Take Your Paws Off Me: An Argument in Favor of Revising the Occupational Safety and Health Act and the Protecting America's Workers Act

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NOTE

TAKE YOUR PAWS OFF ME: AN ARGUMENT IN FAVOR OF REVISING THE OCCUPATIONAL SAFETY AND HEALTH ACT AND THE PROTECTING AMERICA’S WORKERS ACT

I. INTRODUCTION

In 1970, Congress passed the Occupational Safety and Health Act ("OSH Act"). The purpose of this legislation was to secure "safe and healthful working conditions" throughout the United States. Moreover, the OSH Act established federal regulation of labor conditions by forcing employers to provide their employees with a workplace free from "recognized hazards to safety and health." Among the hazards Congress sought to eliminate were "exposure to toxic chemicals, excessive noise levels, mechanical dangers, heat or cold stress, [and] unsanitary conditions." The OSH Act also created two agencies, the Occupational Safety and Health Administration ("OSHA") and the National Institute for Safety and Health ("NIOSH"). NIOSH is tasked with conducting research for OSHA, as well as "establish[ing] recommended occupational safety and health standards." OSHA is subsumed by the U.S. Department of Labor and is responsible for administration of the OSH Act throughout the various jurisdictions of the United States.

2. Id. § 651(b).
4. See U.S. ENVTL. PROT. AGENCY, supra note 3.
5. See 29 U.S.C. § 671; see also U.S. ENVTL. PROT. AGENCY, supra note 3.
7. Id. § 671(c).
8. See id. § 653(a); OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, ALL
The OSH Act has remained largely unchanged since its inception. Additionally, the growth of the American workforce, in combination with stagnant OSHA reforms, has rendered OSHA largely ineffective. Recently, the Protecting America’s Workers Act ("PAW Act") has been proposed as legislation to revamp OSHA. If enacted, this bill will significantly increase the criminal and civil penalties for those employers found to be in violation of the OSH Act. Moreover, the bill also changes aspects of adjudication involving employer violations; specifically, the bill gives employees a key role in litigation. Although the proposed legislation would make several changes to the OSH Act, some critics of the bill believe that its penalties may be too burdensome on employers. Specifically, one organization believes that sharp increases in criminal penalties and workplace regulation may create.

13. See H.R. 2067 §§ 310-311 (amending the civil and criminal penalties currently in effect in the OSH Act to make the penalties much greater).
15. See discussion infra Part II.C.4.
obstacles for employers already in tumultuous economic conditions. Additionally, critics cite the success of OSHA in persistently lowering workplace injury, illness, and fatality rates as a reason to maintain the status quo of the OSH Act. Finally, opponents argue that if the OSH Act is to be changed, the focus of any revision should be on cooperative prevention rather than on an increase in penalties.

Concerns about health and safety in the workplace extend beyond the borders of the United States. Abroad, many countries have recently sought to implement legislation mandating prosecution and high fines for breach of health and safety guidelines in the workplace. In looking to successful policies overseas, it is clear that legislation must be implemented in order to improve stricter compliance with OSHA.

Part II of this note will discuss the history, development, expansion, and weaknesses of OSHA as a federal agency. Part III will examine the implementation of occupational safety and health legislation abroad. Finally, Part IV of this note will discuss the strengths and weaknesses of the newly proposed PAW Act, including an assessment of occupational safety and health legislation abroad, to find common ground between conscientious employees and responsible employers.

II. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

A. The Occupational Safety and Health Act of 1970

In order to understand the shortcomings of OSHA, it is important to understand the development and expansion of the Administration as a federal agency. The American workplace underwent monumental changes during the Industrial Revolution. Prior to the Industrial

17. See COAL. FOR WORKPLACE SAFETY, supra note 16.
18. See id.; Snyder, supra note 16 (quoting Brian Turmail, spokesman for the Associated General Contractors of America, who stated that the PAW Act ignores the successes of the OSHA system).
19. See Letter from C. Christopher Patton, supra note 16, at 2; see also Snyder, supra note 16 (quoting a construction company president who stated that that an increase in penalties, including potential jail time for violations, would strain the construction industry’s relationship with OSHA).
20. See generally Legislative Texts on OSH: Country Index, INT’L LABOR ORG., http://staging2.ilo.org/legacy/english/protection/safework/cis/legosh/index.htm (follow links for Australia, United States, United Kingdom, Japan, and China to see examples of the workplace laws of these countries).
21. See id. (follow any of the hyperlinks to view occupational safety and health statutes from various countries abroad).
22. See PETER N. STEARNS & JOHN H. HINSHAW, THE ABC-CLIO WORLD HISTORY
Revolution, the economic landscape had mainly consisted of manual and animal labor. However, this long tradition began to evaporate with the advent of machinery and factories. Populations condensed around urban centers where factories sprang up, and large amounts of unskilled laborers were concentrated in close quarters with heavy machinery and hazardous chemicals. Legislation regulating these crowded, busy, and complex work areas was practically nonexistent, and lax standards created a great deal of hazards. The workplace was often overcrowded, poorly ventilated, and without emergency escapes. A laborer would be expected to work twelve or more hours per day. All of these conditions made it a common practice for laborers to lose their lives at work. By the beginning of the twentieth century, however, worker advocates were demanding more stringent legislation to make the workplace safer.

23. See Stearns & Hinshaw, supra note 22, at viii (explaining that labor in the production of goods was restricted to the use of animals, the human body, and manual tools); see also Yellowitz, supra note 22, at 3 (noting that, prior to the Industrial Revolution, the United States was "basically an agricultural society, with minimal industrial activity and mechanization").

24. See Stearns & Hinshaw, supra note 22, at 264-265; see also Yellowitz, supra note 22, at 37-38, 44-45 (describing the displacement of skilled craftsmen by unskilled laborers operating machines).

25. Stearns & Hinshaw, supra note 22, at 266.


27. See Mark A. Rothstein, Occupational Safety and Health Law § 1:1, at 2 (2010 ed.) (describing the first statutes passed in an attempt to regulate industrial safety at the end of the nineteenth and beginning of the twentieth centuries as "cosmetic" and not "substantive"); see also MacLaury, The Job Safety Law of 1970, supra note 26, at 19-21 (describing the movement that resulted from the absence of labor laws).


30. See Stearns & Hinshaw, supra note 22, at 112 ("In the early nineteenth century, most industrial workers labored six days a week, twelve or more hours a day."); see also Haymarket Martyrs, ILL. LAB. HIST. SOC'Y, http://www.kentlaw.edu/ils/haymkmnmon.htm (last visited Oct. 30, 2010).


The hazardous work conditions that existed for decades were a direct result of indifferent employers. Laborers who were injured or even lost their lives during the course of work were usually without relief because no effective system of workers' compensation was in place. Individual workers were able to sue in tort, but there were many absolute defenses available to employers that prevented workers from prevailing. Additionally, workers rarely prevailed in tort lawsuits because of overwhelming legal expenses. Furthermore, the idea of criminal punishment or fines for an employer was relatively unheard of. Thus, without adequate legislation regulating the workplace and with very few, if any, penalties for violations of laws that were in place, employers had no incentive to provide adequate working conditions.

Labor reformers recognized that without incentives, employers would never enforce safety precautions that would increase their costs of business. In response, reformers pushed for the creation of workers’


35. ROTHSTEIN, supra note 27, § 1:1, at 2 (explaining that recovery for injuries suffered by employees at work was often blocked by the absolute defenses of assumption of risk, contributory negligence, and the fellow servant rule); Guyton, supra note 35, at 106 (referring to contributory negligence, the fellow servant rule, and assumption of risk as “the ‘unholly trinity of defenses’” (citation omitted)).

36. See ROTHSTEIN, supra note 27, § 1:1, at 2 (explaining that during the early industrial period, prevailing views attributed accidents in the workplace to workers and not to working conditions or to the employers); MacLaury, The Job Safety Law of 1970, supra note 26, at 18 (noting that “[m]any legislatures failed to provide adequate funds for enforcement” of laws covering workplace hazards during the period following the Civil War).

37. See STEARNS & HINSHAW, supra note 22, at 4 (stating that the only incentive for safety, if any, was the risk accidents posed to damaging machinery and reducing production); see also MacLaury, The Job Safety Law of 1970, supra note 26, at 18.

38. See STEARNS & HINSHAW, supra note 22, at 4 (explaining that during the early industrial period, prevailing views attributed accidents in the workplace to workers and not to working conditions or to the employers); MacLaury, The Job Safety Law of 1970, supra note 26, at 18 (noting that “[m]any legislatures failed to provide adequate funds for enforcement” of laws covering workplace hazards during the period following the Civil War).
compensation laws, and the majority of states established these laws. Additionally, individual states created industrial commissions that had the "authority to establish specific safety and health regulations." These commissions were successful in creating a compensation fund for injured employees. The reformers theorized that if employers were to bear the majority of economic costs associated with workplace injuries and deaths, then a financial incentive would be created to prevent these injuries and deaths. Under this system, employees who were injured at work received compensation out of workers' compensation funds, which were paid into by employers as insurance premiums. Therefore, the fewer accidents that occurred in the workplace, the lower the premiums employers would have to pay into the fund. At the same time, federal legislation aimed directly at the large-scale regulation of private working conditions did not come until much later.

President Richard Nixon signed the Occupational Safety and Health Act into law in 1970. The bill came in response to a Senate Report from the same year that estimated that 14,500 Americans died annually as a result of workplace accidents and injuries. The Senate Report also indicated that lost wages due to injuries and deaths at workplaces totaled $1.5 billion each year. Many considered these numbers unacceptable, including former Secretary of Labor George P. Shultz, who, in the hearings on the bill, referred to workplace accidents and their impact on individuals and the American economy as the "grim current scene."

