational disease is compensable by do-

fraud,[495] and addressed the post-injury costs of claims.[496] In

ing more than merely disproving other possible explanations); OR. REV. STAT. ANN. § 656.273 (Supp. 1992) (limiting compensation for aggravations of prior injuries, "if the major contributing cause of the worsened condition is an injury not occurring within the course and scope of employment"); OR. REV. STAT. ANN. § 656.005(7)(a)(A) (Supp. 1992) ("No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition"; administrators interpret this to mean that the claimant has to prove that the condition is more than 50% caused by work). Oregon has also excluded all claims in which the claimant cannot produce "medical evidence supported by objective findings." OR. REV. STAT. ANN. § 656.005(7)(a) (Supp. 1992). This arguably excludes soft tissue back injuries which cannot be detected on radiologic or physical examination. The exclusion of back injuries is currently under litigation. Telephone interview with Larry Niswender, Medical Issues Coordinator, Oregon Workers' Compensation Division (Oct. 29, 1993).

• States have restricted claimants' access to physicians of their own choice for purposes of determining compensability. For example, in Massachusetts claimants must now seek medical reports from physicians chosen by the Industrial Accident Board; many of these physicians are untrained in occupational medicine and are unable to draw connections between health problems and their occupational etiology. Telephone Interview with Emily Novick, claimants' attorney in Boston, Mass. (Oct. 27, 1993).

• Psychological claims unrelated to a physical injury are now noncompensable in a growing number of states, irrespective of the extent or etiology of the disability. *See, e.g.*, W. VA. CODE § 23-4-1(f)f (Supp. 1993); U.S. CHAMBER OF COMMERCE, *supra* note 121, at 3 (Arkansas); Ruth A. Brown, *Workers' Compensation: State Enactments in 1992*, 116 MONTHLY LAB. REV., Jan. 1993, at 50, 53-54 (Missouri, Oklahoma).

495. In 1992 alone, Connecticut, Minnesota, and Oklahoma established fraud units and Alabama, Missouri, and Rhode Island stiffened their fraud penalty provisions. Brown, *supra* note 494, at 50-54.

496. Three particular efforts are appearing in reform legislation:

• First, states have enacted provisions which reduce benefit levels. Some states have increased offsets against weekly benefits when the injured worker has other sources of income. *See, e.g.*, ME. REV. STAT. ANN. tit. 39-A, § 220(1) (West Supp. 1993) (reducing workers' compensation by amount of unemployment benefits received); W. VA. CODE § 23-4-23(b) (Supp. 1993) (reducing workers' compensation benefits when claimants receive insurance or social security payments). Other states have reduced available benefits directly. For example, in 1993 Connecticut decreased the maximum weekly benefit from 150% to 100% of the state average weekly wage. CONN. GEN. STAT. § 31-309 (1993); *see also* U.S. CHAMBER OF COMMERCE, *supra* note 121, at 5. Georgia and Minnesota set new limitations on the maximum number of weeks certain categories of benefits may be collected. Brown, *supra* note 450, at 52-53.

• Second, a large number of states are attempting to reduce medical cost inflation through a variety of cost containment strategies. *See, e.g.*, Neb. Legislative Bill 757, §§ 2, 3, 7 (1993) (amending NEB. REV. STAT. §§ 48-120, -120.02, -121) (authorizing the compensation court to establish medical fee schedules, restricting the right of employees to change treating physicians, establishing informal dispute resolution of medical issues, authorizing managed care options, and creating an independent medical examiner system); OR. REV. STAT. ANN. § 656.245(1), (3) (Supp. 1992) (restricting availability of medical treatment for palliative care after the injured worker's health status has become stationary, restricting right of claimant to change physicians, and encouraging participation in managed health care); OR. REV. STAT. ANN. § 656.248 (Supp. 1992) (authorizing Director of Department of Insurance and Finance to set medical fee schedules). Similarly, Florida enacted of "24 hour" coverage in 1990, which allows employers to combine general health insurance with

many instances, this recent legislation has attempted to turn back the clock, making claims noncompensable which had become compensable within the last twenty years.

This type of legislative response assumes that the critical goal is reduction in costs, not reduction in injuries. Undoubtedly, costs will fall as a result of more aggressive claims management or reduction in the numbers of claims that are viewed as compensable. This approach will not, however, change the underlying health and safety conditions for working people or reduce the number of injuries. Instead, it simply changes the number of injuries which are recognized by the system or the costs of those injuries which are compensated.

Second, mindful of the concerns voiced by organized labor and others, state legislatures are adopting more proactive approaches to occupational safety and health as a component of workers' compensation reform. This approach has significant political appeal: a successful campaign for safety will presumably result in reductions in costs without antagonizing workers through removal of benefits. Investment in safety represents an increasingly rational economic response to the high costs of workers' compensation. In other words, because compensation costs are now so high, it has become more apparent that "safety pays." As a result, safety has become both a viable political solution and, increasingly, a solution accepted by the employer community.[497]

Safety rhetoric is now ubiquitous. Not only unions, but

workers' compensation medical benefits and utilize existing methods of medical cost containment on the combined health costs. *See* Keith T. Bateman, *Twenty-Four Hour Coverage: An Update*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Jan.-Feb. 1993, at 6-7.

• Third, efforts at rehabilitation and return-to-work programs are being amplified. *See, e.g.*, W. VA. CODE § 23-4-9 (Supp. 1993) (identifying injured employee's return to work as the goal of rehabilitation and elaborating on previous guidelines); Neb. Legislative Bill 757, § 17 (1993) (amending NEB. REV. STAT. § 48-162.01) (revising the provision of rehabilitation services and establishing priorities for the development of a rehabilitation plan which focus on return to work with the same employer).

497. A May 1993 report released by the W.E. Upjohn Institute for Employment Research concludes that "[m]any employers have realized that disability incidence and costs are, at least to some degree, within their control. . . . Employers who have not yet begun to pursue disability prevention and management strategies in a systematic and diligent way will find that this is an increasing source of competitive disadvantage." Roger Thompson, *Taking Charge of Workers' Comp; Controlling Costs through Accident Prevention Programs*, NATION'S BUS., Oct. 1993, at 18, 19 (quoting the new Upjohn Report). Similarly, in discussing the trucking industry, the California Insurance Department concluded that "[a]s workers' compensation premiums have grown, protecting employees has begun to receive more attention." California Insurance Study, *supra* note 7, at 58.

workers' compensation insurers,[498] state insurance departments,[499] workers' compensation administrators,[500] academic commentators,[501] and employers' organizations[502] are all beating the safety drum. Safety legislation has emerged as a primary political focus of workers' compensation reform in the 1990s; it has become the language of political compromise. The current state legislative reforms reflect this new consensus.[503]

Given this growing acceptance of safety initiatives as a legitimate political response to the problem of high workers'

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498. For example, Bill Hager, president of NCCI, wrote:

> Over the last decade, we have witnessed a marked deterioration in the safety of the American workplace. That must be not only checked, but reversed. . . . Many of the stresses on the system would be alleviated if the injury rate simply fell back to the earlier, lower levels. A concerted effort of employers, state and federal governments, insurers, and labor to attack the causes of high accident rates must be a fundamental part of a larger program of workers' compensation reform. . . . [T]he American workplace should have been growing progressively safer over the last 20 years. The fact that the opposite has happened is an indictment of our entire society. Safety on the job has been given far too low a priority. . . . To a degree, the insurance industry has been subsidizing such practices by absorbing the losses that the combination of inadequate safety measures and inadequate rates have brought on. One way or another, this unmerited subsidy must end.

Hager, *supra* note 13, at 17.

499. For example, in its 1993 report, the California Department of Insurance strongly advocates worksite safety practices as a mechanism for workers' compensation cost reduction. California Insurance Study, *supra* note 7, at vi (noting that organizations with proactive safety programs have lower workers' compensation costs).

500. For example, Tony Skiff, Director of Workers' Education for the Connecticut Compensation Commission, recently wrote, "Safety is the most direct, effective method of reducing workers' compensation caseloads and costs. This is true at both the worksite and the jurisdictional level." Anthony W. Skiff, *How Safety Reduces Workers' Compensation and Why It's Rarely Used* (1993) (on file with author).

501. *See, e.g*, Raiborn & Payne, *supra* note 2, at 559 (stating that "[i]t is patently obvious that the first action a company with any level of workers' compensation claims should take is to improve workplace safety and employee awareness about safety").

502. For example, in responding to the recommendation that health costs for work-related injuries and illnesses be merged into the new health care plans, the National Association of Manufacturers responded with "Guidelines by which the NAM would judge any proposal that would include the medical portion of workers' compensation in the health care reform proposal." First on the list was the following:

> *Safety in the Workplace*
>
> Good safety practices protect employees. Injury prevention should be a primary focus of employers. Employees must recognize their personal responsibilities to ensure their own safety.

NATIONAL ASS'N OF MANUFACTURERS, WORKERS' COMPENSATION AND HEALTH CARE REFORM: GUIDELINES FROM THE NATIONAL ASSOCIATION OF MANUFACTURERS 3 (1993) (on file with author); *see also* ALEXANDER & ALEXANDER, *supra* note 55, at 3 (noting that, in responses to this survey of 1900 corporate risk managers, workplace safety ranked fourth in importance out of 74 legislative and regulatory issues).

503. The Occupational Safety and Health Department of the AFL-CIO is tracking this state legislation. Refer to note 511 *infra*.

compensation costs, the critical question obviously becomes: will it work? That is, will the use of workers' compensation as a tool for the promotion of increased safety result in reduced numbers of injuries and decreased costs? In order to assess this, it is essential to determine whether these new laws confront the problems described in the preceding sections of this Article.[504]

B. *State Workers' Compensation Safety and Health Reforms*

The new safety and health provisions fall into four categories: premium discounts; safety and health training and consultative services; safety and health committees; and enforcement and penalty provisions which require worksite safety programs. Each of these has somewhat different potential for achieving the goal of primary prevention of injuries.

1. Premium Discounts. Statutory provisions which are designed to entice employers to adopt safety or loss management programs through providing a prospective premium discount appear to be the most common form of workers' compensation "safety" legislation.[505] The popularity of these provisions undoubtedly reflects the lack of political opposition to them. Unlike the other approaches discussed below, premium discounts make no pretense of expanding regulation or worker participation in safety; they offer only a carrot, and a small one at that, to employers willing to engage in loss management.

Some of these new provisions require employers to contract

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504. These problems can be summarized as follows. First, although employer action can reduce both injuries and workers' compensation costs, employers often have not responded as if this is true; a variety of transaction costs have inhibited an economically efficient result. When, in an effort to overcome this resistance, costs have been made more responsive to individual employers' own claims experience, employers have responded in one of three ways: they have continued to fail to perceive themselves as able to influence costs, irrespective of the level of responsiveness of costs; or, in a minority, but growing number, of instances, they have introduced successful safety campaigns; or, even in situations in which they have understood their ability to control costs, they have responded in "nefarious" ways, utilizing their managerial control to establish inappropriate mechanisms to reduce the filing or duration of claims rather than to reduce injuries. Refer to part III.C.2 *supra*.

505. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 152, § 53A (West 1993) (authorizing the Commissioner of Insurance to order a specific prospective decrease in premium rate); MO. ANN. STAT. § 287.125 (Vernon 1993) (outlining requirements for compliance with certified safety program entitling employer to credit against standard premium); W. VA. CODE § 23-2B-3 (Supp. 1993) (authorizing prospective premium rate credit for employer subscribing to qualified loss management program that has demonstrated ability to "significantly reduce workers' compensation losses"). These programs are similar to the schedule rating systems which workers' compensation insurers utilized earlier in this century.

with loss management firms with demonstrated success in reducing workers' compensation claims costs;[506] not surprisingly, these provisions have been criticized for focusing more on cost reduction than on injury prevention. Other similar provisions appear to require employers to conduct safety audits or to demonstrate actual reductions in injuries.[507]

Premium discount provisions generally fail to solve the problem that financial incentives tend to encourage many employers to circumvent rather than reduce injuries.[508] If these discounts are awarded to employers based upon real, not sham, safety programs, they could increase the likelihood that

506. The Massachusetts Qualified Loss Management Program "applies a prospective credit to the premium of an assigned risk insured who subscribes to a qualified loss management program. . . . A loss management firm must have a structured approach in place which focuses top level management of the employer, as well as other personnel, on the issue of safety." THE WORKERS' COMPENSATION RATING & INSPECTION BUREAU OF MASS., FILING MEMORANDUM FOR THE QUALIFIED LOSS MANAGEMENT PROGRAM, REVISED 4/93, at 1-5 (on file with author). In general, however, a loss management firm must demonstrate an overall "ability to reduce losses for its client employers." *Id.*; *see also* Beckwith, *supra* note 7, at 70 (describing the Massachusetts Qualified Loss Management Program which began in 1991: "[T]he initiative's primary focus is on business practices after injuries occur. . . . In order to qualify for the full 10 percent credit, employers must hire an appropriate certified consulting firm, implement a comprehensive loss management program, and reduce their losses by 20 percent in the first year."); Sara Marley, *Loss Control Pays Dividends in Colorado*, BUS. INS., Jan. 11, 1993, at 3, 27 (describing the Colorado Premium Cost Containment Program and quoting John M. Berger, manager of the insurance compliance unit of the Colorado Department of Labor and Employment's Division of Workers' Compensation, as follows: "Our focus is on safety education and claims management and less on the hazards that fall under the jurisdiction of OSHA.").