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41. See id. (discussing that most states had established a workers' compensation program by 1921); see also ROTHSTEIN, supra note 27, § 1:1, at 2 ("By 1890, 21 states had passed occupational safety and health laws, and by 1920, nearly every state had an industrial safety law.").
43. See ROTHSTEIN, supra note 27, § 1:1, at 2; Guyton, supra note 35, at 108.
44. See Guyton, supra note 35, at 108 (noting that a primary financial incentive for employers under the workers' compensation system is exemption from liability for tort claims stemming from injuries covered by workers' compensation).
45. MacLaury, Government Regulation of Workers' Safety, supra note 32, § 6; see Guyton, supra note 35, at 108-09.
46. See Guyton, supra note 35, at 108-09.
47. See ROTHSTEIN, supra note 27, § 1:1, at 2 ("At the federal level there was little meaningful activity during this period.").
49. S. REP. NO. 91-1282, at 2 (1970); see also ROTHSTEIN, supra note 27, § 1:2, at 5 ("By the lowest count, 2.2 million workers were disabled on the job each year, resulting in the loss of 250 million employee work days." (citing id. at 2)).
50. S. REP. NO. 91-1282, at 2 (estimating that the impact from industrial deaths and disabilities was an $8 billion loss to the Gross National Product each year).
51. See id.; see also ROTHSTEIN, supra note 27, § 1:2, at 5 ("In addition, the Public Health
Additionally, the Report noted that various state compensation plans and regulatory statutes were deemed ineffective in promoting health and safety for American workers.\textsuperscript{52}

The effect of the Act was widespread. First and foremost, it provided a means for the federal government to regulate the American workplace with respect to "occupational safety and health hazards."\textsuperscript{53} Additionally, it provided an official federal statutory duty for an employer to provide "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."\textsuperscript{54} Moreover, the statute attempted to promote workplace safety by giving OSHA two new methods of regulation: the ability to issue citations to employers, which require the employers to correct unsafe working conditions,\textsuperscript{55} and criminal and civil penalties for violations, and failure to correct violations, of the OSH Act.\textsuperscript{56}

\section*{B. OSHA: Regulating the American Workplace}

In order to understand the ineffectiveness of OSHA, it is important to understand how the OSH Act imposes liability on employers. The OSH Act sanctions employers by authorizing OSHA to impose citations\textsuperscript{57} and civil and criminal penalties\textsuperscript{58} on those employers who violate their statutory duties to employees under the OSH Act. Citations are written documents that OSHA provides to employers, describing the nature of the workplace violation and providing a "reasonable time for

\textsuperscript{52} See S. REP. No. 91-1282, at 4.
\textsuperscript{53} See Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(b) (2006); see also ROTHSTEIN, supra note 27, § 1:4, at 8 (explaining that employers covered under the OSH Act must abide by OSHA regulations).
\textsuperscript{54} 29 U.S.C. § 654(a)(1); see also ROTHSTEIN, supra note 27, § 1:4, at 8-9.
\textsuperscript{55} 29 U.S.C. § 658(a).
\textsuperscript{56} 29 U.S.C. § 666; see also ROTHSTEIN, supra note 27, § 1:4, at 10 (illustrating the various civil citations that OSHA may issue to employers).
\textsuperscript{57} 29 U.S.C. § 658(a) (giving the Secretary of Labor or his authorized representative the authority to issue a citation to any employer who he believes has violated any regulations prescribed by the OSH Act); see also ROTHSTEIN, supra note 27, § 1:4, at 9 (describing the citation process in more detail).
\textsuperscript{58} 29 U.S.C. § 666 (listing civil and criminal penalties imposed upon an employer for violations of the OSH Act); see also ROTHSTEIN, supra note 27, § 1:4 at 10 (itemizing the civil penalties for violations of the OSH Act).
the abatement of the violation." Civil penalties are fines levied against an employer who has failed to comply with safety standards mandated by the OSH Act. The fines are divided into categories consisting of "[w]illful or repeated" violations, "serious" violations, "not serious" violations, "failure to correct [a] violation," and "[w]illful violation[s] causing death to [an] employee." A "[w]illful violation" issued against an employer for a worker's death is currently required for criminal prosecution. However, OSHA currently engages in the practice of "downgrading the classification of citations from willful to serious, which greatly reduces civil penalties and undermines the possibility of criminal prosecution under the OSH Act [and in some cases OSHA has utilized the practice of changing the characterization of willful or repeat violations to 'unclassified']." Many employers push for "unclassified" violations in order to "lessen the impact of the violations in any civil litigation and to keep willful or repeat violations off their safety and health record."

It may be argued that part of the OSH Act's ineffectiveness stems from the adjudication available to employers. Employers issued citations or fines are hardly without remedy. In fact, an order of abatement may be lifted because the employer has the right to contest a citation in front of an administrative law judge. When an employer is

59. 29 U.S.C. § 658(a); see also ROTHSTEIN, supra note 27, § 15:1, at 458-59.
60. 29 U.S.C. § 666(a).
61. See 29 U.S.C. § 666(a); see also ROTHSTEIN, supra note 27, § 14:5, at 437-43 (noting that the Occupational Safety and Health Commission has adopted a two-pronged standard for "willful" violations because the OSH Act fails to provide a definition for a "willful violation").
62. 29 U.S.C. § 666(b); see also ROTHSTEIN, supra note 27, § 14:3, at 429-30 ("[T]he finding of a serious violation . . . requires 'a substantial probability that death or serious physical harm could result.'" (citation omitted)).
63. 29 U.S.C. § 666(c); see also ROTHSTEIN, supra note 27, § 14:2, at 428-29.
64. 29 U.S.C. § 666(d); see also ROTHSTEIN, supra note 27, § 14:6, at 443-47.
65. 29 U.S.C. § 666(e); see also ROTHSTEIN, supra note 27, § 14:9, at 452-56.
66. 29 U.S.C. § 666(e); see also ROTHSTEIN, supra note 27, § 14:9, at 452-56 (discussing that what constitutes a "willful" violation when the result is an employee's death is disputed between the various circuit courts and the Occupational Safety and Health Review Commission).
68. Id. at 34 (discussing the issuance of "unclassified" citations pursuant to negotiations despite the absence of such a classification in the OSH Act); see also discussion infra Part II.C.1.
69. See generally Karels, supra note 33, at 123-24 (discussing the options available to business owners who choose to contest a citation).
70. Id. at 123 (citing Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 461 (1977)).
issued a citation, it must notify the Secretary of Labor within fifteen days of its intention to formally challenge the citation.\textsuperscript{71} If the notification is timely, the penalty or abatement order is stayed "until there is a final order" of the Occupational Safety and Health Review Commission ("OSHRC").\textsuperscript{72} The employer may petition for review of the citation before the OSHRC.\textsuperscript{73} An employer who is unsuccessful before the OSHRC may again petition for judicial review before an appellate court.\textsuperscript{74} Consequently, an order of abatement or citation may be stayed for the duration of the appeal process if ordered by the court.\textsuperscript{75}

C. OSHA: Failures, Shortcomings, and Legislation

Congress passed the OSH Act with the goal of providing every working American with a workplace that is free from preventable hazards and dangers.\textsuperscript{76} However, nearly forty years after the OSH Act's inception, thousands of American workers continue to die each year.\textsuperscript{77} The Bureau of Labor Statistics ("BLS") places the preliminary number at 4,340 work-related deaths for 2009.\textsuperscript{78} The deaths are caused by a wide range of accidents, including falls, vehicular collisions, exposure to harmful substances, and violent assaults.\textsuperscript{79} These statistics inevitably lead to the question: why do workplaces remain unsafe despite the existence of OSHA? Critics and reformists point to several major reasons that indicate why OSHA has failed to achieve its goal of worker safety.

\textsuperscript{71} Id.; see 29 U.S.C. § 659(a).
\textsuperscript{72} See ROTHSTEIN, supra note 27, § 13:2, at 410.
\textsuperscript{73} See 29 U.S.C. § 659(c).
\textsuperscript{74} 29 U.S.C. § 660(a); see also ROTHSTEIN, supra note 27, § 19:1, at 579-80 (noting that although decisions of the courts of appeals are final, either party may file a petition for a writ of certiorari with the Supreme Court).
\textsuperscript{75} See Serious OSHA Violations: Strategies for Breaking Dangerous Patterns: Hearing Before the Subcomm. on Employment & Workplace Safety of the S. Comm. on Health 24 [hereinafter Serious OSHA Violations] (prepared statement of Eric Frumin) (discussing the ability of employers to appeal citations and simultaneously avoid compliance under OSHA).
\textsuperscript{76} See 29 U.S.C. § 651(b).
\textsuperscript{78} Id.
\textsuperscript{79} See id. at 2.
1. The Conflict Between Deterrence and Negotiation Policies

One problem many critics point to is OSHA’s current negotiation policy with offenders. Additionally, OSHA authorizes worksites to be inspected periodically and also when a violation has been reported or suspected. Inspections may lead to the issuance of a citation, which may be accompanied by a fine. However, the OSHA citation process allows for settlement of these penalties.

OSHA grants significant reductions in fines to employers in two situations. First, the prompt correction of workplace safety violations often results in the downgrade of a fine. Second, agreement by the employer to forgo legal challenges can also provide a successful means to downgrade the classification of a citation. Although it may seem that OSHA engages in these policies of negotiation to promote compliance of offenders and efficiency of the citation process, negotiation has profound negative effects on overall deterrence. This negotiation policy, which often results in downgrading, has arguably removed any fear employers have of significant punishment by the federal government for violating regulations.

80. See Karels, supra note 33, at 134; see also Are OSHA’s Penalties Adequate, supra note 67, at 33-34 (arguing that it is problematic to permit employers who commit the most egregious violations of safety regulations to hide behind “unclassified” citations).
82. Id. § 657(f)(1).
83. Id. § 657(f)(2).
84. See 29 U.S.C. §§ 558(a), 659(a).
86. See Karels, supra note 33, at 134 (citation omitted).
87. See id.; see also Are OSHA’s Penalties Adequate, supra note 67, at 33 (explaining that the limited resources and personnel of OSHA create pressure to settle cases and avoid litigation); Serious OSHA Violations, supra note 75, at 24 (emphasizing the ability of employers to challenge a citation and avoid compulsion to comply for the extent of litigation).
88. See Karels, supra note 33, at 134; see also Are OSHA’s Penalties Adequate, supra note 67, at 31 (arguing that $960 is not a sufficient fine for violations that pose a substantial probability of death or serious bodily harm); MAJORITY STAFF OF S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 110TH CONG., DISCOUNTING DEATH: OSHA’S FAILURE TO PUNISH SAFETY VIOLATIONS THAT KILL WORKERS 5 (2008) (hereinafter DISCOUNTING DEATH) (noting that employers who contest a penalty assessed by OSHA are more likely to receive a significant reduction in the civil penalty than those who do not).
89. Karels, supra note 33, at 134; see DISCOUNTING DEATH, supra note 87, at 5 (stating that the median penalty for a citation in 2007 was $5,900; the median final penalty following the negotiation was $3,675; and the median final penalty assessed to employers was 38% lower than the penalty initially assessed by the OSHA inspector); Are OSHA’s Penalties Adequate, supra note 67,
The prevalence of downgrading citations works in combination with the fact that OSHA penalties, prior to negotiation, are insufficient to create deterrence. For example, the criminal penalty for disturbing wildlife on federal land is more severe than a violation designated as "willful" under the OSH Act that results in an employee's death. Thus, OSHA penalties are initially weak. These sanctions are only further weakened by a policy of compromise.

In addition to criminal citations, OSHA may also levy civil penalties against an employer. Civil penalties under the OSH Act were last updated in 1990 as part of comprehensive budget reconciliation legislation. However, this revenue raising measure did not index OSHA civil penalties for inflation. As a result, OSHA's civil penalties have lost a significant percent of their value since 1990 due to inflation. Regular adjustment for inflation is in place for many other laws pursuant to the Debt Collection Improvements Act of 1996. Interestingly, Congress specifically excluded OSHA from the act. As a result, OSHA's civil penalties no longer reflect the graveness of the violations.

Finally, the negotiation policy has had a negative impact on the prosecution of employers. The high rate of negotiation resulting in settlement has lead to an astoundingly small amount of prosecutions.
From 1970 through 2002, there had been more than 200,000 workplace deaths, but OSHA referred only 151 of those cases involving willful violations to the Department of Justice for criminal prosecution. A mere eight of those cases resulted in a prison sentence for "company officials." More recently, from 2003 through 2008 OSHA referred 21.1%, or fifty, of its eligible cases to the Department of Justice for prosecution. Of the fifty cases referred, the Department of Justice chose to pursue ten of those cases. Ultimately, prosecutions for OSHA citations are few and far between, and those cases that are prosecuted often result in inadequate penalties. The system's inadequacy results in a lack of deterrence for employers.

2. Lack of Resources Equals a Lack of Compliance

OSHA is responsible for protecting 115 million private sector employees and for inspecting eight million worksites. To undertake this monumental task, the Administration was composed of a mere 2,147 employees in the fiscal year of 2009. In the same year, OSHA was only able to undertake 39,057 inspections, covering just 1,332,583 of the employees that it is responsible to protect. As a result of gross understaffing and the enormous amount of work that must be undertaken, OSHA spends less than twenty hours on a case resulting from a safety inspection. Perhaps most startling is the fact that a federally regulated workplace can only expect to receive a single

99. Id.
100. See Reich v. Trinity Indus., Inc., 16 F.3d 1149, 1152 (11th Cir. 1994) (defining willful as "an intentional disregard of, or plain indifference to, OSHA requirements" (quoting Ga. Elec. Co. v. Marshall, 595 F.2d 309, 317 (5th Cir. 1979))); see also ROTHSTEIN, supra note 27, § 14:5, at 437-43 (discussing the definition of "willful" under the OSH Act).
101. PBS FRONTLINE, supra note 98.
102. Id.
103. See DISCOUNTING DEATH, supra note 87, at 20.
104. Id.
105. See id. at 19.
107. DEATH ON THE JOB, supra note 10, at 68.
108. Id. at 60.
109. Id.
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regularly scheduled visit from an OSHA inspector approximately once every 137 years.110

When taken in its entirety and divided among the total number of workers for which OSHA is responsible, OSHA’s 2010 fiscal budget of $558,620,000111 breaks down to about $4.86112 per American worker. Consequently, OSHA must protect one of its private workers with less than five dollars per year.

3. Inaccurate Reports of Injuries and Illnesses

Data from the National Safety Council of Accident Facts and Bureau of Labor Statistics (“BLS”) indicate that workplace illnesses and injuries have been on a steady decline since OSHA’s inception.113 However, there is significant debate over the accuracy of this trend.114 Critics assert that the government may be miscalculating work related injuries and illnesses by as much as 69%.115 This error in calculation by the BLS may be due to several factors. First, the census conducted by the BLS excludes a large number of workers, specifically, “self-employed individuals,” “farms with fewer than 11 employees,” “employers regulated by other federal safety and health laws,” “federal, state and local government agencies,” and “private household

110. Id. at 13 (“At its current staffing and inspection levels, it would take federal OSHA 137 years to inspect each workplace under its jurisdiction just once. In seven states (Arkansas, Delaware, Florida, Georgia, Louisiana, South Dakota and Texas), it would take 150 years or more for OSHA to pay a single visit to each workplace. In 18 states, it would take between 100 and 149 years to visit each workplace once. Inspection frequency is better in states with OSHA-approved plans, yet still far from satisfactory. In these states, it would now take the state OSHAs a combined 63 years to inspect each worksite under state jurisdiction once.”).


112. This number was calculated by taking the total 2010 budget, approximately $559 million, for federal OSHA and dividing it by the 115 million workers OSHA is responsible for covering.

113. See DEATH ON THE JOB, supra note 10, at 8-12.


workers.116 These "built-in exclusions" may eliminate as many as 20% of workers from the BLS Annual Survey.117

Second, the phenomenon of underreported worker injuries and illnesses is perpetuated by numerous factors regarding the actual employers and employees. Employers are aware that a high number of reported injuries will adversely affect their ability to obtain government contracts, increase their costs, and increase the possibility of being selected for onsite inspection by OSHA.118 Thus, OSHA indirectly creates an incentive for employers to underreport injuries because the administration relies heavily on injury reports to select sites for inspections.119 In addition to underreporting by employers, workers may not report an accident or illness as well.120 Some workers are influenced by economic incentives created by employers who reward groups of employees who go “a certain number of days without an injury.”121 Other workers are discouraged from reporting because of fear of retaliation or being “labeled as accident-prone” by employers.122 Finally, there is a segment of workers who simply do not know how to report an injury or accident and utilize workers' compensation.123 This is especially true for many foreign-born workers who lack knowledge and fear deportation.124 Thus, both employers and workers have incentives to underreport the occurrence of work related injury and illness.

Congress has recently recognized the dilemma of underreporting by providing funding for a number of initiatives to study its prevalence and effects.125 Additionally, the Senate Labor Appropriations subcommittee approved a final omnibus bill that provided $2,250,000 for research and

116. DEATH ON THE JOB, supra note 10, at 11; see also HIDDEN TRAGEDY, supra note 115, at 11.
117. DEATH ON THE JOB, supra note 10, at 11.
118. Id.; see also HIDDEN TRAGEDY, supra note 115, at 14-15.
119. See HIDDEN TRAGEDY, supra note 115, at 14 (“The higher an employer's rate [of injuries and illnesses], the more likely the employer is to receive an OSHA inspection.”).
120. See Smerd, supra note 114 (“[E]mployees often underreport injuries and illness for fear of losing their job or being disciplined.”).
121. See DEATH ON THE JOB, supra note 10, at 11; see also HIDDEN TRAGEDY, supra note 115, at 19-21.
122. DEATH ON THE JOB, supra note 10, at 11; see also HIDDEN TRAGEDY, supra note 115, at 15-17.
123. DEATH ON THE JOB, supra note 10, at 11; HIDDEN TRAGEDY, supra note 115, at 13-14.
124. DEATH ON THE JOB, supra note 10, at 11.
125. See id. at 11-12.
prevention of underreporting for fiscal year 2009. In addition, at the request of committees from both the House and Senate, the Government Accountability Office ("GAO") launched a rigorous study on employer injury record-keeping practices. The GAO report acknowledged Congress's concern that underreporting has become a problem directly affecting OSHA's regulation of the American workplace. Moreover, the report states that OSHA's policy of providing injury and illness data is in need of alteration. The report suggests several reforms, including a requirement for inspectors to interview workers regarding work-related injury and illness during audits. OSHA agreed with the recommendations of the report, and it "stated that it would move forward to implement them." Additional legislation, however, would be necessary to ban employer practices that inhibit the accurate reporting of workplace injury and illness.

4. The Need for New Legislation

Legislative action over the years has decreased the number of OSHA staff and inspectors, while at the same time the number of workplaces and workers under OSHA's authority has "more than doubled." In 1980, OSHA was at its highest level of staffing, with a total of 1,469 federal OSHA inspectors. At that time, there were about fifteen OSHA inspectors for every one million workers. By 2008, the number of federal OSHA inspectors had decreased to 936, a ratio of about six-and-a-half inspectors per one million workers, the lowest ratio in the history of the OSHA. Additionally, new regulation by OSHA was practically stopped during the eight years of the Bush administration. Not only was OSHA's staff reduced and new

126. See id. at 12.
128. See WORKPLACE SAFETY AND HEALTH, supra note 127, at 22.
129. See id. at 22-23.
130. See id. at 23.
131. Id. at 23-24.
132. See DEATH ON THE JOB, supra note 10, at 12.
133. Id. at 14.
134. Id.
135. Id.
136. Id.
137. Id. at 18.
regulation put on hold, but the administration also took action to withdraw dozens of regulations already in the regulatory agenda.\textsuperscript{139}

The Obama administration has taken steps to rebuild OSHA from the slashes to its budget and regulations throughout the proceeding eight years.\textsuperscript{140} For fiscal year 2010, the OSHA budget was increased by $51 million compared to the budget for fiscal year 2009,\textsuperscript{141} and 100 new inspectors were hired.\textsuperscript{142} The fiscal year 2011 proposal asks for a $14 million increase in the budget and the hiring of twenty-five additional inspectors.\textsuperscript{143} The administration is also taking steps to introduce new regulation by supporting a measure that would require employers to track and report "musculoskeletal disorders" to health officials.\textsuperscript{144} This proposal is facing stiff opposition from big business and its chief lobbyist, the U.S. Chamber of Commerce.\textsuperscript{145}