507. For example, Montana's law, initially passed in 1987, authorizes insurers to "provide financial incentives to an employer who implements a formal safety program. An insurer may provide to an employer a premium discount that reflects the degree of risk diminished by the implemented safety program." MONT. CODE ANN. § 39-71-421 (1992 & Supp. 1993). Similarly, Missouri's law requires the department of labor and industrial relations to establish standards for certified safety programs under which certified employers receive premium credits for reduction in the number of work-related injuries, illnesses, and lost workdays. MO. ANN. STAT. § 287.125 (Vernon 1993); *see also* OKLA. STAT. ANN. tit. 36, § 924.2 (West Supp. 1994) (basing premium reductions on successful participation in safety and health consultation, education and training program administered by the Department of Labor, which includes undergoing a worksite hazard survey, correction of all hazards, establishing a workplace safety and health program, and reducing lost workday case rate); N.D. CENT. CODE § 65-04-19.1 (1993) (providing for a 5% premium discount for any employer who implements or maintains an approved risk management program).

508. *See, e.g.*, Marley, *supra* note 506, at 27 (quoting the Regional Vice President of Transamerica Insurance Group, Tom Glock, complaining that under the Colorado program "[s]ome of the most unattractive businesses are getting [loss control] certificates . . . [companies that] have no genuine interest in the welfare of their employees").

real injury reductions will be achieved.[509] Workers' compensation administrators are unlikely, however, to have adequate resources to perform on-site evaluations of such programs; the only alternative is to reward employers based upon successful reduction in claims costs. There is, moreover, no evidence to date that these provisions have achieved any significant success.[510] Notably, the AFL-CIO Department of Safety and Health does not include premium reduction programs in its enumeration of safety initiatives.[511]

2. *Safety and Health Training and Consultative Programs.* Employer and worker ignorance contributes to the failure to reduce workplace hazards. Acknowledging this, states have developed safety education and training programs which are often financed through a surcharge on workers' compensation premiums.[512] Voluntary consultative services are also provided to employers in many states; these programs generally receive federal funding. Purely consultative programs, particularly in states that lack OSHA enforcement powers, are generally

509. In his article on experience rating, Terence Ison has noted the difference between token safety audits which indicate only "nominal gestures" and real safety audits that

> might include a scrutiny of the design of plant, the choices and uses of machinery and equipment, the existence and control of toxic substances, and a testing of emergency procedures. . . . It is not practicable, however, for safety audits of this type to be undertaken by a workers' compensation board among the general range of employers.

Ison, *supra* note 20, at 740.

510. There are no studies on the success of these programs. Some reports allege that employers have received significant premium reductions. *See* Marley, *supra* note 506 (reporting that since January 1991 Colorado businesses have saved $10.6 million in premiums through the cost containment program). On the other hand, the California report noted that "[i]n Delaware, beginning in 1989, small employers (less than $60,000 in premiums) became eligible for a discount on their workers' compensation premium, up to 20 percent, if they submit to an independent inspection service and subsequently pass an unannounced safety inspection . . . . As of January 1992, less than 3 percent of eligible employers had signed up." California Insurance Study, *supra* note 7, at 110.

511. AFL-CIO SAFETY & HEALTH DEP'T, SUMMARY OF STATE INITIATIVES ON WORKER SAFETY AND HEALTH [hereinafter AFL-CIO MEMORANDUM] (on file with author).

512. *See, e.g.*, MICH. STAT. ANN. § 17.50(55) (Callaghan Supp. 1993-1994) (requiring the director of the labor department to assess a surcharge against insurance carriers, self-insured employers, and the state accident fund on total indemnity benefits paid by each and to deposit these funds in a safety and education training fund to be appropriated by the legislature); MICH. STAT. ANN. § 17.50(56) (Callaghan 1988) (requiring the state department of public health to conduct occupational health education and training). Connecticut and New York have similar provisions which fund training efforts through workers' compensation surcharges; in New York funding is also provided to occupational health clinics which provide occupational medicine services to workers. AFL-CIO MEMORANDUM, *supra* note 511, at 4-5.

underutilized, however.[513]

3. Safety and Health Committees. There is increasingly general acceptance of the idea that workers can be a source of significant and useful information regarding worksite hazards and that their education regarding hazards is a critical component of improving occupational safety. Over the objection of industry representatives, a number of states have therefore adopted amendments to their workers' compensation laws which require employers to establish safety and health committees composed of representatives of both management and workers.[514]

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513. This is reported anecdotally by state officials who operate these programs. Telephone Interview with Roy Smith, West Virginia Commissioner of Labor (Aug. 9, 1992); Telephone Interview with Jack Pompeii, Director, Oregon Occupational Safety and Health Division (OR/OSHA) (Oct. 29, 1993).

514. These provisions vary. In some states, the requirement for the creation of these committees applied to all employers. For example, in Nebraska every employer subject to the workers' compensation law must establish a safety committee by January 1, 1994. In unionized workplaces, the committee is to be established through the collective bargaining process; in nonunion workplaces, the statute specifies that the "committee shall be composed of an equal number of members representing employees and employer" and the "employer shall compensate employee member of the safety committee at their regular hourly wage plus their regular benefits while the employees are attending committee meeting or otherwise engaged in committee duties." Neb. Legislative Bill 757, § 32 (1993) (amending NEB. REV. STAT. § 48-612 (1988)).

In other states, the safety committee requirement is imposed only on specified groups of employers. For example, the following states only require employers over a certain size to establish committees: Minnesota (employers with 25 employees), Montana (five or more employees), and Nevada (20 or more employees). AFL-CIO MEMORANDUM, *supra* note 511, at 3; *see also* ALA. CODE § 25-5-15 (1984) (providing that every employer subject to Alabama's workers' compensation law must appoint a safety committee of at least three members at the request of any employee).

Other states require safety committees in workplaces with relatively high claims loss experience. For example, Connecticut recently adopted a provision which requires "each employer of twenty-five or more employees . . . and each employer whose rate of work related injury and illness exceeds the average incidence rate of all industries in the state" to establish a safety and health committee in accordance with regulations to be drawn by the chairman of the workers' compensation commission in consultation with the labor commissioner. 1993 Conn. Legis. Serv. P.A. 93-228 § 28 (West). West Virginia's 1993 workers' compensation legislation provides that the commissioner of workers' compensation may require any employer whose experience modification factor exceeds the criteria established by the new labor-management council "to establish a safety committee composed of representatives of the employer and the employees." W. VA. CODE § 23-2B-2(b) (Supp. 1993). Tennessee's 1992 legislation requires that a safety committee be established by every public or private employer with "an experience modification factor (or rate) applied to the premium in the top twenty-five percent (25%) of all covered employers' modification factors (or rates) applied to the premium." TENN. CODE ANN. § 50-6-501 (Supp. 1993). Oregon requires employers in high hazard industries, or employers with more 11 or more employees, to have committees. AFL-CIO MEMORANDUM, *supra* note 511, at 4. Similarly, North Carolina enacted a provision in 1991 which requires employers

Legislative mandates for worker participation in safety and health committees are undoubtedly rooted in sincere attempts to strengthen the voice of workers in the prevention of occupational injuries; there is no question that workers may be more aware of (and concerned about) hazards than many managers have proven themselves to be. Successful and active participation by hourly workers in these committees is nevertheless unlikely to occur in many nonunion workplaces. As the Upjohn Report has shown, toleration of workplace hazards, frequent injuries and claims, and negative attitudes toward workers go hand-in-hand in many enterprises;[515] it is likely that it is in the workplaces most in need of labor-management cooperation that employers are most likely to retaliate against workers who exercise statutory rights. Although some of these new provisions establishing safety and health committees include specific protection for employees who participate,[516] this is unlikely to overcome employees' rational perception that participation may yield more trouble than safety.

Only anecdotal evidence supports the claim that these legislatively mandated safety and health committees are effective in nonunion workplaces.[517] Unless states establish clear

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with 11 or more employees and an "experience rate modifier" of 1.5 or more to establish safety committees and safety programs; civil penalties can be assessed for violations of these provisions. N.C. GEN. STAT. ANN. § 95-250 to -256 (1993).

Some of these provisions exempt workplaces in which collective bargaining agreements have previously established joint labor-management committees for this purpose. West Virginia, for example, excludes any "employer that is a member of a multi-employer group operating under a collective bargaining agreement that contains provisions regulating the formation and operation of a safety committee that meets or exceeds the minimum requirements of this section . . . ." W. VA. CODE § 23-2B-2(d) (Supp. 1993).

Generally, these provisions require that the committee meet regularly and maintain written minutes of the meetings. Many of the statutes set penalties if an employer fails to comply with the specifications for the joint committees.

515. Upjohn Report, *supra* note 7, at 10 (noting that "companies who treat employees as stakeholders and valued participants in the organization's activities" are likely to experience fewer workers' compensation claims).

516. For example, the 1993 Nebraska legislation provides:

> An employee shall not be discharged or discriminated against by his or her employer because he or she makes any oral or written complaint to the safety committee or any governmental agency having regulatory responsibility for occupational safety and health, and any employee so discharged or discriminated against shall be reinstated and shall receive reimbursement for lost wages and work benefits caused by the employer's action.

Neb. Legislative Bill 757, § 32(4) (1993) (amending NEB. REV. STAT. § 48-612).

517. Representatives of the AFL-CIO indicate that several success stories have emerged during the inquiry into models for labor-management cooperation and total quality improvement programs by the Commission on the Future of Worker-Management Relations (commonly referred to as the Dunlop Commission). Telephone Interview with Lynn Rhinehart, Assistant Director, Occupational Safety and Health Dep't,

strategies for enforcement of these provisions, they are likely to be ineffective.[518] Unfortunately, workers' compensation programs which are designated to enforce these provisions may lack both the expertise and the financial resources necessary to achieve more than token compliance.[519]

4. *Safety and Health Enforcement Activities.* Several states have adopted provisions which require employers to develop safety programs[520] or authorize the workers' compensation program director to conduct workplace inspections, with[521] or without[522] advance notice to employers. Employers are then

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AFL-CIO (Oct. 15, 1993). As indicated in the Upjohn Report, however, it appears that most of these success stories involve enterprises which have made a general commitment to change corporate culture and expand worker involvement. Upjohn Report, *supra* note 7, at 15 (concluding that the employers expected to have good experiences with workers' compensation are those who are committed to the "well-being, productivity, participation, and accountability" of their employees).

518. According to Jim Ellenberger, the State of Washington has had a provision for safety and health committees on its books "forever, but nobody ever enforced it." Therefore, nothing came of it. Telephone Interview with James Ellenberger, Assistant Director, Occupational Safety & Health Dep't, AFL-CIO (Sept. 15, 1993); *see* WASH. REV. CODE § 296.24.020 (1992) (requiring, since 1980, that employers develop "a formal accident-prevention program, tailored to the needs of the particular plant or operation and to the type of hazards involved" including, for all employers of eleven or more employees, a safety and health committee "composed of employer-selected and employee-elected members").

519. For example, in West Virginia, the Workers' Compensation Fund, as of the time of this writing, has *no* employees who specialize in health and safety or who have any expertise in health and safety; no budgetary allotment for health and safety activities was included when the 1993 amendments to the workers' compensation statute expanded the commissioner's authority over employers' safety and health programs.

520. Alaska, California, Montana, Nebraska, Nevada, and Washington require all employers to develop safety and health plans; Hawaii, Michigan, Minnesota, North Carolina and Oregon impose the same requirement on employers in specified groups, which are either designated by industrial class or by relatively high claims filing experience. AFL-CIO MEMORANDUM, *supra* note 511, at 2-3. Beginning in 1992, Utah has also required safety programs. Brown, *supra* note 494, at 55.