The most promising advance of the Obama Administration for OSHA is the Protecting America’s Workers Act ("PAW Act").\textsuperscript{146} The OSH Act has been largely unchanged since its inception.\textsuperscript{147} Conversely, the PAW Act would radically change OSHA’s ability to regulate the American workplace.\textsuperscript{148} For example, the PAW Act proposes harsher penalties for willful and repeat violations that result in serious bodily injury or death.\textsuperscript{149} Specifically, the new act provides a potential ten-year prison sentence for a willful violation resulting in an employee’s death, as opposed to the current potential penalty of a six-month prison sentence.\textsuperscript{150} The PAW Act also proposes criminal penalties for willful

\begin{thebibliography}{99}
\bibitem{138} Id. at 68.
\bibitem{139} Id. at 18.
\bibitem{140} See John B. Judis, The Quiet Revolution, NEW REPUBLIC (Feb. 1, 2010), http://www.tnr.com/article/politics/the-quiet-revolution; see also DEATH ON THE JOB, supra note 10, at 18-19, 68.
\bibitem{141} Laura Walter, DOL FY 2010 Budget Includes Increased OSHA Funding, EHS TODAY (May 8, 2009), http://ehstoday.com/standards/osh/dol-fy-2010-budget-increased-osa-funding-0508.
\bibitem{142} Laura Walter, DOL 2011 Budget Request Includes OSHA Increase, Focus on Enforcement, EHS TODAY (Feb. 1, 2010), http://ehstoday.com/standards/osh/dol-budget-request-osa-increase-focus-enforcement-2414.
\bibitem{143} See id.; see also News Release, Occupational Safety & Health Admin., supra note 111.
\bibitem{145} See id.
\bibitem{146} Protecting America’s Workers Act, H.R. 2067, 111th Cong. (2009).
\bibitem{147} GIBSON DUNN, supra note 9.
\bibitem{148} See id.
\bibitem{149} Id.
\bibitem{150} Compare H.R. 2067 §311(a)(1), with Occupational Safety and Health Act of 1970, 29

http://scholarlycommons.law.hofstra.edu/hlelj/vol28/iss1/8
and repeat OSHA violations by providing a maximum five-year prison sentence when the violation results in "serious bodily injury."\textsuperscript{151} Moreover, this increase in sentencing makes willful and repeat OSHA violations felonies rather than misdemeanors, thereby increasing the likelihood of prosecution by the Department of Justice.\textsuperscript{152} Under the PAW Act, there would also be a large increase in criminal fines for willful and repeat OSHA violations resulting in serious bodily injury or death.\textsuperscript{153} Currently, the maximum fine is $70,000.\textsuperscript{154} Under the PAW Act, the maximum would increase to $250,000 for individuals\textsuperscript{155} and $500,000 for corporations.\textsuperscript{156}

The PAW Act proposes several other reforms. One aspect of the bill includes an increase in civil penalties for employers with more than twenty-five employees.\textsuperscript{157} Willful and repeat citations resulting in a worker’s death or serious bodily injury would lead to a maximum civil penalty of $250,000.\textsuperscript{158} Additionally, the bill indexes civil penalties to the Consumer Price Index to account for inflation.\textsuperscript{159} Furthermore, the bill eliminates “unclassified” citations, effectively ending the relabeling of willful or repeat violations in negotiations.\textsuperscript{160}

The PAW Act suggests important changes in other areas of OSHA besides criminal and civil penalties. For example, the PAW Act would allow employees to challenge OSHA citations, demand higher penalties, and request more severe classifications than those issued by the initial assessment.\textsuperscript{161} Finally, the PAW Act would displac e other federal agencies’ regulation of workplace safety unless they obtain OSHA

\textsuperscript{152} H.R. 2067 § 311(a)(5).
\textsuperscript{154} 29 U.S.C. § 666(a).
\textsuperscript{155} 18 U.S.C. § 3571(b)(3).
\textsuperscript{156} 18 U.S.C. § 3571(c)(3).
\textsuperscript{157} H.R. 2067 § 310(a)(1)(C).
\textsuperscript{158} Id.
\textsuperscript{159} H.R. 2067 § 310(b) (“Amounts provided . . . shall be adjusted by the Secretary at least once during each 4-year period to account for the percentage increase or decrease in the Consumer Price Index . . .”).
\textsuperscript{160} Id. § 305 (“The Secretary may not designate a citation . . . as an unclassified citation.”); see also GIBSON DUNN, supra note 9.
\textsuperscript{161} See H.R. 2067 §§ 306-307. Currently, employees only have the right to challenge a deadline set for compliance with an order of abatement. See 29 U.S.C. § 659(c) (2006).
“certification.” Essentially, OSHA would be the regulating force for workplaces of many private companies that are currently regulated by some other federal agency. While the PAW Act proposes an increase in enforcement, we must look to occupational safety legislation abroad for guidance on how to best effectuate the proposed bill.

III. HEALTH AND SAFETY LEGISLATION ABROAD

Concerns about health and safety in the workplace go beyond the borders of the United States. In fact, many jurisdictions have recently implemented legislation seeking stricter compliance with health and safety guidelines in the workplace. Because the PAW Act fails to take into account certain key aspects needed to fix the ineffectiveness of OSHA, it is useful to consider the successful policies of comparable overseas jurisdictions and their recent legislative developments to determine how the United States may improve compliance with OSHA. A breach of health and safety guidelines abroad may result in an unlimited fine, prosecution, and the possibility of the government stepping in to close down the workplace, compared to the less harsh penalties under OSHA in the United States.

A. United Kingdom

The United Kingdom has implemented legislation in order to increase the maximum penalties applicable to certain offenses relating to an employee’s health and safety in the workplace. The Health and Safety (Offences) Act 2008 ("Offences Act") was implemented to "satisfy the demands of those who have long campaigned for higher penalties..."
penalties to be imposed for conduct which creates a risk of personal injury to workers or the general public."\(^{169}\) The Offences Act is the second major development from the United Kingdom over the past three years regarding health and safety in the workplace, following closely on the implementation of the Corporate Manslaughter and Corporate Homicide Act 2007 ("CMCHA").\(^{170}\) However, the CMCHA applies only to fatal accidents in the workplace,\(^{171}\) while the new Offences Act may apply to all accidents within a workplace.\(^{172}\) The Offences Act "increases penalties for offences charged under the Health and Safety at Work Act 1974, and its effect is in addition to the corporate manslaughter legislation."\(^{173}\) According to Keith Hill, the member of Parliament who introduced the Bill, there were three main goals for increased penalties for health and safety violations: "tougher, more commensurate punishment, more effective deterrence, and greater efficiency in the dispensation of justice."\(^{174}\)


The Offences Act seeks to impose harsher sanctions for offenses set out under Great Britain’s Health and Safety at Work Act 1974\(^{175}\) ("Health and Safety at Work Act 1974") and the Northern Ireland’s Health and Safety at Work Order 1978\(^{176}\) ("Health and Safety at Work Order 1978").\(^{177}\) These two pieces of legislation govern occupational


\(^{170}\) *Id.* at 79; see Health and Safety (Offences) Act, 2008, c. 20, § 1 (U.K.); Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 1 (U.K.).


\(^{173}\) Gomersal, *supra* note 172.

\(^{174}\) Barrett, *supra* note 169, at 75 (citation omitted).

\(^{175}\) Health and Safety at Work Act, 1974, c. 37 (U.K.).

\(^{176}\) Health and Safety at Work Order 1978 (S.I. 1039/1978) (Irl.).

\(^{177}\) The Health and Safety (Offences) Act does not introduce any new crimes, but rather seeks to impose penalties for crimes that already exist. See HBJ GATELEY WAREING, EMPLOYMENT LAW UPDATE FOR LATE FEBRUARY 2009 pt. 3 (2009), available at...
health and safety in the United Kingdom. Prior to the enactment of the Offences Act, individuals in the workplace did not face prison sentences unless they were charged with manslaughter. Additionally, courts were unable to prosecute employers, since custodial sentences were “only an option in the Magistrates’ Court for failure to comply with an improvement or prohibition notice or with a court remedy order, and for offshore offences.”

The sanctions imposed under the Health and Safety at Work Act 1974 and Northern Ireland’s Health and Safety at Work Order 1978 are very similar to OSHA in that courts imposed ineffectively low monetary fines as opposed to prosecuting those who breach the statute. For example, in October 2008, “a worker [in London] was fined £2,500 after an accident he caused by cutting corners left a member of the public dead.” Thus, harsher penalties were needed in order to “deter businesses that do not take their health and safety management responsibilities seriously and further encourage employers and others to comply with the law.” The harsher penalties also were implemented to deal with those businesses that “gain commercial advantage[s] over competitors by failing to comply with health and safety law and who put workers and the public at risk.”

http://www.employmentforum.co.uk/Images/DBImages/Search/GateWay%20Employment%20Latest%20-%20Late%20February%202009..doc.

178. See Gomersal, supra note 172. The Health and Safety at Work Act 1974 states that “[i]t shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.” Health and Safety at Work Act, 1974, c. 37, § 2(1). The Act goes on to state that “[i]t shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.” Health and Safety at Work Act, 1974, c. 37, § 3(1). Articles 4 and 5 of Northern Ireland’s Health and Safety at Work Order 1978 contain almost identical language. See Health and Safety at Work Order 1978 (S.I. 1039/1978) (Ir.) arts. 4-5.

179. CLARKE, supra note 172, at 2.


181. See Gomersal, supra note 172.

182. HBJ GATELEY WAREING, supra note 177, pt. 3 (quoting Lord McKenzie, Dep’t of Work & Pensions Minister).

183. Id. (quoting Judith Hackitt, Chair of the Health & Safety Executive).

The Health and Safety (Offences) Act 2008 raises the maximum penalties available to courts with regard to health and safety offenses under Great Britain’s Health and Safety at Work Act 1974 and Northern Ireland’s Health and Safety at Work Order 1978. The Offences Act also extends the option of imprisonment to senior managers and directors of companies. Judith Hackitt, the Chair of the Health and Safety Executive (“HSE”), explained the Offences Act as follows:

It is right that there should be a real deterrent to those businesses and individuals that do not take their health and safety responsibilities seriously. Everyone has the right to work in an environment where risks to their health and safety are properly managed, and employers have a duty in law to deliver this.

The Offences Act makes three major changes to previous legislation. The first change is that the Offences Act amends the Health and Safety at Work Act 1974 to give courts the power to prosecute employers by imposing a potential prison sentence, with a maximum of a two-year sentence for health and safety offenses in the workplace. Fines were almost always the maximum punishment a court could impose under the Health and Safety at Work Act 1974. Additionally, no matter what position a person holds within the

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184. See CLARKE, supra note 172, at 1.
185. Barrett, supra note 175, at 79; see Health and Safety (Offences) Act, 2008, c. 20, § 1, sch. 2 (U.K.).
189. See CLARKE, supra note 172, at 1.
workplace, whether an administrator or a general employee, the individual may be prosecuted under section 7 of the Health and Safety at Work Act 1974 if he or she fails “to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work.” Further, the Offences Act seeks to prosecute employers, directors, and managers where the offense is attributed to their neglect, consent or connivance.

In contrast, employees in the United States do not have this same responsibility. The only responsibility required of employees by OSHA is to comply with all OSHA requirements under the Act that are applicable. OSHA in the United States does not seek to sanction individual employees. Similarly, under the Health and Safety at Work Act 1974, liability will not attach to an individual solely because the individual has a senior role in the company; rather, courts will specifically focus on managers and directors with particular health and safety responsibilities.

The second change the Offences Act made to previous legislation is that it made certain offenses that were previously limited to be triable in Magistrate Court “triable in either Magistrate[ ] Court or the Crown Court.” The Crown Court has the discretion and power to impose higher fines and custodial sentences, and “by extending the [larger] maximum fine . . . and making imprisonment an option [in the lower courts,] the effect of the new Act is likely to be that more cases will be resolved in the lower courts.”

192. See Health and Safety at Work etc Act, 1974, c. 37, § 7 (U.K.).
193. See Young, supra note 190 (“[T]he [Offences] Act creates the threat of imprisonment for all employees who may have contributed to a health and safety offence by their, consent, connivance or neglect.”); Proceedings Against Director, Manager, Secretary or Other Similar Officer, HEALTH & SAFETY EXECUTIVE, http://www.hse.gov.uk/enforce/enforcementguide/investigation/identifying-directors.htm (last visited Dec. 18, 2010).
196. See id.
197. See CLARKE, supra note 172, at 2.
198. Id.
199. Id.
200. Id. at 2; see also Lucie Ponting, The Offences Act: Shades of the Prison House?, HEALTH & SAFETY AT WORK MAG. (Dec. 8, 2008),
The final change the Offences Act made to previous legislation was to increase the maximum fine for breaches of any regulation under the Health and Safety at Work Act 1974 in the Magistrate Court from £5,000 to £20,000. Many criticized the previous punishment as being inconsequential for those who broke the law. Finally, the Offences Act also penalizes employers for "offences which undermine the ability of enforcers to regulate health and safety, to prevent harm or to investigate what may be a serious health and safety offence."

The Offences Act, however, is not without criticism. Commentators and critics have recognized the potential for abuse surrounding the prosecution of individuals under the new legislation. Although there is growing anxiety surrounding overzealous prosecution practices, Keith Hill, the member of Parliament who introduced the bill, suggested that "the best estimates are that the new provisions will only raise the number of those imprisoned each year from around three or four to six or eight."

With respect to workplace violations causing death, the Sentencing Guidelines Council has published a definitive guideline for these types of offences entitled "Corporate Manslaughter & Health and Safety Offences Causing Death." The panel instructs that judges must take into account certain key factors in making the determination about whether an individual should be prosecuted. The panel advises that seriousness should ordinarily be assessed first by asking how foreseeable the serious injury was, and the more foreseeable it was, the greater the penalty. Next, judges are instructed to ask how far short of the applicable standard the defendant fell and how common the kind of breach is in the organization. This can be determined by assessing

http://www.healthandsafetyatwork.com/hsw/content/offences-act-shades-prison-house. Magistrate judges have expressed that on many occasions they referred occupational safety cases up to the Crown Court "to ensure a punishment that better fits the crime." By referring these cases to the higher court, they in essence slowed down the judicial process. Id.

201. CLARKE, supra note 172, at 1.
202. See Barrett, supra note 169, at 75.
203. See CLARKE, supra note 172, at 1.
204. See Ponting, supra note 200.
205. Id.
207. See id.
208. Id.
209. Id.
how widespread the non-compliance was.\textsuperscript{210} Factors for this part of the analysis include whether the event "was isolated in extent or indicative of a systematic departure from good practice across the defendant['s] operations."\textsuperscript{211} The last part to this analysis asks how far up the organization the breach goes.\textsuperscript{212} Typically, the "higher up" the organization, the more serious the penalty is.\textsuperscript{213}

Additionally, the Health and Safety Executive policy statement makes clear that prosecutions will not be taken lightly.\textsuperscript{214} The Health and Safety Executive only seeks to prosecute individuals for breaches of the health and safety guidelines which reflect "serious neglect; reckless disregard for health and safety requirements; repeated breaches which create significant risks; false information [provided to the Health and Safety Executive by an employer;] and serious risks which have been deliberately created to increase [employer] profit."\textsuperscript{215} As the Health and Safety Executive Chairman explains:

Our message to the many employers who do manage health and safety well is that they have nothing to fear from this change in law. There are no new duties on employers or businesses, and HSE is not changing its approach to how it enforces health and safety law. We will retain the important safeguards that ensure that our inspectors use their powers sensibly and proportionately. We will continue to target those who knowingly cut corners, put lives at risk and who gain commercial advantage over competitors by failing to comply with the law.\textsuperscript{216}

Thus, it is clear that the new legislation does not seek to make an example of all employers. At most, it seeks to punish those who continuously breach health and safety guidelines, and those responsible for the most serious breaches of occupational health and safety.\textsuperscript{217} Additionally, the Offences Act is unlikely to significantly increase the number or length of imprisonments because magistrates have long had

\begin{thebibliography}{2}
\bibitem{210} Id.
\bibitem{211} Id.
\bibitem{212} Id.
\bibitem{213} Id.
\bibitem{214} \textsc{Health & Safety Executive, Enforcement Policy Statement 3 (2009), available at} \url{http://www.hse.gov.uk/pubs/hse41.pdf} ("HSE believes in firm but fair enforcement of health and safety law.").
\bibitem{215} Young, \textit{supra} note 190.
\bibitem{216} News Release, Health & Safety Executive, \textit{supra} note 188.
\bibitem{217} \textit{See id.}
\end{thebibliography}
the option of issuing prison sentences for the most serious breaches. It was noted in the House of Commons Workplace Health and Safety Follow-Up Report that it is "hard to envisage [judges] suddenly availing themselves of custodial sentences for lesser offences." Similarly, in the United States, OSHA has the power of imposing a prison sentence for the most serious breaches pertaining to occupational health and safety, but this option is rarely utilized. In the proposed PAW legislation, it would be useful for the United States to avail itself the option of prosecution more frequently, as the absence of prosecution has clearly not helped the number of accidents and deaths in the workplace.

i. Burden of Proof

In the United Kingdom, the implementation of tougher sentencing powers, which permit the imprisonment of individuals with a reverse burden of proof on defendants, may cause an issue under European human rights law. Section 40 of the Health and Safety at Work Act 1974 imposes a reverse burden of proof on defendants where an individual is alleged to have breached occupational health and safety guidelines in the United Kingdom. That is, an employer is "assumed to be at fault unless they can prove otherwise." This reverse standard of proof is not applicable to Article 6 of the European Convention on Human Rights ("ECHR"), which requires a presumption of innocence.

The presumption of innocence standard is identical to that of the United States. The standard holds that in a criminal proceeding, the

219. Id. (citation omitted).
220. See supra Part II.C.1.
221. See supra Part II.C.1.
223. Ponting, supra note 200.
accused is considered innocent until proven guilty. This raises the question of whether imprisonment would be justified in a case where a conviction depended on that reverse standard of proof. Following a Health and Safety Executive prosecution in 2001, David Janway Davies was convicted under the Health and Safety at Work Act 1974 after one of his employees was killed on the job, and Davies challenged his conviction “on the grounds that Section 40 [of the Health and Safety at Work Act 1974] was incompatible with Article 6.2 of the [ECHR].” The Court of Appeals addressed this issue, “holding that the reverse legal burden of proof in Section 40 was compatible with the convention as it was proportionate and justified.” In light of this issue, it is increasingly important that the Health and Safety Executive only seek to prosecute cases where there has been serious personal fault on the part of the defendant.

ii. Effect on Proposed Legislation

The Offences Act provides many principles that the United States may seek to adopt in its PAW legislation. The United Kingdom’s prosecution practices seem neither overzealous nor ineffective. If the United States chose to implement a model similar to that of the United Kingdom, it should disregard the reverse burden of proof standard and assume that all offenders are innocent until proven guilty. The United Kingdom’s model of occupational health and safety seems to suggest that prosecutions should be reserved for those who knowingly cut corners, as well as repeat offenders. The most important insight that the United Kingdom model provides is how to tailor prosecutions to those who knowingly breach occupational safety guidelines, while protecting those business owners who comply with such standards.