521. *See, e.g.*, 28 TEX. ADMIN. CODE §§ 164.1-.6 (West 1992). The Extra-Hazardous Employer Program allows the Texas Workers' Compensation Commission (TWCC) to identify extra-hazardous employers based on high rates of injury in the employer's workforce and industry. *Id.* § 164.1. TWCC then must notify the employer of its extra-hazardous employer status. *Id.* § 164.2. The employer has thirty days to obtain a professional safety consultation by an inspector who will make a written hazard survey that includes both hazardous practices and conditions. *Id.* § 164.3. The employer has another thirty days to develop an accident prevention plan that complies with federal and state safety standards. *Id.* § 164.4. TWCC then will conduct a follow-up inspection of the premises six months after the employer files the report. *Id.* § 164.5. That inspection will be with full notification and during normal working hours. *Id.* § 164.5.

522. *See, e.g.*, W. VA. CODE § 23-2B-2(a) (Supp. 1993) (authorizing the workers' compensation commissioner "to conduct special inspections or investigations focused on specific problems or hazards in the work place with or without the agreement of

subject to penalties for failure to adopt safety programs or to correct hazards identified as a result of safety audits.[523] States with federally approved safety and health plans assess penalties as part of the state labor department's health and safety enforcement activities.[524] Some of these states are achieving better coordination of regulatory and compensation activities through reorganization of the state administration, placing both the state OSHA and workers' compensation programs into one department.[525] States without approved plans have adopted two different strategies for imposing penalties. In the first, penalties or fines are assessed when an employer fails to comply with provisions of the workers' compensation laws.[526] The second turns the employer over to federal OSHA

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the employer. The commission shall issue a report on his or her findings and shall furnish a copy of the report to the employer and to any bargaining unit [sic] representing the employees of the employer. The commissioner may share information obtained or developed pursuant to this article with other governmental agencies."). *Id.*

523. *See, e.g.*, 28 TEX. ADMIN. CODE § 164.1(c)(4) (West 1992) (referring non-complying Texas Extra-Hazardous employers to TWCC division of compliance and practices for investigation); N.C. GEN. STAT. § 95-256 (1993) (allowing civil penalties under workers' compensation); NEV. REV. STAT. § 618.383(7) (1992) (giving the manager of the state industrial insurance system discretion to raise workers' compensation insurance premiums as much as 15%).

524. CAL. LAB. CODE § 6401.7(e) (Deering Supp. 1993) (requiring the standards board to adopt a standard setting forth the employers' duties in establishing injury prevention programs).

525. *See, e.g.*, OR. REV. STAT. § 656.726 (Supp. 1992) (placing compensation and health and safety enforcement programs under a single administrative roof).

526. *See, e.g.*, TEX. LAB. CODE ANN. §§ 411.041-.050 (Vernon Supp. 1994) (setting up an extra-hazardous employer program). The Texas Extra-Hazardous Employer Program requires safety consultations and follow-up inspections. *Id.* §§ 411.043, 411.045. Failure to comply leads to a Class B administrative violation that can result in a fine, not to exceed $5000 per violation. *Id.* § 411.046; 28 TEX. ADMIN. CODE § 164.7(e) (West 1992) (Tex. Workers' Compensation Comm'n, Worker's Health and Safety—Extra-Hazardous Employer Program). The rules governing the program specifically require that employers utilize well-trained safety professionals, rather than loss management firms. Employers contested the method for identifying participants in the program; at this point, the program may be on hold pending final resolution of litigation challenging the constitutionality of the reforms. *See* Texas Workers' Compensation Comm'n v. Garcia, 862 S.W.2d 61, 103-04 (Tex. App.—San Antonio 1993, n.w.h.); *State Workers' Comp Fund Writer Intends to Cut Rates*, HOUS. POST, Aug. 27, 1993, at 32 (reporting that an appellate court declared the workers' comp law unconstitutional and noting that Jack Floyd, President and CEO of the Texas Workers' Compensation Insurance Fund, hoped that the law would be upheld because, "If we had to go back to the old law, we'd be in deep yoghurt"); *It's Back Again; Legislators Face New Bout With Workers' Comp Law*, HOUS. POST, Aug. 21, 1993, at A26 (editorial) (reporting that workers' compensation laws will be rewritten in 1995, regardless of the decision by the Texas Supreme Court); *Appeals Court Rules State's Workers' Comp Law Unconstitutional*, HOUS. POST, Aug. 12, 1993, at B1 (reporting responses to the court of appeals decision); Daniel B. Moskowitz, *Court's, Lawmakers at Odds on Workers' Compensation Reform*, WASH. POST, June 10, 1991, at F30 (reporting on tensions between legislative reform and court review).

for purpose of enforcement.[527] The coordination of these state enforcement efforts in states without state OSHA plans can be perplexing.[528] In cases in which penalties are assessed locally, several states have utilized the monies generated by enforcement activities to fund other safety and health activities.[529]

These plans endorse the idea that compensation and regulatory activities should be coordinated and abandon the idea that increased compensation costs alone will yield improved attention to safety. The motivation is to create an environment in which compensation costs will decline as a result of injury prevention, and to encourage injury prevention through the combined efforts of workers' compensation and regulatory programs. Unfortunately, states without approved

527. *See, e.g.*, Neb. Legislative Bill 757, § 36 (1993). The bill creates the Workplace Safety Consultation Program which authorizes the Department of Labor to conduct workplace inspections and consultations to determine whether employers are complying with federal OSHA standards. *Id.* § 36(1)-(2). The bill provides that Nebraska will inspect the worksite if the employer meets a number of criteria. *Id.* § 36(3). Those criteria include: the amount of premium paid by the employer; the employer's experience modification produced by the experience rating system; the employer's risk of injuries as evidenced by insurance rates or loss costs; and the nature, type or frequency of accidents. *Id.* § 36(3). An employer who refuses to eliminate workplace hazards in compliance with an inspection shall be referred to federal OSHA for enforcement. *Id.* § 36(5).

528. *See, e.g.*, W. VA. CODE § 23-2B-2(e) (Supp. 1993). The West Virginia safety provisions state that "[i]t is not the purpose of this article to either supersede the federal Occupational Safety and Health Act program, federal Mine Safety and Health Act program or to create a state counterpart to this program." *Id.* The U.S. Supreme Court has ruled that the federal Occupational Safety and Health Act preempts the right of states without approved state plans to enact occupational safety and health standards in areas in which a federal standard has been promulgated. Gade v. National Solid Waste Management Ass'n, 112 S. Ct. 2374, 2383 (1992). The OSH Act specifically does not preempt state workers' compensation provisions, however. 29 U.S.C. § 653(b)(4) (1988). Other courts have applied this savings clause so that workers' compensation penalties which increase workers' compensation benefits have been held not to be preempted. *See, e.g.*, Kroger Co. v. Industrial Comm'n, 402 N.E.2d 528, 530 (Ohio 1980) (per curium). State courts have also held that the states are not preempted from creating additional penalties for health and safety violations, particularly criminal penalties. *See, e.g.*, Illinois v. Chicago Magnet Wire Co., 534 N.E.2d 962, 966 (Ill. 1989). The court's ruling in *Gade* makes challenges to penalties for safety violations that are imposed through workers' compensation statutes more likely. *Gade*, 112 S. Ct. at 2383.

529. *See, e.g.*, MINN. STAT. ANN. § 176.129 (West 1994) (creating an assigned risk safety fund from fines and penalties); OR. REV. STAT. § 654.191 (1991) (using fines generated by the state OSHA program for health and safety training programs). Interestingly, these efforts bear some similarity to Ehrenberg's recommendation that increased costs to employers not be linked directly to increased compensation for workers, see Ehrenberg, *supra* note 18, at 81-86, 95-96, as well as to Sugarman's prediction that "accident law will eventually become a combination of social insurance (the extreme distributional method) and criminal sanction (the extreme method of deterrence)," Sugarman, *supra* note 19, at 637 (quoting Izhak Englard, *The System Builders: A Critical Appraisal of Modern Tort Theory*, 9 J. LEGAL STUD. 27, 49 (1980)).

state OSHA plans often lack the resources and the expertise to enforce these provisions adequately.

C. The Implication of Safety and Health Reforms for Injury Prevention

It is undoubtedly too early to reach a final conclusion as to whether any of these strategies will be effective in reducing injuries and costs. Evaluating the results of this legislation is further complicated by the fact that states have simultaneously enacted measures which make significant changes in administration of claims and reduce the availability of compensation for known disabilities. It will therefore be difficult to tell the extent to which injury prevention is the cause of any reductions in cost.

Nevertheless, it is safe to make three observations. First, the current level of workers' compensation costs finally appears to be sufficiently high to spark interest in primary prevention; the fact that the effort is being made at all is a positive change. Second, given the past history of workers' compensation, efforts that are simply designed to entice high claims employers into changed behavior are unlikely to be effective; premium discounts and consultative services, standing alone, will not generate substantial improvements. Third, states that enact legislation without addressing the need for increased funding for safety activities are only engaging in token efforts to reduce the hazards at worksites.

At this point, reforms appear to have produced reductions in employers' premium costs only in Oregon[530] and Texas.[531] Texas' reforms, which have been successfully challenged in court, have been in place for too short a time to evaluate.[532]

530. *See* Klein, *supra* note 52, at 12 (showing NCCI sought rate reductions in Oregon starting in 1990).

531. Media reports indicate that Texas premium rates stabilized after years of dramatic increases. *See, e.g.*, James M. Burcke, *Texas Comp Reforms Working: Study*, BUS. INS., Sept. 28, 1992, at 22 (indicating that half of 139 Texas risk managers responding to Business Insurance survey indicated that their workers' compensation costs dropped after Texas reform legislation went into effect in 1991); *State Briefs*, NAT'L UNDERWRITER, Sept. 16, 1991, at 12. During the first six months of 1991, the Texas Workers' Compensation Commission reported that lost-time claims went down 9.1%, while litigation and administrative costs were reduced by 44.3%. The legislation was also widely criticized, however, including by Texas Governor Ann Richards. *Id.* at 13.

532. The court in Texas Workers' Compensation Comm'n v. Garcia, 862 S.W.2d 61, 103-04 (Tex. App.—San Antonio 1993, n.w.h), held the Texas Workers' Compensation Act of 1989 to be unconstitutional. Responses to this decision, rendered after rehearing on October 1, 1993, did not appear to be fully formulated at the time of this writing.

At this point, Oregon stands alone as a state in which there have been a consistent pattern of falling employer premium rates over a period of years, demonstrating that there have been successful cost reductions in the workers' compensation system.[533] Prior to these reductions, Oregon's insurance rates had been increasing rapidly, and injury rates and claims costs were among the highest in the country.[534] Recent reductions in rates have been accompanied by drops in other key indicators: the incidence rate of reported injuries fell by twenty-one percent from 1989 to 1991; fatality rates dropped from 7.1 to 4.9 per 100,000, showing a reduction in every year from 1987 to 1992, during a period when the workforce grew by ten percent; the number of *accepted* disabling claims decreased by over thirty-three percent.[535]

Three other critical changes occurred in Oregon during this period of remarkable decline in costs and reported injury rates. First, the enforcement of the Oregon OSHA (OR/OSHA) plan was substantially strengthened. The number of employees assigned to enforcement grew from about 90 to 243 and the visibility of OSHA enforcement was vastly increased.[536] Jack Pompeii, administrator of the OR/OSHA program, says that employers now practice safety because there are a sufficient number of inspectors to "encourage" them not to ignore safety standards; the inspectors are, he asserts, "hanging over the state like a giant condor."[537] The OR/OSHA program changed its focus from "happy worker posters and gimmicks" to "ergonomics and engineering controls" during this period.[538] Meanwhile, assessed penalties rose from $1.0 million in 1987 to $3.0 million in 1992 and the legislature increased the penalty per violation.[539] Some of these fines are now being used in a grant program to fund innovative safety and health training

533. *See* Klein, *supra* note 52, at 12 (noting that NCCI applied for an overall rate reduction of 12% in Oregon in 1990). Rates continued to drop for three subsequent years: 11% in 1991, 11.4% in 1992, 4.3% in 1993. *Oregon Law Resulted in Fewer Accidents, Elevated Presence of State OSHA, Official Says*, 23 O.S.H. Rep. (BNA) 248 (Aug. 4, 1993).

534. OREGON DEP'T OF INS. & FINANCE, OREGON WORKERS' COMPENSATION: MONITORING THE KEY COMPONENTS OF LEGISLATIVE REFORM i (1993) [hereinafter OREGON REPORT] (noting that in 1986, Oregon ranked sixth highest in average workers' compensation rates paid by employers and had one of the nation's highest occupational injury and illness rates).

535. *See id.* at 2.