B. Australia

Australia’s individualistic state approach to occupational health and safety provides another model of an approach the PAW Act may seek to
adopt. Australia’s workplace health and safety legislation includes varying practices among states, as well as an in-depth, three-tiered approach to occupational safety.\textsuperscript{231} In Australia, the legislative powers of the federal government are set out in the Commonwealth Constitution,\textsuperscript{232} but this Constitution does not grant a “general power” to the Commonwealth to legislate for Occupational Health and Safety (“OHS”), and consequently, Australia has implemented ten OHS statutes.\textsuperscript{233} Specifically, five Australian jurisdictions have sought to prosecute employers via industrial manslaughter legislation “or [have] introduced imprisonment as a sentencing option for OHS breaches which result in an industrial death.”\textsuperscript{234} Queensland, New South Wales, South Australia, Tasmania, Western Australia, and Victoria have all sought to implement prosecution guidelines against corporate directors and officers for breaches of OHS legislative guidelines.\textsuperscript{235}

Similar to the United Kingdom’s practices, the “duty to take reasonable care for the safety of employees is . . . not imposed upon individual directors of a corporate employer” in Australia.\textsuperscript{236} Similar to the Corporate Homicide and Corporate Manslaughter Act 2007 in the United Kingdom,\textsuperscript{237} Australian legislation seeks to hold a corporation liable for day-to-day practices, but does not attach liability to an individual director.\textsuperscript{238} Additionally, similar to what occurs in the United States and the United Kingdom, breaches of health and safety guidelines in Australia historically have resulted in little prosecution.\textsuperscript{239} However, individual states in Australia have implemented different approaches to

\textsuperscript{232} Id.
\textsuperscript{233} Id. Occupational health and safety legislation in Australia is comprised of ten statues, including “six state Acts, two territory Acts, a Commonwealth Act covering Commonwealth employees and employees of . . . corporations, and a Commonwealth Act covering the maritime industry.” Id.
\textsuperscript{235} Id. at 1.
\textsuperscript{237} Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, §§ 18(1)-(2) (U.K.).
\textsuperscript{238} See Wheelwright, supra note 236, at 472-73.
\textsuperscript{239} See Harpur, supra note 234, at 3 (citing to a case where management was clearly to blame for an explosion at the company but where no directors or senior company officers were charged for the deaths).
prevent death and to ensure safety in the workplace. It is useful to examine how different jurisdictions in Australia have set out legislation pertaining to occupational health and safety to determine which practices have helped to reduce deaths and serious accidents in the workplace.

1. Western Australia

In 2004, Western Australia implemented the Occupational Safety and Health Legislation Amendment and Repeal Act 2004 ("Repeal Act"), which changed the previous Occupational Health and Safety Act 1984 by introducing an offense of "gross negligence" for workplace deaths. Under the Repeal Act, "gross negligence" is defined as an offense "where [a person] knew that [his] conduct would be likely to cause the death of, or serious harm to, a person, and death resulted." The maximum penalty for an employer who is found to have been grossly negligent is two years.

i. The Gross Negligence Standard

The gross negligence standard adopted by Western Australia for breaches of occupational health and safety serves the purpose of deterrence. The elements of a crime for gross negligence create a standard that is "easier to satisfy than the elements for general manslaughter." In Western Australia, both industrial and general manslaughter require that there be a death in the workplace. However, the two differ in that industrial manslaughter "attributes criminal liability for negligent conduct, where general manslaughter requires recklessness or criminal intent." The adoption of the negligence standard for industrial manslaughter may result in an employer being faced with

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242. Harpur, supra note 234, at 5.
243. Id.
244. Id.
245. See id. at 5-6.
246. Id. at 6 (citation omitted).
247. Id.
248. Id.
prosecution "based upon imputed knowledge." Additionally, states that have adopted the gross negligence standard "have made it easier to gain a prosecution for this offence . . . and thus have increased the deterrent effect of industrial death provisions." Therefore, this may be a standard that OSHA should consider enacting because it sets a clear standard for what and who may be prosecuted.

The broad stance that Western Australia takes in regard to who they prosecute, and the fact that they prosecute those people based on imputed knowledge, may be extremely helpful to the United States in ensuring compliance with its OSHA standards. The proposed legislation in the United States must include such specificities with regard to a gross negligence standard because it will ensure efficient prosecution practices. The Australian legislation sets out a precise means of evaluating offenses, and such precision may mean the difference between ensuring strict compliance and allowing employers to get away with what they have always gotten away with: cutting corners around health and safety guidelines.

ii. Effect on Proposal

The makeup of Australia’s legislative scheme with respect to occupational health and safety in the workplace is something the United States should implement to ensure employees health and safety at work. Similar to Safe Work Australia, OSHA has the administrative capability to enforce national codes. Further, much like Australia’s states and territories, many states may want to implement their own penalties with regard to workplace health and safety. These states, however, must meet, at minimum, OSHA standards. It seems that in some states, where there are unique types of industries, penalties for occupational health and safety should be tailored to the specific needs of the individual state. For example, New South Wales, a state with

249. Id.
250. Id. at 7.
253. See id.
extensive coal mining practices,\textsuperscript{254} imposes harsh sanctions on those who breach occupational health and safety guidelines.\textsuperscript{255} Similarly, states such as Wyoming, with extensive coal mining practices,\textsuperscript{256} may seek to adopt individualized penalties for such breaches.

IV. ANALYSIS OF THE PROTECTING AMERICA'S WORKERS ACT

The United States has taken important steps toward addressing occupational health and safety in the workplace. The late Senator Edward Kennedy reintroduced the PAW Act\textsuperscript{257} shortly before his death in 2009.\textsuperscript{258} Kennedy had unsuccessfully sponsored the bill in the past.\textsuperscript{259} A few months before Kennedy reintroduced the PAW Act in the Senate, Representative Lynn Woolsey introduced a companion bill\textsuperscript{260} to Kennedy's PAW Act in an effort to reform the OSH Act.\textsuperscript{261} Together, the proposed legislation would allow OSHA to aggressively regulate the American workplace.\textsuperscript{262} In 2009, Congress was largely occupied with healthcare reform, leaving both bills in committee at the end of the year.\textsuperscript{263} Although the proposed bill has acquired support from many individuals and organizations, opponents argue that Congress is seeking to reform OSHA with overzealous prosecutions and harsh sentencing guidelines.\textsuperscript{264}


\textsuperscript{255} See Mine Health and Safety Act No 74 2004 (NSW) s 48 (Austl.).


\textsuperscript{257} Protecting America’s Workers Act, S. 1580, 111th Cong. (2009).


\textsuperscript{259} See id.

\textsuperscript{260} Protecting America’s Workers Act, H.R. 2067, 111th Cong. (2009).

\textsuperscript{261} See Swanton, supra note 258.

\textsuperscript{262} Id.

\textsuperscript{263} Id.

\textsuperscript{264} See COAL. FOR WORKPLACE SAFETY, supra note 16 (noting that workplace injuries are at an all time low, companies will react negatively to higher penalties, and small companies will bear the brunt of the higher penalties). See also Snyder, supra note 16 (interviewing a construction industry spokesman, who believes that increasing penalties may undermine efforts to improve safety.
A. Felony Sentencing: Too Much or Too Little?

The proposed bill "would sharply increase criminal penalties" for violations of occupational health and safety standards.\(^{265}\) Currently, the maximum prison penalty for an OSHA violation resulting in death of an employee is six months.\(^{266}\) This penalty increases to a maximum of one-year imprisonment if the OSHA violation is a repeat violation.\(^{267}\) As previously discussed, the PAW Act, if passed, would extend the maximum prison sentence to ten years, or twenty years in the case of a repeated violation.\(^{268}\) Moreover, violations resulting in serious bodily injury, but not death, would also carry stiff penalties.\(^{269}\) Under the proposed legislation, a first-time willful offense resulting in serious bodily injury would carry a prison term of up to five years, or ten years for a repeat offender.\(^{270}\) The current OSH Act does not contain a criminal penalty for a willful offense resulting in serious bodily injury.\(^{271}\) Accordingly, the criminal penalties are significantly harsher under the new bill. Additionally, Congress would effectively elevate willful and repeat OSHA violations from misdemeanors to felonies if the PAW Act were passed.\(^{272}\)

Classifying certain OSHA violations as felonies may be the most contentious proposition of the PAW Act.\(^{273}\) The significance of elevating OSHA sanctions to felonies from misdemeanors is that the Department of Justice will be more likely to prosecute cases referred to it by OSHA.\(^{274}\) Proponents of the PAW Act assert that increased

\(^{265}\) GIBSON DUNN, supra note 9.
\(^{267}\) Id.
\(^{269}\) Id. § 311(a)(5).
\(^{270}\) Id.
\(^{271}\) See id. § 666.
\(^{272}\) See GIBSON DUNN, supra note 9.
\(^{273}\) See Swanton, supra note 258 (quoting former OSHA head Edwin Foulke as stating, "[c]hanging from misdemeanor charges to felonies would have the most opposition from the business community").
\(^{274}\) See GIBSON DUNN, supra note 9.
criminal penalties are a necessary element in establishing deterrence for OSHA violations, but opponents argue that the proposed criminal penalties are likely to increase the divide between employers and employees, as well as that between businesses and government.

1. But, I Didn’t Mean to Kill My Worker!

Critics of the PAW Act argue that imprisonment for willful or repeat OSHA violations that result in death or serious injury is too harsh. However, the proposed bill will simply adopt similar criminal sanctions that are already available at the state level. For example, under the PAW Act, willful and repeat violations resulting in death are consistent with New York State statutes that deal with criminally negligent homicide and reckless murder. Similar to the PAW Act, under New York Penal Law, crimes that involve criminal negligence and recklessness do not require the prosecutor to prove that the defendant had an intent to kill; rather, it only requires that the prosecutor establish that the death occurred as a result of the defendant’s failure to recognize, or the defendant’s disregard of, a substantial risk.

In New York State, criminally negligent homicide is a class E

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275. See DISCOUNTING DEATH, supra note 87, at 6-8; see also DEATH ON THE JOB, supra note 10, at 1 (“OSHA penalties are too low to deter violations.”).
276. See COAL. FOR WORKPLACE SAFETY, supra note 16 (arguing that increasing penalties may create an “adversarial posture between OSHA and an employer”); Snyder, supra note 16 (stating concerns from employers that imposing harsher sanctions would deteriorate the construction industry’s relationship with OSHA).
277. See supra Part IV.A.
280. Compare PENAL LAW § 15.05 (providing that a person acts recklessly “when he is aware of and consciously disregards a substantial and unjustifiable risk,” and acts negligently “when he fails to perceive a substantial and unjustifiable risk”), with H.R. 2067 § 311(a)(1) (providing criminal penalties when an employer willfully violates an OSHA standard which causes an employee’s death, rather than only providing criminal penalties when an employer purposefully causes the death of an employee).
felony. This crime occurs when someone causes another person’s death by means of criminal negligence. New York State law defines an act of criminal negligence as when an individual “fails to perceive a substantial and unjustifiable risk” inherent in his act. Second-degree manslaughter, on the other hand, is defined as the act of “recklessly caus[ing] the death of another person,” and it is a class C felony. A person acts recklessly when he perceives the substantial and unjustifiable risk inherent in his act, but “consciously disregards” it. In essence, the culpable mental states of the crimes are distinguished by whether the accused recognized a risk inherent in his act that resulted in someone’s death. Additionally, criminally negligent homicide is punishable by up to four years in prison, while second-degree manslaughter has a maximum sentence of fifteen years. Thus, New York State courts punish defendants who are found to be aware of the risk of death and disregard the risk more harshly than it does those who fail to perceive the risk of death.