536. Telephone Interview with Jack Pompeii, *supra* note 513; *see also* OREGON REPORT, *supra* note 534, at 4.

537. Telephone Interview with Jack Pompeii, *supra* note 513.

538. *Id.*

539. OREGON REPORT, *supra* note 534, at 4.

and related efforts.[540] Inspections are now triggered by high claims experience;[541] the compensation program generates quarterly reports which are utilized to set priorities to target employers for regulatory inspections. Employers must voluntarily seek consultative services; these services are not offered after an enterprise is targeted for enforcement.[542]

As the enforcement capabilities of OR/OSHA have increased, so have the employer requests for voluntary consultative services to assist them in promoting safety without risk of penalties; consultations increased from 502 in 1988 to 2,430 in 1992.[543] According to Pompeii, "Enforcement drives the whole system. If you've got weak enforcement, no one's going to use consultation services."[544] Thus, the fact that Oregon employers were saddled with comparatively high workers' compensation costs did not lead them to change their internal practices. Enforcement activities may, however, have had this result.

Finally, with regard to health and safety, requirements in the 1990 legislation for establishing safety committees are, according to Jack Pompeii, a success.[545] OR/OSHA monitors compliance with safety committee requirements by, among other things, inspecting minutes of meetings; if hazards discussed at these meeting are not corrected, employers will subsequently be cited for willful violations.[546] Citations for failure to comply with the requirements to establish these committees grew from 131 in 1990 to 1014 in 1992.[547]

Second, workers' compensation reform legislation enacted in 1987 and 1990 in Oregon made it more difficult for workers to obtain benefits in certain instances. Many injuries and diseases that were previously compensable are no longer compensated.[548] In particular, compensability of diseases resulting from cumulative effects is more difficult to prove; diseases caused by a combination of work and non-work-related hazards are no longer compensable; and a new requirement for objective

540. Telephone Interview with Jack Pompeii, *supra* note 513.

541. *Id.*

542. *Id.*

543. OREGON REPORT, *supra* note 534, at 4.

544. Telephone Interview with Jack Pompeii, *supra* note 513.

545. *Id.* Pompeii acknowledges that these committees do not "work as well in nonunion facilities; but it's moving health and safety up a notch or two . . . empowering people to do more than they did before . . . every little bit helps." *Id.*

546. *Id.*

547. OREGON REPORT, *supra* note 534, at 5.

548. Refer to note 494 *supra*. Oregon now excludes many claims which have traditionally been compensated on the theory that employers must "take employees as they find them." OREGON REPORT, *supra* note 534, at 5.

medical evidence is likely to exclude considerable numbers of cases involving disabling back pain.[549] In addition, severe restrictions on palliative care and medical cost containment efforts yielded significant savings after 1990.[550] As one Oregon administrator noted, the political "pendulum swung hard" in 1990 toward "giving insurers more tools to contain costs."[551] From 1988 to 1992, the total number of claims filed dropped from 153,000 to 108,000;[552] it is difficult to assess how much of this represents a decline in injury rates and how much shows worker discouragement as a result of the compensability changes in rules governing compensability of claims.

Third, the state fund, SAIF, administratively reduced the number of claims it paid and increased the number it denied.[553] SAIF now insures about one-third of the employers in Oregon.[554] While the head of SAIF credited most of the costs reductions "to legislative redefining of what is a compensable injury,"[555] others think that SAIF artificially, but effectively, forced costs down by the simple approach of refusing to approve claims.[556] An investigation of SAIF's practices has led to a higher approval rate.[557]

Officials in Oregon acknowledge that sinking workers' compensation premium costs are a reflection of several, interlocking variables.[558] Nevertheless, it appears that premium rates began to drop before both the SAIF administrative reduction in claims approval and the 1990 workers' compensation reform legislation reduced the availability of medical benefits and narrowed the compensability of claims.[559] The Oregon effort differs materially from efforts to improve safety and

549. OREGON REPORT, *supra* note 534, at 5.

550. Telephone Interview with Larry Niswender, *supra* note 494. SAIF, the state insurance fund, reported that its medical payments declined from $80 million in 1990 to $64 million in 1991. *Id.*

551. *Id.*

552. *Id.*

553. *See, e.g.*, Meg Fletcher, *Oregon Probes State Comp Fund*, BUS. INS., Apr. 20, 1992, at 3 (stating that SAIF's denial rate on claims was, for a period of time, double that of commercial insurers active in the Oregon market).

554. Telephone Interview with Larry Niswender, *supra* note 494.

555. Louise Kertesz, *Oregon Reforms Still Yield Savings*, BUS. INS., Sept. 28, 1991, at 34.

556. *See* Stuart Silverstein, *Oregon's How-To Book on Repairing Workers' Compensation*, L.A. TIMES, Nov. 20, 1991, at A1, A26, A28.

557. Telephone interview with Larry Niswender, *supra* note 494.

558. *Id.*; Telephone Interview with Mary Dora, Division of Workers' Compensation (Oct. 26, 1993).

559. Telephone Interview with Mary Dora, *supra* note 558. Dora suggests that the initial premium drops reflect aggressive safety enforcement, while the more recent ones may be the result of benefit reductions. *Id.*

reduce costs solely through manipulation of the compensation system; it acknowledges that employers are not adequately motivated by workers' compensation incentives alone. The intertwining of compensation and regulation, together with the allocation of significant state resources to preventive activities, appears to create a profoundly different—and more positive—effect on real injury rates.

V. CONCLUSION

When the Commission on State Workmen's Compensation Programs issued its report in 1972, concern for benefit adequacy shaped the political debates about workers' compensation reform. Now, anxiety about costs controls these discussions. Existing evidence unequivocally supports the conclusion that more effective prevention of occupational injury and disease would yield both cost savings for employers and less disability for workers. If our goal is to reduce costs without penalizing injured workers, we must confront the failure of exploding costs to spur efforts at primary prevention.

It is tempting to conclude that the optimal solution to this problem is to boost employers' economic incentives by increasing and clarifying the internalization of these costs. But this approach creates an inescapable tension: expanding incentives in order to encourage prevention is likely to result in employers' use of managerial authority to discourage the filing of legitimate claims or to engage in other problematic cost reduction strategies. The use of this escape valve by knowledgeable employers may be an economically rational response; it fails, however, to meet the dual goals of cost containment and injury prevention.

In contrast, the Oregon experience provides strong evidence that the coordination of regulation and compensation yields both improved safety and decreased compensation costs. This may, in fact, be the only approach which can meet these dual goals. Its success requires the forging of a new political compromise: expansion of safety regulation in exchange for decreased escalation of workers' compensation costs. The legislation passed in the last few years in many states indicates that a national consensus is in fact emerging around these principles.

Unfortunately, the current combination of state and federal compensation and regulatory programs makes this coordination difficult in many states. Those states with state OSHA plans can emulate Oregon's model. As long as compensation programs

dom, unequivocally made every one of the Lanham Act's existing remedy provisions applicable to all section 43(a) violations, regardless of [illegible]ication. In effect, Congress acquiesced to an unsound judicial [illegible] that had evolved in the federal courts. A better, more logical, and more complete solution would have been to create separate remedy provisions for section 43(a) violations.

Congress also blundered when it failed to address the issue of consumer standing under section 43(a). In blatantly avoiding its legislative responsibility, Congress gave absolutely no guidance to a badly fragmented federal court system. Instead of making the wrong choice, as with the wholesale incorporation of section 43(a) into the Lanham Act remedy provisions, Congress made no choice. Instead, Congress should have explicitly granted consumers standing to sue under section 43(a).

NOTE

RECONCILING CONFLICTS BETWEEN THE AMERICANS WITH DISABILITIES ACT AND THE NATIONAL LABOR RELATIONS ACT TO ACCOMMODATE PEOPLE WITH DISABILITIES

Rose Daly-Rooney[*]

INTRODUCTION

Imagine being consulted to provide legal advice to the following employers: (1) The personnel director of a large metropolitan public school district who has hired a man with a mental disability to work as a janitor for the school district. The employee receives training assistance through a job coach under the auspices of another state agency that provides vocational rehabilitation. With training, he has learned the job functions at a specific school site. Because he has less seniority, however, he has been bumped from his position by senior employees on several occasions pursuant to the terms of a collective bargaining agreement. Each time he has had to be retrained for a position at the different site. He now complains that this is not a reasonable accommodation under the Americans with Disabilities Act.[1]

(2) An office manager for an advertising agency who has hired a deaf applicant to work in a word processing department. The position requires extensive typing and proofreading with written instructions accompanying each project. On a rotating basis the five workers in the unit answer the phone for their department, usually consisting of in-

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1. This example is similar to the facts of a complaint pending before the EEOC that was reported in 3 HIGHLIGHTS TO DISABILITY L. REP. 8 (Feb. 3, 1993). Additional circumstances for the example were added for purposes of creating the hypothetical.

#5

NOTHING TO DO w/ OSHA... but interesting + could be significant w/ Labor + Work Safety.

house calls inquiring about a project's status. The office manager is unsure whether she may eliminate phone answering from the job duties listed in the job description in the collective bargaining agreement to accommodate the deaf applicant.

(3) A factory owner who employs over two hundred workers each of whom work on one of three shifts. An applicant who uses a wheelchair seeks the first shift because he relies on public transportation.[2] The accessible route ends before the second shift is over so that he could travel to work but not home unless he is hired for the first shift. Openings on the first shift are granted to senior employees. The employer does not know if she can make an exception to permit her to hire this applicant.

To provide legal advice to any of these employers requires an examination of the effect of collective bargaining agreements on the employer's duty to provide reasonable accommodations to qualified individuals with disabilities under the Americans with Disabilities Act of 1990 (ADA).[3]

This Note will argue that the terms of a collective bargaining agreement should be one of numerous factors taken into consideration when determining whether a proposed accommodation is reasonable. A conflicting provision in the collective bargaining agreement, standing alone, should not be dispositive of a finding that the accommodation is unreasonable. This Note will advocate the use of a multifactorial test[4] to evaluate the reasonableness of a proposed accommodation that conflicts with the collective bargaining agreement.

I. Background

A. *Requirements for Employers Under the ADA*

The Americans with Disabilities Act requires numerous individualized determinations by employers making employment decisions about people with disabilities. Evaluating whether an individual is disabled is the first of these individualized inquiries. Disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[5] Generally, there are no

2. Although the Americans with Disabilities Act also requires that the barriers to accessible mass transportation be eliminated, the time lines for reaching compliance will continue to result in similar inequities until full compliance can be accomplished. *See* 42 U.S.C. §§ 12141-150 (Supp. II 1990).

3. *See id.* §§ 12101-213.

4. *See infra* notes 134-142 and accompanying text.

5. 42 U.S.C. § 12102(2)(A) (Supp. II 1990). *See also id.* §§ 12102 (2)(B)-(C) (defining disabil-

categorical determinations. Accordingly, not all people with epilepsy are disabled; and conversely, not all persons with attention deficit disorder are disabled under ADA standards.[6] The employer must understand what qualifies as a "major life activity" to determine whether a job applicant should be considered disabled. Working is a major life activity.[7] Determining whether an individual is substantially limited in a major life activity[8] and specifically in the major activity of working[9] are also individualized inquiries.

Once an individual meets the statutory definition of disability, he must otherwise be qualified to perform the essential functions of the job either with or without a reasonable accommodation.[10] This requires (1) distinguishing between the functions that are essential rather than marginal to the job[11] and (2) assessing whether the employee with a disability could perform the essential function with or without a reasonable accommodation.

The ADA prohibits a covered employer from discriminating against a qualified individual with a limitation by not making reasonable accommodations to the known physical or mental limitation.[12] The ADA envisions that an employer's efforts to reasonably accommodate individuals with disabilities may take the following forms:

ity as: "a record of such an impairment" or "being regarded as having such an impairment" but which does not require consideration of reasonable accommodations and therefore will not be discussed in this note).

6. There are some conditions which are not covered under the ADA, such as transvestitism.

7.. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i) (1993).

8. *Id.* §§ 1630.2(j)(2)(i)-(iii) (including such factors as the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact, of or resulting from the impairment).

9. *Id.* § 1630.2 (j)(3)(ii). Including such factors as:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment.

Id.

10. 42 U.S.C. § 12111(8) (Supp. II 1990).

11. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(o) (1993).

12. *Id.* at app. § 12112(b)(5)(A).

> [M]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment with devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[13]

Congress intended that the ADA would level the playing field between disabled and non-disabled employees and applicants. Recognizing that individuals with disabilities experience staggering levels of unemployment and poverty, Congress attempted to substantially alleviate a major obstacle to their employment — reliance on the cost and inconvenience of accommodations as grounds for not employing otherwise qualified people with disabilities.

According to a Louis Harris poll cited by the Senate Committee considering the ADA bill, "about 8.2 million people with disabilities want to work but cannot find a job."[14] Testimony presented to the committee indicated that the major categories of job discrimination faced by people with disabilities include the failure to provide or make available reasonable accommodations.[15]

In designing a reasonable accommodation standard, Congress intended an interactive process to take place between the employer, the employee, and outside resources.[16] Although the employer should consider those alternatives preferred by the employee, the employer is ultimately free to choose the least costly, effective alternative.[17]

The defenses of undue hardship and business necessity set boundaries on the lengths an employer must go in order to accommodate the applicant or employee with a disability. If an employer proves that the accommodation would pose an undue hardship on the operation of the business, the accommodation is not required.[18] If the employer adequately demonstrates that maintaining a standard, test, or other selection criteria is a business necessity, she may be excused from eliminating that standard even though it has a disparate impact on workers with disabilities.[19]

13. *See Id.* at app. § 12111(9).

14. S. REP. NO. 116, 101st Cong., 1st Sess. 32 (1989) and H.R. REP. NO. 485, 101st Cong., 2d Sess. 41 (1990); *reprinted in* COMM. ON EDUC. AND LABOR, 101st Cong. 2d Sess., LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT, 107 (1990) [hereinafter *Legislative History of the ADA*].

15. *Id.*

16. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(o) (1993).

17. *Id.* at app. § 1630.9.

18. *Id.* at app. § 1630.2 ("Undue hardship refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of a business.").

B. Impact of the Collective Bargaining Agreement on the ADA Duty to Accommodate

Entering into this rather private interactive process between the employer and the applicant with a disability are the rights of the other employees as summarized in the collective bargaining agreement. The National Labor Relations Act (NLRA)[20] regulates the relationship between labor unions, as duly authorized representatives of employees, and employers. This statute and its corresponding regulatory provisions proscribe unfair labor practices related to the collective bargaining agreement.

Certain actions by an employer represent unlawful labor practices under the NLRA. Those unlawful labor practices which are pertinent to the duty to accommodate include refusing to bargain collectively with the representatives of the employees;[21] unilaterally modifying or ignoring the terms of a negotiated collective bargaining agreement;[22] implementing a policy affecting represented employees without negotiating the policy through the union;[23] and engaging in individual dealing with union members.[24]

Collective bargaining agreements generally cover rates of pay, wages, hours of employment, and other conditions of employment.[25]

19. An employer may also defeat a claim of discrimination for using a standard, test, or selection criteria that has an adverse and disparate impact upon people with disabilities if it is proven to be (1) job-related, (2) consistent with business necessity, and (3) its performance cannot be accomplished by reasonable accommodation. *Id.* at app. § 1630.15(b).

20. 29 U.S.C. §§ 151-191 (1988).

21. *Id.* § 158(a)(5).

22. *Id.* § 158(d).

23. *Id.* § 158(a)(5).

24. *Id.* § 158(a)(1). *But see id.* § 159(a) (permitting an exemption from the requirement of dealing with representatives when the adjustment is consistent with the terms of the collective bargaining contract or agreement then in effect and the bargaining representative has been given the opportunity to be present at such adjustment).

Section 159 of the NLRA raises another potential conflict between the NLRA and the ADA which is not addressed in this Note, but was addressed in Jules L. Smith, *Accommodating the Americans with Disabilities Act to Collective Bargaining Obligations Under the NLRA*, 18 EMPLOYEE RELATIONS L.J. 273, 277 (1992). The conflict is whether the requirement to deal with representatives interferes with the right of the employee with a disability to confidentiality regarding his/her condition under the ADA.

25. *See generally* BASIC PATTERNS IN UNION CONTRACTS (BNA ed., 8th ed. 1975).

Provisions of collective bargaining agreements usually address discharge and discipline, insurance, pensions, grievances and arbitration, income maintenance, hours and overtime, holidays, layoff, rehiring, worksharing, leaves of absence, vacation, wages, working conditions, safety, and seniority.[26]

Seniority provisions are found in the vast majority of collective bargaining agreements.[27] Seniority, i.e., the length of continuous service with an employer, is generally used to rank employees for various employment actions, such as layoff, promotion, and transfer.[28] Seniority may be the sole factor, the determining factor, an equal factor, or a secondary factor considered only when other factors are equally considered in making these employment decisions.[29]

C. How the Conflict Emerges

Whenever an employer proposes an accommodation that contradicts the collective bargaining agreement, a conflict between duties emerges. Conflicts that commonly emerge include granting a shift change, transfer, or assignment to a light duty position[30] for a person with a disability who does not have the prerequisite seniority to bid competitively. Often preferential shifts and assignments may require a minimum number of years of service before the employee can bid for the position. Similarly, workers with more seniority may "bump" workers with less seniority from positions under the terms of some agreements. If an employer freezes a position to accommodate a worker with a disability that position has been exempted from the competitive bidding process set up in the private agreement.

Another potential conflict might emerge if an employer made an exception to a general policy for a worker with a disability[31] where no exceptions were available to the other workers under the collective bargaining agreement. For example, an employer may have an absentee policy stated in the collective bargaining agreement whereby employees are discharged for more than eight absences per quarter. If the employer granted an exception for an employee with a disability who needed twelve days each quarter to take leave for necessary medical treatment, the letter of the agreement would be violated. Also, some collective bargaining agreements include descriptions of jobs. If an employer restructured a job and reassigned nonessential duties to other workers in a manner that altered the duties set out in the job descriptions, the employer technically would be violating the agreement.

Of all of these areas of potential conflict, the role of seniority in light duty assignments, transfers, and reassignments pose the thorniest problems for employers because the rights of one worker are pitted against the rights of another. If an employer wishes to accommodate an individual with a disability by a transfer, assignment to a part-time or modified position,[32] or reassignment, the collective bargaining agreement would require that the bidding procedures of the contract be utilized. When competitive bidding procedures are followed and a more senior employee bids on the position, the seniority provisions most often require that the senior employee be placed in the position. Such a strict adherence to a collective bargaining agreement can essentially prevent qualified persons with disabilities from obtaining such positions.

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26. *Id.* at iii.
27. *Id.* at 85.
28. *Id.* at 89.
29. *Id.* at 66.
30. Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987). Bringing an action under the *Rehabilitation Act of 1973*, plaintiff claimed that he was entitled to a reasonable accommodation of a permanent transfer to a light duty assignment because of his disability. However, the light duty positions fell under the collective bargaining agreement which mandated that those positions be assigned to employees with a specified amount of seniority. *Id.* at 467.
31. Wimbley v. Bolger, 642 F. Supp. 481, (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987) (claiming his excessive absenteeism, the motivation for his termination, was caused by a service-connected disability). Plaintiff asked for a transfer in lieu of the termination, but the transfer he requested fell within those covered by the collective bargaining agreement. Ultimately, the request for a transfer was not upheld by the court because, in part, plaintiff did not take the proper steps to request the transfer through the union. *Id.* at 486. This case illustrates that transfers may be potential accommodations subject to the provisions of a collective bargaining agreement.
32. Jasany v. United States Postal Service, 755 F.2d 1244, 1251-52 (6th Cir. 1985). Plaintiff was hired by the United States Postal Service as a Distribution Clerk, Part-time Flexible, Machine Qualified. The job included duties working as an operator of a mail sorting machine and manual distribution. The operation of the machine caused an exacerbation of plaintiff's pre-existing eye condition. He was unable to perform these duties and was terminated. In lieu of termination, plaintiff sought either to share the work as an "allied man" or part-time schedule on the machine. The court noted that "there was nothing in the record pertaining to the existence of such a position . . . [and] . . . that an employer cannot be required to accommodate a handicapped employee by restructuring a job which would usurp the legitimate rights of other employees in a collective bargaining agreement." *Id.* at 1251-52.

II. ANALYSIS

There is evidence in the language of the statute and regulations, guidance from the EEOC,[33] legislative history,[34] the nature of collective bargaining agreements, and sound public policy that a multifactorial test should be used to balance the rights of the senior worker and the less senior worker with a disability. Because no cases have been decided to date under the ADA, the analysis also includes a review of pertinent cases decided under the Rehabilitation Act. These cases are not dispositive of the test to be used under the ADA, however, because of several key differences between the Rehabilitation Act and the ADA.

A. *Case Law Under the Rehabilitation Act*[35]

Until a case is decided under the employment provisions of the ADA, it remains unknown how the courts will resolve conflicts between terms of collective bargaining agreements and proposed accommodations. One commentator recommends that courts defer to collective bargaining agreements as has been done under the Rehabilitation Act.[36] Another commentator suggests that the duty under the ADA is different from the duty under the Rehabilitation Act and "should be capable of mitigation by the provisions of a collective bargaining agreement only under extraordinary circumstances."[37]

Although at least one district court acknowledged that the terms of a collective bargaining agreement should be a factor in analyzing reasonableness of a proposed accommodation,[38] many courts deciding

33. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630 (1993).

34. *Legislative History of the ADA*, *supra* note 14, at 107.

35. 29 U.S.C. §§ 701-796i (1988).

36. *See generally* Jules L. Smith, *Accommodating the Americans with Disabilities Act to Collective Bargaining Obligations Under the NLRA*, 18 EMPLOYEE RELATIONS L.J. 273 (1992).

37. *See* Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 3 DET. C.L. REV. 925, 927 (1991).

38. Dexler v. Tisch, 660 F. Supp 1418, 1424 at n. 7 (D. Conn. 1987) (noting that "[w]hile the collective bargaining agreement cannot override federal law regarding employment of the handicapped, its provisions are factors to consider in analyzing the reasonableness of a proposed accommodation"). The court ultimately found that Mr. Dexler, who had achondroplastic dwarfism, could not be accommodated by the USPS because of safety and loss of efficiency. The terms of the collective bargaining did not come into play under the accommodations proposed by Mr. Dexler. *Id. See also* Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982) (holding that a five year minimum seniority for light duty was reasonable and substantially related to established goals, while deeming placement of the employee with a disability in that position was unreasonable).

cases under the Rehabilitation Act have adopted the equivalent of a *per se* rule; if a proposed accommodation conflicts with the terms of a collective bargaining agreement, the accommodation is not reasonable.

Although the sponsors of the ADA drew upon the regulations and case law of the Rehabilitation Act to create the ADA, it was also their intent to "create a statute that [could] stand on its own and not be dependent on incorporation by reference to regulations issued under Section 504."[39] For the following reasons the ADA should stand on its own in utilizing a multifactorial test to resolve the reasonableness of an accommodation in the face of a conflicting collective bargaining provision. First, the majority of the cases under the Rehabilitation Act are distinguishable from cases that will be brought under the ADA. Second, a *per se* rule provides over-inclusive protection for workers with seniority. Third, federal workers with disabilities need less protection offered by a *per se* rule than do workers in the private sector.

1. *Cases Under the Rehabilitation Act Are Distinguishable*

Although the ADA provisions track some of the regulations and decisions of the Rehabilitation Act, the ADA is different in two key ways. Unlike the Rehabilitation Act, the Americans with Disabilities Act listed reassignment, as a method of accommodating employees with disabilities.[40] Also different is a tripartite standard that the employer must meet to establish a defense of business necessity under the ADA.[41] These variances will yield different results for cases with similar facts brought under the ADA.

Cases, such as *Carty v. Carlin*,[42] *Alderson v. Postmaster General*,[43] *Jasany v. United States Postal Service*,[44] *Dancy v. Kline*,[45] and *Carter v. Tisch*[46] are cited for the proposition that an accommodation is unreasonable if it conflicts with the collective bargaining agreement. These cases discuss whether reassignment is a contemplated alternative for accommodating the worker with a dis-

39. *Legislative History of ADA*, Vol. 3 of 3, *supra* note 14, at 2219-20 (written response by Chai Feldblum, Legal Counsel to the American Civil Liberties Union and a drafter of the ADA bill, to the Honorable James Sensenbrenner).

40. 42 U.S.C. § 12111(9) (Supp. II 1990).

41. *See supra* note 19.

42. 623 F. Supp. 1181 (D. Md. 1985).

43. 598 F. Supp. 49 (W.D. Okla. 1984).

44. 755 F.2d 1244 (6th Cir. 1985).

45. 639 F. Supp. 1076 (N.D. Ill. 1986).