OSHA violations resulting in death should be aligned with criminal statutes in New York that deal with criminally negligent homicide and second-degree manslaughter through the PAW Act, because employers who commit OSHA violations that result in death are not intentionally killing employees. However, employers are aware, or should be aware, of the risk of death that these violations pose. In either case, a violating employer’s general mental state has risen to culpability worthy of punishment under New York law. An example of this is the recent indictment of the owner of New York Crane & Equipment Corporation for manslaughter and criminally negligent homicide in connection with a
crane collapse that killed two employees. Sentencing in these types of cases is at the discretion of the court. A court may find that employers who are unaware of a substantial and unjustifiable risk deserve a mitigated sentence compared to those employers who disregard such a risk. Thus, when considering current state statutes pertaining to similar crimes, it becomes apparent that the proposed penalties under the PAW Act are not grossly disproportionate. However, setting sentencing aside, opponents of the PAW Act argue that other aspects of the bill may be counterproductive to workplace regulation.

B. Increased Civil Penalties: I Can’t and I’m Not Paying That

Critics argue that the PAW Act would have significant detrimental economic effects on employers. First, the drastic increase in civil penalties under the PAW Act would likely result in a simultaneous increase in litigation against citations by large companies. Moreover, many small companies would bear the true burden of increased civil penalties because they lack the resources to challenge citations. Second, the increase in civil penalties would directly affect how OSHA’s compliance officers allocate their time. Compliance officers would be forced to spend more time on inspections in order to assure that citations would be able to stand up to the scrutiny of litigation. In addition, compliance officers would be drawn away from actually inspecting worksites when they would be required to appear in litigation to defend their citations. Thus, an increase in civil penalties encourages litigation by large companies, hurts small businesses, and wastes valuable inspection time.

However, the arguments against increasing civil penalties are weak. Under the OSH Act, employers already often challenge civil citations.


292. See PENAL LAW § 70.00(2)(c), (e).

293. See COAL. FOR WORKPLACE SAFETY, supra note 16.

294. See id.

295. See id.

296. Id.

297. Id.

298. See DISCOUNTING DEATH, supra note 87, at 15-17 (discussing that “employers who contest citations . . . face lower final penalties than employers who do not”).
and citations are routinely downgraded upon contestation.\textsuperscript{299} In fact, employers who challenge citations are more likely to have the fines reduced in the form of a "[c]ontest discount."\textsuperscript{300} Thus, an increase is necessary to eliminate the inadequacies of the current framework and to establish deterrence through civil penalties.

The PAW Act does not propose new regulations that would increase costs for any specific employers or small businesses.\textsuperscript{301} While the PAW Act does increase criminal and civil penalties, only employers who violate regulations would incur these costs.\textsuperscript{302} Moreover, the amendments pertaining to the OSHA citation process do not create overhead costs for employers.\textsuperscript{303} Additionally, OSHA currently follows a policy of reducing citations for small businesses and employers that act in good faith, and it anticipates continuing this policy if the PAW Act is enacted.\textsuperscript{304} Therefore, small businesses will not bear a disproportionate brunt of civil penalties.

Finally, increases in civil penalties will not reduce the number of inspections performed by OSHA. From fiscal years 2002 through 2009, the number of hours spent by OSHA on safety and health violations has only fluctuated slightly.\textsuperscript{305} In fact, years with the highest average for civil penalties issued for willful citations do not indicate a drop in average hours spent by inspectors on safety or health violations.\textsuperscript{306} Based on this data, there does not appear to be a correlation between the number of hours spent on an inspection and the amount of an OSHA citation.

\begin{itemize}
\item \textsuperscript{299} See id.
\item \textsuperscript{300} Id. at 15-16.
\item \textsuperscript{301} See Protecting America’s Workers Act, H.R. 2067, 111th Cong. (2009) (The purpose of the bill is “[t]o amend the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for certain violators, and for other purposes.”).
\item \textsuperscript{302} See id. §§ 310-311 (The proposed bill only provides for penalties to be assessed to violators.).
\item \textsuperscript{303} See id. §§ 306-307 (The proposed bill does not provide any additional financial costs to employers in these sections).
\item \textsuperscript{304} Kent Hoover & Michael DeMasi, Stricter Safety, PORTFOLIO.COM (May 3, 2010), http://www.portfolio.com/business-news/2010/05/03/osha-is-increasing-penalties-for-serious-safety-violations.
\item \textsuperscript{305} See DEATH ON THE JOB, supra note 10, at 60.
\item \textsuperscript{306} See id. For example, in fiscal year 2005, the average fine for a willful citation was $43,294, while the average number of hours spent on a health violation was 34.8. Id. Meanwhile, in fiscal year 2009, the average fine for a willful citation dropped to $34,271, but the average number of hours spent on a health violation remained at 34.8. Id.
\end{itemize}
C. Adversarial Posture of the PAW Act

Opponents also argue that the PAW Act would increase prosecution and foster a defensive rather than preventive occupational safety and health culture. During inspections, opponents argue, employers threatened with prosecution might be more likely to conceal unsafe working conditions or to outright refuse entrance to an inspector. The creation of an adversarial relationship between employers and OSHA would inhibit adequate safety investigations, especially in the case of a fatality. The threat of criminal prosecution would likely increase the role of employers’ attorneys in OSHA inspections and other interactions between the agency and employer.

Opponents of the bill also argue that the enactment of the PAW Act would lead employers to focus on avoiding the increased penalties, rather than remaining focused on “their obligations for workplace safety and health.” Further, opponents of the bill argue that statistical data indicate a consistent drop in work-related deaths since OSHA’s inception, and that this trend suggests that no amendments to the OSH Act are necessary. Critics argue that even if revisions are required, the PAW Act does not make appropriate changes. A federal policy that emphasizes prevention is preferable to one that focuses on penalties, critics argue, and increased penalties do little to inform business owners of their obligations under federal law. Rather, opponents of the bill argue that employers would be better served with materials and

307. See COAL. FOR WORKPLACE SAFETY, supra note 16 ("Increasing the . . . penalties will make it far more likely that large companies will have their lawyers require OSHA to obtain a search warrant before entering a workplace and have their attorney present during an OSHA inspection."); Snyder, supra note 16 (quoting Brian Turmail, spokesman for the Associated General Contractors of America, who stated that “[i]f I know I’m going to be fined or at risk because I know there’s a problem on site, I think it would actually drive safety concerns underground because I’m going to keep quiet”).

308. See COAL. FOR WORKPLACE SAFETY, supra note 16.

309. See id. (suggesting adversarial employers may have their attorneys require that OSHA inspectors have a warrant before entering a workplace).

310. See Westcott, supra note 264 (quoting Jonathan Snare, former head of OSHA, who also stated that “[i]n my view there are better approaches to deal with the problems than those being proposed [and t]hat would be a strategy focused more on prevention than penalties”).

311. See COAL. FOR WORKPLACE SAFETY, supra note 16. See generally DEATH ON THE JOB, supra note 10, at 34 (indicating that workplace fatality rates have dropped from 18% of the workforce in 1970 to only 3.8% of the workforce in 2007).

312. See COAL. FOR WORKPLACE SAFETY, supra note 16.

313. See Westcott, supra note 264.

314. Id.
programs promoting compliance rather than a statute that creates a greater magnitude of liability.\textsuperscript{315}

Finally, opponents argue that the increased regulation proposed under the PAW Act may result in overdeterrence. This overdeterrence, critics argue, would drive employers away from industries most heavily regulated by OSHA for fear of criminal liability.\textsuperscript{316} Alternatively, companies may also seek to avoid prosecution by moving offshore. In general, employers who fear prosecution may be less likely to cooperate with OSHA or restrict activities of employees.

Nevertheless, the argument that the enactment of the PAW Act would create a defensive culture between OSHA and employers is without merit. The function of OSHA is to regulate the American workplace using the power delegated to it by Congress,\textsuperscript{317} and the relationship between OSHA and employers will always be an adversarial one; OSHA regulates employers by threat of penalty. However, in order for OSHA to effectively operate and achieve its purpose, it must be properly equipped.\textsuperscript{318} Currently, OSHA is not able to effectively deter employers from violating its regulations, and since civil monetary and criminal penalties are essentially OSHA’s only methods of enforcement, “the threat of penalties being imposed must be credible, and the penalty itself must be high enough to prompt the employer to correct the hazard.”\textsuperscript{319} Specifically, “employers will find it cheaper to risk an OSHA penalty than spend the money to correct a safety hazard” if the penalties are not sufficient.\textsuperscript{320} Therefore, the PAW Act is appropriate legislation to maintain stability in the relationship between the federal government and employers.

The argument that prosecution of employers will deter qualified businesses and management from pursuing their interests is weak at best. This argument assumes that prosecution of employers would be rampant and carried out in every violation, creating a widespread fear of liability. This is hardly the purpose of the proposed bill.\textsuperscript{321} Prosecution of

\begin{footnotes}
\item[315] See id.; see also Letter from C. Christopher Patton, supra note 16, at 2.
\item[316] See Snyder, supra note 16.
\item[319] Discounting Death, supra note 87, at 6.
\item[320] Id.
\item[321] See Protecting America’s Workers Act, H.R. 2067, 111th Cong. (2009) (discussing that one of the purposes of the bill is to “increase penalties for certain violators” (emphasis added)).
\end{footnotes}
employers under the PAW Act would only be applied in situations where an employer willfully or repeatedly violated an OSHA regulation causing someone serious bodily injury or death. Thus, employers would have nothing to fear, so long as they comply with mandated federal regulations. In essence, the implementation of the PAW Act would only create fear for those who willfully or repeatedly break the law.