46. 822 F. 2d 465 (4th Cir. 1987).

ability. In each of these cases, federal employees working under collective bargaining agreements requested the accommodation of a reassignment to a position where they could perform the essential functions of the job. Each was decided on a premise that an employee was only entitled to an accommodation if he could perform the functions of the present job with or without an accommodation. In dicta, the court in *Carty v. Carlin*[47] noted that "such a reassignment might also violate other employees' rights secured by the collective bargaining agreement."[48]

In *Carty v. Carlin*,[49] the plaintiff had worked for the United States Postal Service (USPS) for over fourteen years as a mail collector, messenger and later as a custodian. Due to severe depression and other medical conditions, Mr. Carty was temporarily reassigned to clerical work. When his doctor recommended a permanent assignment to this position, Mr. Carty was terminated from employment. The court focused its inquiry on whether Mr. Carty could successfully perform the job of custodian with an accommodation.[50] When it was found that he could not perform those duties, the court held he was not a qualified handicapped individual despite his abilities to perform as a clerical worker.[51]

The inclusion of reassignment in the ADA as an option in the menu of accommodations would have probably resulted in Mr. Carty being granted an accommodation if he was working for an employer covered by the ADA. As an existing employee with a disability, he would be entitled to reassignment to the clerical position unless it posed an undue hardship upon the employer. Because he had worked there temporarily without creating an undue hardship on the employer, a permanent accommodation would have likely been reasonable.

Another difference affecting the outcome of cases determined under the ADA is that the ADA imposes a higher standard than the Rehabilitation Act for establishing a defense to a discriminatory use of a qualification standard, test, or selection criteria. The ADA creates a tripartite test: (1) job-relatedness, (2) business necessity, and (3) inability to be accomplished through reasonable accommodation.[52]

47. 623 F. Supp. 1181 (D. Md. 1985).
48. *Id.* at 1189.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See supra* note 19.

Such a test was not set out in the statute or regulations of the Rehabilitation Act. Under the Rehabilitation Act, some courts applied a watered down legitimate business standard,[53] while other courts applied the lone element of business necessity.[54]

This more stringent standard will not be met by circumstances accepted by courts utilizing the less rigorous standard of the Rehabilitation Act. For example, in *Daubert v. United States*,[55] Ms. Daubert applied to the USPS as a part-time distribution clerk. She satisfied the job requirements despite a disclosed history of preexisting back problems. The USPS later converted a job function from dragging mail sacks to loading a large dolly with mail sacks. After this change, Ms. Daubert began experiencing back problems and was temporarily assigned to light duty where she rewrapped parcels. She underwent a fitness-for-duty examination by USPS medical officer and was declared unfit for duty because of her back disability. She was ultimately discharged.

Although the federal district court held that she had established a *prima facie* case of handicap discrimination, the USPS defeated the claim by establishing a legitimate business reason for Daubert's termination; "[The USPS] was legally incapacitated under its national union contract to modify the job requirements of a distribution clerk-machine operator or create an exception due to her back injury."[56]

Ms. Daubert asked for either an accommodation of permitting her to perform part of the duties or of transferring her to light duty work. Both options were foreclosed because of seniority provisions in the collective bargaining agreement. There was no discussion that another worker wanted the position or if reassignment of nonessential duties would have burdened other workers. If the facts in this case had been tried under the ADA standard, however, it is unlikely that a covered employer could have satisfied the ADA's standard because there were no reported facts that the accommodations she requested would have actually harmed the rights of other workers or jeopardized the efficiency of the business.

53. *See generally* Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984).
54. *See* Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989).
55. 733 F.2d 1367 (10th Cir. 1984).
56. *Id.* at 1369.

2. *A Per Se Rule Is Over-Inclusive*

In addition to the court in *Daubert*,[57] other courts were concerned that the rights of people with disabilities under the Rehabilitation Act should not usurp the legitimate rights of employees under a collective bargaining agreement.[58] However, the legitimate rights of non-disabled employees may be protected under a multifactorial test without sacrificing the goals of the ADA.

When a *per se* rule is invoked by a court, a proposed accommodation will be deemed unreasonable if it conflicts with a provision of the collective bargaining agreement, even if another worker's legitimate rights are not involved. For example, an accommodation of restructuring the duties of the job would be *per se* unreasonable if the job duties are different in the collective bargaining agreement. Moreover, where positions are available only to employees with a specified seniority, it is difficult to argue that another employee's rights are being violated if no qualified employee bids for the job.

In both *Daubert*[59] and *Carty*,[60] the courts did not discuss whether another, more senior employee was bidding for the position which would have accommodated these employees with disabilities. The *per se* rule invoked by the courts under the Rehabilitation Act failed to provide a framework for evaluating when a conflict would usurp the legitimate rights of other workers.[61] Therefore, the *per se* rule protected the letter of the agreement even in cases where no legitimate rights of union members were at stake.

3. *Workers with Disabilities in the Private Sector Need Greater Protection*

The ADA applies to nearly every employer, except the federal government and employers with fewer than twenty-five employees.[62] Whether the courts have fairly interpreted the Rehabilitation Act to that rights under that Act cannot prevail over rights created by a

57. *Id.*
58. Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); Carty v. Carlin, 623 F. Supp 1181 (D. Md. 1985).
59. *See supra* note 55.
60. *See supra* note 42.
61. *See also* Ervin, *supra* note 37, at 950 ("[T]he opinions are . . . noteworthy in the absence of a developed rationale.").
62. 42 U.S.C. § 12111(5)(A) (Supp. II 1990).

bona fide seniority system, justification remains for not applying the same rationale for cases under the ADA. An applicant or employee of the United States government has additional protections that applicants and employees of other covered employers do not possess. These protections include Constitutional protections, most notably substantive and procedural due process and equal protection. These protections, while also available to employees of state and local government covered by the ADA, are not available to the employee with a disability in the private sector.

These protections make a person with a disability less vulnerable to arbitrary decisions by the state and afford them protections when they are affected by an adverse decision. In *City of Cleburne v. Cleburne Living Center*,[63] the United States Supreme Court invoked an elevated rational basis test more akin to intermediate scrutiny[64] to overturn a zoning ordinance that had a discriminatory impact upon the living arrangements of persons with disabilities.

Congress intended for the federal government to become a model employer of people with disabilities.[65] The federal government is required to take positive steps to employ and advance qualified handicapped persons under the Rehabilitation Act. The affirmative action component helps to ensure that steps will be taken to recruit and select people with disabilities for federal employment. The positive steps include special hiring programs offered exclusively to persons with disabilities. An example of a special hiring and training program for people with severe disabilities was described in *Davis v. United States Postal Service*.[66]

The statutory and regulatory language, guidance by EEOC, and the legislative history of the ADA demonstrate that the duty to provide a reasonable accommodation is greater than the duty carved out by the courts under the Rehabilitation Act.

63. 473 U.S. 432 (1985).
64. *Id.* at 458 (Marshall, J., concurring in part and dissenting in part). Chastising the majority, Marshall stated, "The refusal to acknowledge that something more than minimum rationality is at work here is, in my view, unfortunate . . . ." *Id.* at 459. He referred to the scrutiny in this case as "second order" rational review. *Id.* at 458.
65. 29 U.S.C. § 791(b) (1988).
66. 675 F. Supp. 225 (M.D. Pa. 1987) (describing a special program in which people with severe disabilities were hired in a noncompetitive process for training and permanent hiring if they later met performance standards).

B. *Statutory and Regulatory Language*

The language of the ADA suggests that collective bargaining agreements should not be the sole factor in determining reasonableness of an accommodation. Specific references in the statute and regulations prove that the existence of the collective bargaining agreements is only one factor among others in this evaluation. Just as important in interpreting the ADA is the exclusion of a provision to protect seniority systems.

1. *Specific Language About Collective Bargaining Agreements*

The ADA defines unlawful discrimination as the "participation in a contractual or other arrangement that has the effect of subjecting an applicant or employee of the employer to discrimination."[67] The employer cannot engage in actions through a contractual arrangement that would be discriminatory if committed directly by the employer.[68] The regulations define contractual or other arrangements to include collective bargaining agreements with labor unions.[69] Therefore, the plain language of the statute, together with the regulations, prohibit an employer from refusing to accommodate an individual with a disability solely because of an inconsistent term in the collective bargaining agreement.[70] Complying with a term of an agreement which precluded providing a reasonable accommodation would be tantamount to directly refusing to provide the accommodation.[71]

67. 42 U.S.C. § 12112(b)(2) (Supp. II 1990).

68. *See generally* Ervin, *supra* note 37, at 971 (exploring the theory that the labor unions also have a duty to make reasonable accommodations for employees with disabilities under the Americans with Disabilities Act).

69. 29 C.F.R. § 1630.6 (1993).

70. The regulations that implement the Rehabilitation Act have some similar provisions regarding contractual relationships.

> A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies with labor unions . . . .

34 C.F.R. § 104.11 (a)(4) (1993).

Compare this with the regulations implementing the ADA which added the language that contractual or other arrangements include "collective bargaining agreements." 29 C.F.R. § 1630.6 (b) (1993); *see also* 34 C.F.R. §104.11 (1993) ("[A] recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party").

71. *Legislative History of the ADA*, *supra* note 14, at 332-33 (explaining this section by stating "the basic intent of this provision is that any entity may not do through a contractual provision what it may not do directly").

The language of the regulations point to Congress's reliance on multifactorial approaches in making determinations under the ADA. For example, there are multifactorial approaches for determining when: (1) a person is substantially limited in a major life activity;[72] (2) a person is limited in the activity of working;[73] (3) the job functions are essential;[74] and (4) an accommodation poses an undue burden.[75]

This reliance on a multiplicity of factors in making determinations demonstrates a general unwillingness to use a *per se* approach. A *per se* approach in which the terms of a collective bargaining agreement either always or never outweigh the rights of an individual with a disability would be inconsistent with the multifactorial approach used throughout the ADA.

2. *No Express Exemption for Bona Fide Seniority Systems*

Absent from the language of the ADA is any provision to exempt seniority systems. To protect seniority systems, Title VII of the Civil Rights Act of 1964 included a provision which excluded from the scope of unlawful employment practices the "appl[ication] of different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system."[76]

If Congress wished to exempt the application of different terms, conditions, or privileges of employment based on seniority systems, an express provision patterned after Title VII would have been incorporated.[77] Excluding seniority systems would have been inconsistent with the findings and purpose of the ADA as set out in the statute. Congress found that discrimination against individuals with disabilities persists in employment and other areas key to gaining access to em-

72. *See supra* note 8 (listing factors considered in the determination of substantial limitation of a major life activity).

73. *See supra* note 9 (listing factors considered in the determination of substantial limitation of working).

74. A non-exhaustive list of factors that may be considered in determining essential job functions include: (i) the employer's judgment as which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for the job; and (iii) the amount of time spent on the job performing the function. 29 C.F.R. § 1630.2(n)(3) (1993).

75. *See supra* note 18.

76. 42 U.S.C. §§ 2000e-2(h) (1988).

77. Ervin, *supra* note 37, at 962 (excluding seniority systems from the scope of unlawful employment practices was intentional, Ervin argues, because Congress presumedly knew the exception was being read into discrimination cases under § 504, and therefore Congress did not make such a counterpart in the ADA).

ployment, such as transportation and public accommodations. Individuals with disabilities face "outright intentional exclusion, the discriminatory effects of . . . transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser . . . jobs, or other opportunities."[78]

Excluding seniority systems would have made the goals of the ADA illusory. Provisions of collective bargaining agreements strike more heavily against most employees with disabilities than those protected under Title VII because these agreements control most personnel actions and job descriptions where modifications must be made to accommodate many workers with disabilities.

For workers with disabilities, access to jobs is not only impeded by the attitudinal barriers other protected groups face but also by actual physical, mental, communicative, architectural, and transportation barriers. Two-thirds of the working-age disabled are unemployed.[79] Gaining access to employment is the first step to realizing the ADA's goals of equal employment opportunity and economic self-sufficiency.[80] These barriers include the inaccessible public transportation system that others may rely on to get to work, the lack of telecommunications devices for people who are deaf (TDD) at a place of employment to contact an employer regarding job inquiries, architectural barriers at the front door, lack of an accessible bathroom in the work site, or actual physical and mental limitations in performing certain job functions. All of these barriers have made the most accurate descriptive account of what its like to be disabled in America as "not working."[81]

Davis v. United States Postal Service[82] offers an example of the additional adverse impact that seniority systems may pose for workers with disabilities. Davis, who was disabled by hemophilia and arthritis, was precluded from permanent employment because he was unable to perform the duties of an entry level position.[83] Although Davis was able to perform the duties of a non-entry level position, the Postal

78. 42 U.S.C. § 12101(a)(5) (Supp. II 1990).
79. *Legislative History of the ADA*, *supra* note 14, at 107.
80. 42 U.S.C. § 12101(a)(8) (Supp. II 1990).
81. *Legislative History of the ADA*, *supra* note 14, at 107.
82. 675 F. Supp. 225 (M.D. Pa. 1987).
83. *Id.* at 230.

Service would not accommodate him by placing him in such a position.

The non-entry level positions were not available to him under the applicable collective bargaining agreement because he did not possess the requisite seniority. *Davis*, although ultimately unsuccessful, challenged the disparate impact of this policy upon similarly-disabled people[84] because they were unable to obtain employment in jobs for which they could perform since the only channel to those jobs were through jobs that they could not perform.[85]

Seniority provisions of a collective bargaining agreement that arbitrarily eliminate people with disabilities from entry into a workforce, which occurred in *Davis*,[86] were not intended to be excluded from unlawful employment practices as is evidenced by the lack of an express exemption.

C. Equal Employment Opportunity Commission's Guidance in Interpreting the ADA

Three excerpts from the Equal Employment Opportunity Commission's (EEOC) guidance to interpreting the ADA lends support to a multifactorial approach of evaluating reasonableness. First, the EEOC's guidance on determining essential job functions is relevant to accommodations of part-time or modified work arrangements which often require reallocating nonessential job functions to other employees. The Appendix indicates that the collective bargaining agreement would be relevant,[87] but it also indicates other relevant sources, such as the work experience of past and current employees in the position.[88] This guidance by the EEOC strongly suggests that an employer must use a multifactorial approach to the determination of essential job functions, marked by consideration of, but not complete deference to, the terms of a collective bargaining agreement.

Secondly, the EEOC's guidance, that a policy that does not qualify as a disparate impact on people with disabilities may nonetheless be challenged as discriminatory in individual cases, is important to deter-

84. *Id.* at 237. Other people with disabilities did qualify for entry level positions when the plaintiff took the test, but they had different types of disabilities. *Id.* The plaintiff's claim was that it had a disparate impact on similarly-disabled people. *Id.*
85. Id. at 235.
86. *Id.*
87. *See* 29 C.F.R. app. § 1630 (1993).
88. *Id.*

mining if exceptions might be made in policies contained in the collective bargaining agreement. The Appendix offers an example of a no-leave policy during the first six months of employment.[89] Even if the policy withstood a disparate impact analysis, an employer may still be required to make an exception to accommodate an individual with a disability (unless it would cause an undue hardship on the operation of the business).[90] Applying this analogy to the collective bargaining agreement would mean that exceptions to the policies embodied in the terms of these agreements may also need to be made. Making exceptions to policies such as competitive bidding and bumping would permit the provision of accommodations without abandoning the policies.

Third, employers under the ADA may not rely on the lack of discriminatory intent to save those provisions of a collective bargaining agreement which have a discriminatory effect.[91] An employer and the representatives of the union could negotiate an agreement without consideration of the effect on workers with disabilities yet without a specific intent to discriminate against them. The interpretative guidance makes clear that provisions having a discriminatory effect on people with disabilities will have to be avoided. For example, in *Daubert v. United States Postal Service*,[92] where the defendant defeated the plaintiff's *prima facie* case by showing in part that there was no intent to discriminate,[93] the lack of intent would not be helpful to establishing a defense.

D. *Legislative History*

The legislative history of the ADA evinces Congressional intent that the determination of reasonable accommodation would be an individualized inquiry marked by a flexible approach. An example from the Judiciary Committee Report illustrates that a *per se* approach to determining reasonableness was avoided in favor of a multifactorial approach.[94] The Committee rejected a proposal that would have deemed unreasonable any accommodation that cost more than ten percent of

89. *Id.*
90. *Id.* at app. § 1630.15(b).
91. *Id.* at app. § 1630.6.
92. 733 F.2d 1367 (10th Cir. 1984).
93. *Id.* at 1369-70.
94. *Legislative History of the ADA*, *supra* note 14, at 481.

the disabled employee's salary.[95]

The rationale behind the rejection of the proposal was that "[b]y including a number of factors [it is] intended to establish a flexible approach" and "that setting a ceiling on reasonable accommodation is inappropriate."[96] If Congress took painstaking steps to reject a *per se* approach to assess reasonableness in light of cost, it is unlikely the approach was intended to be abandoned in light of conflicting collective bargaining terms.

The legislative history provides additional support that a flexible approach should be used when there is an employer who is covered by a collective bargaining agreement. The Senate Report explained that "an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this legislation."[97]

Both the House and Senate in their reports concluded that the collective bargaining agreement would be "relevant in determining whether a given accommodation is reasonable."[98] The reports added that if there were seniority provisions that reserved some jobs for employees with a specified seniority, such provisions would represent a "factor" for consideration.[99] Moreover, the House concluded the existence of an inconsistent term in the collective bargaining agreement would not be "determinative."[100]

E. *Private Agreements*

Congress recognized the potential for flexibility in these private agreements when it recommended insertion of a clause permitting the employer to take necessary steps to comply with the ADA.[101] Such a provision would be consistent with anti-discrimination clauses found in the majority of collective bargaining agreements that provide guarantees against other kinds of discrimination by management. These

95. *Legislative History of the ADA*, *supra* note 14, at 481.
96. *Legislative History of the ADA*, *supra* note 14, at 481.
97. *Legislative History of the ADA*, *supra* note 14, at 336.
98. *Legislative History of the ADA*, *supra* note 14, at 130, 336.
99. *Legislative History of the ADA*, *supra* note 14, at 130, 336.
100. *Legislative History of the ADA*, *supra* note 14, at 336.
101. *Legislative History of the ADA*, *supra* note 14, at 130, 336 (recommending a method for employers to avoid any conflicts between the duty to provide reasonable accommodations and the duty to comply with collective bargaining agreements. Congress stated that the parties could include a provision in collective bargaining agreements that permit the employer "to take all actions necessary to comply with this legislation").

provisions usually provide that the company will not discriminate against groups protected by various federal, state, and local ordinances prohibit discrimination.[102]

Congress recommended a method for employers to avoid any conflicts between the duty to provide reasonable accommodations and the duty to comply with collective bargaining agreements. Given this Congressional recommendation to insert such a clause, a plaintiff should more easily be able to rebut a defense by the employer that an accommodation is unreasonable because it conflicts with the collective bargaining agreement.

Without more evidence, the proffered reason would seem pretextual. If the collective bargaining agreement (1) has been negotiated since the date of the enactment of the ADA, or (2) has a provision which permits renegotiation in the event of conflict with other laws,[103] the nature of the anti-discrimination provisions sanction variations in the terms of collective bargaining agreements to create accommodations that are otherwise reasonable.

F. Policy Considerations

There are important public policy considerations on both sides of this issue. Respecting the rights of individuals with disabilities to obtain necessary and reasonable accommodations as well as the rights of union members to collectively bargain with management requires more than a *per se* approach. A *per se* approach would result in one set of policy considerations overshadowing all other concerns. A multifactorial approach will ensure that neither set of policy concerns are ignored.

A multifactorial analysis recognizes that collective bargaining holds numerous advantages for both labor and management. Unions provide workers with an avenue towards genuine bargaining.[104] The collec-

102. Guarantees against discrimination—by either the union, the company, or both—appear in 83 percent of the sample of collective bargaining agreements, an increase since the Civil Rights Act of and the Age Discrimination in Employment Act of 1967. BASIC PATTERNS IN UNION CONTRACTS 127 (BNA ed., 8th ed. 1975).

103. Some collective bargaining agreements do contain provisions which set out the procedures in the event that a provision conflicts with a law. *Id.* at 7.

104. A single employee bargaining with an employer is at a great disadvantage unless s/he is critical to the business of the employer. With numbers of workers being the individual, however, the employee will not have to accept whatever wages and working conditions the employer offers. MARVIN J. LEVINE & EUGENE C. HAGBURG, LABOR RELATIONS, AN INTEGRATED PERSPECTIVE 6 (1978).

tive bargaining agreement is central to the relationship between labor and management. Seniority provisions are one of the strongest measures protecting workers. Both labor and management would agree that the benefits of seniority provisions include: (1) avoidance of claims of favoritism and discrimination in personnel actions, such as layoffs, transfers, recalls, shift preferential, demotions and promotions, and (2) ease in administration.[105]

Adherence to the collective bargaining agreement and its seniority provisions is not absolute. Although the overwhelming majority of collective bargaining agreements contain seniority provisions that prefer employees who have longer continuous service with the employer, exceptions to this general rule exist. Three such exceptions are the "super-seniority" afforded union representatives, the selection of less senior workers with specialized training, and the settlements of discrimination suits.

Policy considerations affording union representatives super-seniority[106] is grounded in policy considerations of preventing them to be the first to go in a layoff. The policy spares the less senior representative for the good of the union. Continuity in representatives during time of layoff ensures better representation and eliminates the disincentive to serving as a representative.

Another exception is that a junior employee, who has specialized training not possessed by more senior employees, will not be laid off if the training is needed for efficient business operations.[107] The seniority standards are relaxed for the ultimate good of the company. Labor would not be able to negotiate a seniority policy that did not include some exceptions to make contrary hiring decisions for the efficiency of the business.

One commentator offers another exception to the general principle of adhering to the collective bargaining agreement: providing remedies to victims of discrimination.[108] The Supreme Court has allowed collective bargaining agreements to be overridden in order to make victims of discrimination whole under Title VII. In *Franks v. Bowman*

105. More debatable claims of the advantages of seniority systems are that they reward the most efficient, reliable, and loyal employees and protect the older workers. These benefits are subject to debate because employers raise concerns that seniority systems tend to decrease the ambitions of younger employees and decrease the likelihood that they will remain with the employer. *Id.* at 72.

106. *Id.*

107. *Id.* at 70.

108. *See* Renee Cyr, *The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237 (1992).

Transportation Co., Inc.,[109] the plaintiffs, who had been the victims of racial discrimination, sought retroactive seniority as a component of damages. The plaintiffs argued that they would have been working in the seniority earning position if not for the discrimination.[110] The defendants claimed that awarding seniority to employees who had not in those positions would violate the collective bargaining agreement.[111] The Court held that the only way to adequately compensate the plaintiffs was to include retroactive seniority as part of the damages and permitted the collective bargaining agreement to be overridden.[112]

Achieving the goals of the ADA also warrants departing, at times, from the terms of the collective bargaining agreement. There are strong public policy considerations at stake in accommodating people with disabilities in the workplace. Those considerations include: (1) decreasing the enormous costs of the wasted productivity associated with unemployment of the disabled; (2) reinforcing the labor market with another population of workers before a critical labor shortage occurs; and (3) eliminating the staggering discrimination in all areas of life experienced by people with disabilities.

Remarks by former President Bush expounded on these public policy considerations:

> On the cost side, the National Council on the Handicapped states that current spending on disability benefits and programs exceeds $60 billion annually. Excluding the millions of disabled who want to work from the employment ranks cost society literally billions of dollars annually in support payments and lost i tax revenues . . . . The United States is now beginning to face labor shortages as the baby boomers move through the work force. The disabled offer a pool of talented workers whom we simply cannot afford to ignore, especially in connection with the high tech growth industries of the future.[113]

It been estimated that there is a "20 year window of opportunity" to integrate people with disabilities into the labor pool before we are faced with a critical labor shortage.[114] Looking for opportunities for employing those who need accommodations will benefit the em-

109. 424 U.S. 747 (1976).
110. *Id.* at 758.
111. *Id.* at 773.
112. *Id.* at 778.
113. *Legislative History of the ADA*, *supra* note 14, at 115.
114. *Legislative History of the ADA*, *supra* note 14, at 115 (comments from Jay Rochlin, the executive director of the President's Committee on Employment of People with Disabilities to the Committee on Labor and Human Resources).

ployer. The employees receive an incidental benefit of a robust company not plagued by a labor shortage.

The reason most cited by cases decided under the Rehabilitation Act for deferring to the collective bargaining agreement is that providing accommodations may usurp the legitimate rights of other workers. However, the courts in these cases did not expound on the nature of the legitimate right of other workers. In *Carty v. Carlin*,[115] the District Court of Maryland objected to an accommodation that "might also violate other employees' rights secured by the collective bargaining agreement . . . ."[116] It appeared that the possibility of a violation of other's rights, without further inquiry, would be enough to override the duty to accommodate.

An automatic determination that all provisions of the agreement equate to legitimate rights of covered employees would result in a *per se* determination of unreasonableness whenever an accommodation conflicted with one of its terms. This approach shows too little respect for the interests of people with disabilities and the goals of the ADA while overprotecting the union workers. Balancing the legitimate rights of union workers with the right of workers with disabilities to reasonable accommodations requires a determination of what rights are actually legitimate. It is clear that there is a legitimate right to be safe from being bumped from a job to accommodate an employee with a disability and less seniority.[117] It is also clear that mere inconvenience of other workers does not qualify as a defense of undue burden.