Finally, an argument citing decreasing rates of workplace related injury and death as evidence of OSHA’s effectiveness is flawed because the statistics are flawed. Congress has only recently taken steps to evaluate the accuracy of employer reporting methods. Until the prevalence of underreporting is ascertained, it cannot be stated with certainty that work injuries and deaths have steadily declined. Although the PAW Act emphasizes enforcement by increasing penalties, it does not abandon voluntary and cooperative programs to educate employers. These informative programs are appropriate efforts to supplement enforcement, rather than replace it. However, the increase of civil and criminal penalties is necessary to deter employers from harmful practices, a goal that volunteer and educational programs cannot reach on their own.

D. The Lack of Sentencing Guidelines: Problems and Proposals

A major shortcoming of the PAW Act is the absence of sentencing guidelines, which creates uncertainty as to who has discretion to determine a sentence for the most serious repeat and willful violations. Both OSHA and federal judges may claim the authority to determine an

322. See id. § 311.
323. See supra Part II.C.3. See generally HIDDEN TRAGEDY, supra note 115, at 2 ("[E]xtensive evidence from academic studies, media reports and worker testimony shows that work-related injuries and illnesses in the United States are chronically and even grossly underreported.").
324. See U.S. WORKPLACE SAFETY AND HEALTH, supra note 127, at 1. This governmental report reviews the Department of Labor’s efforts to ensure that workplace injuries are properly and accurately recorded by employers.
325. See generally HIDDEN TRAGEDY, supra note 115 (providing specific examples where it is believed that the decrease of reported work-related injuries can be attributed to deficiencies in recordkeeping).
326. DEATH ON THE JOB, supra note 10, at 17 ("Voluntary programs still are part of the OSHA program but are viewed as supplemental to, not a replacement for enforcement.").
327. See id.; see also Letter from C. Christopher Patton, supra note 16, at 2.
TAKE YOUR PAWS OFF ME

employer’s sentence. The PAW Act should include a clarification as to who has the authority to declare a sentence and what factors should be considered in forming punishment.

Another flaw of the PAW Act is the absence of any guidelines to effectively tailor prosecutions to those employers most deserving of prosecution. The most important part of effectuating the new sentences is to tailor prosecutions to individuals most deserving of the stiff penalties proposed under the pending legislation. Prosecutions based on criminally negligent and reckless behavior in the workplace are a good starting point to determine who should be prosecuted. For example, in the United Kingdom, corporations are prosecuted when they breach a duty of care, and the breach causes an employee’s death. This duty of care is owed under the law of negligence. Further, a director, manager, or worker can be prosecuted if he fails “to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work.” Thus, in the United Kingdom, the responsibility for occupational health and safety falls not only on the employer but on the individual employee as well.

Similarly, the proposed legislation in the United States would seek to sanction employers who fail to take the necessary precautions to prevent an employee’s death. The question is not whether there should be prosecutions but rather when there should be prosecutions. In Australia, for example, Neil Gunningham, the Director of the National Research Centre for Occupational Health and Safety Regulation of Australian National University, suggests that different types of firms are likely to react differently to increased prosecution. For example, Gunningham states that it is different to prosecute a key decision maker in a small business than it is to prosecute a senior officer in a large

328. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(b)(3) (2006) (authorizing the creation of an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act); id. § 660 ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order in any United States court of appeals . . .").
330. See supra Part III.A.2.
331. See Health and Safety at Work etc Act, 1974, c. 37, § 7 (U.K.).
333. See Gunningham, supra note 329, at 370.
company who might not be directly responsible for the death or serious injury that occurred.\textsuperscript{334} Perhaps the most important of Gunningham’s suggestions is that we must recognize that prosecutions do not work universally and instead should be carefully targeted to appropriate circumstances and actors that are likely to respond positively to it.\textsuperscript{335}

The United States would also be wise to look at the United Kingdom’s sentencing standards, which are tailored to each individual situation,\textsuperscript{336} in determining its own sentencing standards. In the United Kingdom, the Judge considers how foreseeable the injury was, and whether there were any particular aggravating or mitigating circumstances.\textsuperscript{337} Additionally, the judge is advised to “[c]onsider the nature, financial organisation and resources of the defendant.”\textsuperscript{338} Additionally, Gunningham notes that some failures on the part of a duty holder expose others to substantial risk of serious harm, while other failures are far less harmful.\textsuperscript{339} Consequently, those who are found liable for multiple breaches are deemed prime candidates for stricter penalties, because repeated breaches give rise to significant risk.\textsuperscript{340} Accordingly, OSHA should take into account the defendant’s past OSHA record when determining sentencing guidelines. Finally, it is important to note that prosecution may have a negative impact when it is inappropriately used. For example, evidence from Australia has shown that a “confrontational style of enforcement may diminish the willingness of firms to cooperate and learn from past experience[s].”\textsuperscript{341}

Finally, another major shortcoming of the OSH Act and the proposed PAW Act is that they fail to provide specific guidelines about an individual employee’s responsibilities in the workplace. While the OSH Act focuses on the responsibility of the employer, legislation abroad has sought to hold an individual employee responsible for their conduct in the workplace.\textsuperscript{342} The United States should follow the United Kingdom’s lead in ensuring that responsibility for health and safety violations extend to every individual in the workplace. While

\begin{itemize}
\item \textsuperscript{334} See id.
\item \textsuperscript{335} See id.
\item \textsuperscript{336} See supra Part III.A.2.
\item \textsuperscript{337} See supra Part III.A.2.
\item \textsuperscript{338} Corporate Manslaughter, supra note 206 (advising judges to consider factors such as the financial consequences of a fine, compensation for the injury, and all circumstances of the case).
\item \textsuperscript{339} Gunningham, supra note 329, at 377-78.
\item \textsuperscript{340} See id. at 378.
\item \textsuperscript{341} Id. at 369.
\item \textsuperscript{342} See supra Part III.A.1.
\end{itemize}
individuals in the workplace should take reasonable precautions to ensure that the workplace remains safe, the only way to make certain employees take this responsibility seriously is to punish those who do not.

V. CONCLUSION

Clearly the OSH Act is in need of reformation. The current conflict between deterrence and negotiation policies has crippled OSHA’s ability to effectively regulate the American workplace. The downgrading of citations against offending employers has proven to be detrimental in maintaining compliance with OSHA standards, and the relabeling of citations as “unclassified” has eliminated the ability of OSHA to keep and maintain accurate history of repeat offenders. OSHA’s civil penalties are equally weak because they do not account for inflation rates. Perhaps most discouraging is the extremely limited amount of prosecutions brought by the Department of Justice against employers who commit violations resulting in serious injury or death.

While the current situation seems bleak, the PAW Act promises much needed reformation. The bill provides deterrence for willful and repeat violations by creating felonies that will make employers consider the consequences of failing to protect their employees. In addition, the PAW Act strengthens civil penalties by significantly increasing fines and accounting for inflation. Finally, the proposed legislation empowers employees by giving them a greater role in the punishment of employers.

Although several arguments have been made against the increased penalties in the PAW Act, they are largely unsubstantiated. Longer sentences are justified given that current state law prescribes for similar punishment in cases of reckless murder or criminally negligent homicide. Moreover, the argument that prosecution of employers is counterproductive is unfounded. The PAW Act does not increase burdensome financial expenses for small businesses; rather, it provides more protection for employees. Also, the PAW Act does not damage the relationship between OSHA and employers, as this relationship is naturally adversarial. Finally, the proposed bill will not over deter employers from pursuing their interests because only repeat and willful violators should be deterred by these new punishments.

The PAW Act, however, lacks specific sentencing guidelines, which will inevitably lead to problems in several different areas. In order to effectuate the harsher sanctions, Congress must keep in mind
the cultural apathy that lies in the prosecution of business owners. Prosecution guidelines must be tailored to the individual offenders to ensure that the imposition of prison sentences is not abused. Moreover, the lack of sentencing guidelines creates confusion as to who has authority in determining employer’s sentences. Finally, the PAW Act makes no clear delineation between the responsibilities of the employer and employee.

Looking to occupational health and safety legislation abroad, it is clear that the PAW Act must include additional provisions that effectuate occupational health and workplace safety enforcement. In the United Kingdom, under the Health and Safety Offences Act, judges are given the inherent authority to enforce prosecutions, but they must also comply with standards set up by the Sentencing Advisory Panel. Accordingly, the United States should follow suit in establishing sentencing power for an OSHA violation. Further, in the United Kingdom, responsibility for maintenance of a safe and healthy workplace extends to the individual employee. The United States could benefit from adopting this idea. Individuals in the American workplace should pay close attention to their specific duties in relation to health and safety in the workplace to ensure that effective systems and procedures are being facilitated.

Finally, the most important lesson to be learned from legislation abroad is the importance of sentencing guidelines. In Australia, an individual state is responsible for setting occupational health and safety guidelines. This ensures that in states with dangerous industries, state governments have more of a role in facilitating punishment for health and safety breaches. While the makeup of OHS in Australia, differs

343. See supra Part III.A.2.ii.
344. See supra Part III.A.2.
345. See supra Part III.A.2.
346. See Gunningham, supra note 329, at 359-60.
347. See id. (giving New South Wales as an example of a state with a dangerous industry where legislation effectuates harsher sentences because there is a higher risk of workplace accidents).
from that of OSHA in the United States, the idea of tailoring prosecution to those who are most deserving of sanction cannot be ignored. In providing specific sentencing guidelines, the United States will ensure that implementation of harsher sanctions will deter those who knowingly cut corners around occupational health and safety guidelines.

Although the absence of sentencing guidelines in the PAW Act creates several problems, these conflicts can be resolved. The observation of workplace regulation abroad provides a reference for the United States in reforming the OSH Act. Moreover, the lack of sound arguments against the PAW Act, in combination with the obvious need for reform, has proven that the proposed bill must be enacted.

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