In *Davis v. Frank*,[118] the United States Postal Service failed to promote an employee who was deaf and needed some accommodations, including elimination of the nonessential job function of answering phones and the use of basic sign and written communication by fellow workers.[119] *Davis* illustrates that some accommodations will conflict with a term of a collective bargaining agreement and the result may only be inconsequential or inconvenient to other workers. In those cases the need to accommodate people with disabilities in the

115. 623 F. Supp. 1191 (D. Md. 1985).
116. *Id.* at 1189.
117. *Legislative History of the ADA*, *supra* note 14, at 130 ("The Committee also wishes to make clear that reassignment need only be to a vacant position 'bumping' another employee out of a position to create a vacancy is not required").
118. 711 F. Supp. 447 (N.D. Ill. 1989).
119. *Id.* at 450.

workforce should outweigh the "rights" of other workers.

Legitimacy of rights of union workers is a continuum. At the low end of legitimacy is the mere inconvenience standard of *Davis* and at the high end of legitimacy is the security from being bumped from a current position by a less senior, worker with a disability. Other "rights" may include: performing the job duties as written in the job description of the contract; bumping a less senior worker for a more choice position; preference in selection of shift, for transfers, and assignment to light duty positions; greater lay-off protection; and access to non-entry level positions.

The evaluation of the strength of the legitimacy of these "rights" depends upon the factual context. Several variables which contribute to this context include: the existence of a proviso regarding compliance with the ADA, the degree of harm to each party, and basic notions of fairness.

Generally, seniority provisions create reasonable expectations with respect to various personnel decisions. Through seniority lists, an employee knows whether she is the most senior person eligible for a position and by its terms knows the duties she is expected to perform. However, if the agreement contained a provision that the employer may take whatever steps are necessary to comply with the ADA, then the expectation that seniority will always prevail is no longer reasonable.

In evaluating when an expectation by another worker is legitimate, employers and employees without disabilities may need to rethink their notions of fairness. It certainly is not fair to people with disabilities that the job descriptions are based on the norm of the non-disabled employee.[120] Capable people with disabilities often look as though they are not measuring up even though at times the standard is arbitrary. For example, in *Prewitt v. United States Postal Service,*[121] a job requirement that applicants be able to raise their arms above the shoulder was based on the norm of a non-disabled person and bore no real relation to the job. The requirement existed because a shelf for

120. *See* Martha Minnow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987). In discussing various approaches to dealing with difference, Minnow notes that labeling a group as different is an "act of power by which the namers simultaneously assign names and deny their relationships, with, and power over, the named. . . ." *Id.* at 128.

121. 662 F.2d 292 (5th Cir. 1981).

casing mail was above shoulder height.[122] By lowering the shelf, Mr. Prewitt would become just as capable as any non-disabled employee.[123] The court noted that the shelf could be lowered making the "requirement" unnecessary.

It is equally unfair that barriers unique to people with disabilities and outside of the place of employment also influence access to employment. For example, people who rely on public transportation to travel to work may work for any employer located near a bus line. People with mobility impairments who rely on public transportation must rely on those routes that have become lift-equipped. Not all routes are lift equipped nor will be lift-equipped for some time even under the ADA.[124] Opportunities are unequally available because of barriers like these.

Non-disabled workers enjoy their seniority to some extent because of the lack of competition with the full labor pool. The pool of applicants for jobs would have been greater if people with disabilities had been able to compete without discrimination. At least 8.2 million people with disabilities who are unemployed want to work.[125] If the barriers had not existed, many of those individuals would have been competing in the private sector for the jobs now held by non-disabled workers.

It would be grossly unfair to keep people with disabilities out of the workforce whenever an accommodation conflicted with a seniority provision to protect other workers who earned their seniority in a discriminatory system. In *Franks v. Bowman,*[126] the Court gave credence to the plaintiffs' claim of race discrimination — but for the discrimination, they would have been in seniority earning positions.[127] Credence must be given to the claim that absent the pervasive discrimination, many more people with disabilities would have been in the workforce earning seniority.

Certain personnel decisions that do not involve decreases in pay or foreclosure of future opportunities are more akin to inconvenience than bumping unless there are other important, nonfinancial reasons for the request. A non-disabled senior employee may miss an opportu-

122. *Id.* at 305.

123. *Id.*

124. *See supra* note 2.

125. *See supra* note 14 and accompanying text.

126. 424 U.S. 747 (1976).

127. *Id.* at 758.

nity occasioned by the need to accommodate an otherwise qualified applicant or employee, but this missed opportunity may not represent a foreclosure to future opportunities based on seniority. In that case, the frequency of turnover in those opportunities would inform the significance of the right at stake.

The Supreme Court has allowed for reduction in opportunities in other cases to eradicate discrimination. In *United States v. Paradise*,[128] the Supreme Court held that a court-ordered racial quota of promoting one African-American for every other position within the Alabama Department of Safety was permissible given the pervasive manner in which discrimination had persisted in the department. A reduction in half of the opportunities for the other officers was not deemed unlawful under these facts.[129]

In *Johnson v. Transportation Agency*,[130] the Supreme Court held an affirmative action plan that took gender into account as one factor in the promotion decision of a road dispatcher position was acceptable under Title VII.[131] In that case, a white male employee was passed over for promotion in favor of a female employee who had equivalent qualifications, although the male employee had a score on a written civil service test that was two points higher. The Court found significant that although the "petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."[132]

Although the facts in *Johnson* involved the legality of a voluntary affirmative action plan, the comparison of what kind of personnel decisions may rise to the level of an entitlement is equally open to decisions under the ADA. The issue under the ADA is whether the other worker is burdened by the accommodation rather than an affirmative action plan.

The public policy stakes on each side are high. Neither the rights of union workers nor workers with disabilities should always prevail. Many factors effect the importance attributed to any particular provision. Exceptions are made to accommodate competing policy considerations. Therefore, the appropriate test must weigh these various considerations.

128. 480 U.S. 149 (1987).
129. *Id.* at 180.
130. 480 U.S. 616 (1987).
131. *Id.* at 623-24.
132. *Id.* at 638.

III. How the Multifactorial Test Works

The multifactorial test is the polestar to determining when an exception should be granted to accommodate a person with a disability.[133] The direction of the ADA, its implementing regulations, and its legislative history all advise against a *per se* rule and instead favor a flexible approach. The approach must consider numerous factors (in addition to the factors listed in the EEOC regulations)[134] to address the competing policy considerations raised by the group right of collective bargaining and the individual right of reasonable accommodation. These factors should include:

(1) whether the accommodation raises an actual conflict with the "right" of another employee;
(2) if the accommodation affects another employee and the nature of the effect;[135]
(3) the weight the agreement gives seniority;
(4) the existence of other exceptions to the provision;[136]
(5) the reason the senior employee needs the position in question;

133. Ervin, *supra* note 37, at 969. Factors "a covered entity is likely to consider" when grappling with reassignment of a disabled employee include:

1. The number of employees in the bargaining unit.
2. The rate at which positions like the one in question becomes available.
3. The demand for reasonable accommodation in this particular unit.
4. The number of employees whose seniority rights would be adversely affected by a reassignment decision.
5. The difference in amount of seniority between the disabled employee and the able-bodied employee(s) whose seniority rights are adversely affected.
6. The alternative opportunities for employment with this employer of both the disabled employee and the non-disabled employee(s), both short and long-term.
7. The extent to which the seniority rights of the non-disabled employee(s) have been negatively affected in the past.

Id.

Ervin's factors could be applied to other types of proposed accommodations besides reassignment. These factors would be helpful in analyzing various factors within the multifactorial test.

134. *See supra* text accompanying notes 87-93.

135. *See* Ervin, *supra* note 37, at 969 (in analyzing this factor, Ervin's factor #6 is particularly applicable).

136. *See* Ervin, *supra* note 37, at 971 (concluding that the "employer of a unionized workforce might be said to have a corresponding duty in the context of the ADA to propose an accommodation that has the least negative impact on majority rights under the agreement"). This is closely tied to determining if there are alternative accommodations. *Id.* Some reasonable accommodations may not impact the collective bargaining agreement and should first be explored. *Id.* This commentator suggests that all alternatives that impact the agreement should be analyzed for the most effective accommodation and the least negative impact.

(6) the existence of alternative accommodation(s) that do not conflict with the terms of the collective bargaining agreement; and
(7) the burden on non-disabled union members in the relative work site.[137]

When an employer is faced with a conflict between the terms of a collective bargaining agreement and a proposed accommodation, the inquiry should begin with a determination of whether the accommodation actually affects another worker's rights. Generally, eliminating a nonessential job requirement or eliminating a physical "requirement" for a job may not affect another worker's rights. For example, if a job requirement of lifting one's arm above shoulder level was eliminated by lowering a shelf, the rights of another worker would not be affected.[138] If there is no actual conflict with another worker's rights then the inquiry should end and the accommodation granted.

A proposed accommodation may raise a potential conflict but not an actual conflict. For example, in the second hypothetical presented in the introduction, the office manager wishes to accommodate a deaf typist in the word processing department by eliminating the need for him to answer the telephone. The job duties in the collective bargaining agreement include answering the phone, but elimination of the duty for this individual will not significantly affect the rights of the other typists in the business because they are already required to answer the phone.

Similarly, a position may be available through competitive bidding but no other worker at the time bids for the position, transfer or shift, yet, under the applicable terms of the collective bargaining agreement, the position may be foreclosed to people with less than one year of seniority. If no other worker with sufficient seniority desires the position, an employer should not be foreclosed from devising an accommodation for an applicant or employee with a disability. No employee's rights under the collective bargaining agreement are at stake even though the terms of the agreement come into play. Employees with less than one year seniority do not have a right to apply

137. This is a factor which concerns the Supreme Court in evaluating the constitutionality of affirmative action plans. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); United States v. Paradise, 480 U.S. 149 (1987); Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986). *See also* Ervin, *supra* note 37, at 969 (suggesting that factors 1,2,3,4, and 7 provide useful guidance in determining the burden in the relative work site).

138. Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981).

for the position so their rights do not come into play.

When the rights of another worker do come into play, the other factors of the multifactorial test should be examined, including: the nature of the right at stake; the weight given seniority under the collective bargaining agreement; existence of other exceptions to selection by seniority; the reason the senior employee needs the position in question; existence of other reasonable accommodations that do not conflict with the collective bargaining agreement; and the burden on non-disabled union members in the relative work site.

The importance of the right at stake should influence the weight given to the other factors. Financial benefit and future opportunities may add to the importance of the right. In the third hypothetical,[139] an applicant requires a day shift so that he can use accessible public transportation, but employees with more seniority have preference for openings on the day shift. Working the day shift probably does not involve a pay increase. However, assignment to a non-entry level position over a senior employee is likely to involve a wage differential. A right that does not offer increased wages may be less weighty than one where rate of pay is effected.

There may be occasions when a right to a transfer or shift preference may involve other important non-financial benefits, such as proximity of the work site to home or family responsibilities. In those cases it is also important to consider the frequency of additional, similar opportunities. For example, if openings in the day shift occur every few weeks or months, the opportunity might merely be postponed for the senior employee. If the openings are rare, the loss of the opportunity may be more significant.

Frequency of other opportunities is closely tied to the diffusion of the burden throughout the place of employment. These factors are of importance to the ultimate resolution of the first hypothetical[140] about the individual with a mental disability who worked as a custodian and had been bumped on numerous occasions from his work site. One way to accommodate his training needs is to lock him into a position at one site and take that position out of the competitive bidding process. If the employer has numerous janitorial positions with frequent openings at different sites, the restriction of one position might be less burdensome on the other employees. If, on the other

139. *See supra* note 2 and accompanying text.

140. *See supra* note 1 and accompanying text.

ıand, the employer accommodated numerous people with disabilities ı janitorial services and had restricted numerous positions, the burden .nay be too great on the other workers.

Also important to the determination are other factors, such as the existence of other alternatives for accommodating people with disabilities that do not pose actual conflicts with other workers' rights. If a reasonable accommodation does exist which does not interfere with another worker's rights under the agreement, the accommodation should be implemented first.

CONCLUSION

If the mandate of the Americans with Disabilities Act is to be fulfilled, a multifactorial approach to weighing competing considerations must be adopted. Not all the terms of a collective bargaining agreement translate to actual rights of other workers. Not all "rights" of other workers deserve absolute deference in the face of competing and significant interests of integrating people with disabilities into the workplace.

The words of the ADA and its regulations impose an obligation to weigh the effect of the collective bargaining agreement into an equation of reasonable accommodation but not to foreclose opportunities for people with disabilities because of an inconsistent term. The legislative history of the ADA warns that terms of collective bargaining agreements are not determinative of the reasonableness of accommodations. The nature of private agreements teach us that they can be adapted to various legal requirements. Public policy reminds us that a greater duty of accommodation must be carved out under the ADA.

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