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PUNISHMENT VERSUS COOPERATION IN REGULATORY ENFORCEMENT: A CASE STUDY OF OSHA

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INTRODUCTION

After two decades of health and safety regulation, there is a growing interest in regulatory reform.[1] One focus of the reform movement is on the assessment of risks and the economic impact of proposed regulations.[2] Another focus, which receives less attention, is on agency enforcement policies. A complaint of agency enforcement policies is that agencies rely too heavily on punishment to induce compliance and ignore cooperative enforcement policies.[3] In this critique, law is "suffocating America" because regulators zealously enforce detailed rules in circumstances where enforcement is counterproductive, unfair, and even nonsensical.[4] In short, there has been a "death of common sense."[5]

Such criticisms have a political impact. The Republican majority in Congress, for example, moved to reign in enforcement by the Occupational Safety and Health Administration (OSHA), which they regard to be a particularly egregious example of overzealous enforcement.[6] The Clinton administration responded by identifying ways to "reinvent" enforcement as part of its broader effort to create a government that works better and costs less.[7]

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1. *See* Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463 (1996); *Symposium: Regulatory Reform*, 31 WAKE FOREST L. REV. 581 (1996).

2. *See* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE chs. 11-12, 14 (1997); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).

3. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4-5 (1992); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 6-7 (1982).

4. PHILIP HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994).

5. *Id.*

6. *See Senate Committee Approves Job Safety Bill*, O.S.H. REP. (BNA) 1355 (May 6, 1996).

7. VICE PRESIDENT AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993). *See* THE NATIONAL PERFORMANCE REVIEW, THE NEW OSHA: REINVENTING WORKER SAFETY AND HEALTH (1995) [hereinafter NEW OSHA].

Despite the interest in reforming enforcement policies, scant attention is given to what is known about the efficacy of cooperation and punishment as elements of regulatory enforcement. This article sets out to remedy this oversight. Part I examines the policy literature's input on the efficacy of cooperative enforcement policies and reaches two conclusions. First, a mix of cooperation and punishment can maximize employer compliance with agency regulations, but excessive reliance on cooperation is likely to be counterproductive. While regulatees prefer cooperative policies, they also want assurance that companies that operate in bad faith are likely to decrease, rather than increase, voluntary compliance with regulatory norms. Without such assurance, voluntary compliance will break down and cooperative policies will fail. Second, although a mix of cooperation and punishment is likely to be optimal, the policy literature provides no clear guidance on finding the ideal combination.

Part II describes and evaluates two general methods that agencies can use to implement cooperative enforcement. One method is to delegate to inspectors the discretion to determine whether cooperation or punishment is appropriate. The other method is to cooperate with employers until they demonstrate their lack of good faith, and to step up punishment based on the significance of the lack of compliance. Agencies can also improve the effectiveness of cooperative approaches by involving regulatory beneficiaries.

Part III examines OSHA's cooperative efforts in light of the policy analysis considered in Part II. The analysis begins with an examination of OSHA's ample legal authority to adopt cooperative approaches. It then describes how OSHA deployed this authority to mix its enforcement approaches. This analysis reveals that OSHA employs a number of useful cooperative polices, although some of its approaches could be improved.

Part IV considers additional cooperative polices that OSHA can adopt. These proposals, such as use of a "warning citation," much like a warning ticket given for speeding, hold considerable promise. Until OSHA experiments with these proposals, however, their effectiveness will be difficult to predict.

Part V describes cooperative approaches proposed by Congress. The difficulty with the majority of these amendments is their limitation on OSHA's flexibility to adjust the mix of enforcement and cooperation in light of its experience and new policy studies. Because the policy literature is unclear on defining the optimal mix, Congress would be better off prodding OSHA to experiment with additional cooperative policies such as those considered in Part IV.

Finally, Part VI considers the significance of the OSHA case study for the general issue of cooperation versus punishment. We conclude that

OSHA's experience confirms the importance of both cooperation and appropriate punishment. While neither alone is sufficient, the optimal mix is unknown. Like OSHA, other agencies should experiment with cooperation to determine what methods should be utilized and the extent to which these methods should be utilized.

I. THE UTILITY OF COOPERATIVE APPROACHES

Regulated entities have strong short-term incentives to disobey agency regulations when enforcement is unlikely, but long-term incentives encourage managers to voluntarily obey these rules anyway. Agencies can undermine such voluntary compliance if they aggressively pursue and punish minor violations instead of relying on more cooperative approaches. The policy evidence is equivocal concerning the extent to which such agency cooperation increases regulatory compliance. Other evidence, however, suggests that substantial reliance on cooperation may decrease compliance. Given the paucity of evidence, we conclude that agencies should cautiously experiment with a mix of cooperation and punishment.

A. Incentives for Compliance

Regulated entities have short-term and long-term incentives for regulatory compliance. Short-term incentives may deter compliance; but long-term incentives, which are both economic and sociological, may compel a firm to comply voluntarily with government regulations. Whether firms will cooperate, however, depends on government enforcement policies.

1. Short-Term Incentives

Economic theory teaches that a firm's short-run incentive to comply with agency regulations is a function of the cost of both compliance and noncompliance. Compliance costs include the expense of obeying agency regulations, while noncompliance costs are related to the probability that an agency will find a firm out of compliance, and the size of the penalty the agency will assess.[8] If the risk of being inspected is not high, there is little incentive for a firm to comply. For example, if a firm expects to have ten violations at $1,000 per violation, it is potentially liable for a total fine of $10,000. But if the firm only has a one in 1,000 chance of being caught, it will calculate the cost of noncompliance as the probability of being in-

8. *See* W. Kip Viscusi, *Reforming OSHA: Regulation of Workplace Risks*, *in* REGULATORY REFORM: WHAT ACTUALLY HAPPENED 234, 259 (L. Weiss et al. eds., 1986) (noting employer's incentive to avoid fines is related to likelihood that OSHA will detect violations and assess fines).

spected (one in 1,000) multiplied by the amount of the fine ($10,000), or ten dollars.[9] This example may seem extreme, but it is not. Employers routinely avoid paying OSHA fines because, with the exception of a few industries specifically targeted by OSHA, most industries are seldom inspected by the agency.[10] During the previous five years, OSHA failed to inspect seventy-five percent of the 6,411 sites where a fatal or serious accident occurred from 1994 through May, 1995.[11]

2. Long-Term Incentives

Although a firm may lack short-term incentives to comply with agency regulations, managers also have long-term incentives that induce compliance. In the long-run, firms are influenced by a magnitude of additional factors including "the extent that compliance costs can be passed onto customers, the average size of the firms in the industry, and the degree to which the regulations are consonant with liability law, market pressures,

9. The situation in the real world can be more complex. Besides the potential of OSHA fines, for example, employers who fail to comply with OSHA regulations may have to pay additional wage premiums and workers compensation. Employers, however, can avoid paying these costs in many cases. *See* THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ch. 2 (1993) [hereinafter MCGARITY & SHAPIRO, WORKERS AT RISK] (analyzing why these costs do not increase when employers fail to make health and safety improvements).

A wage premium is the additional amount of money that an employer must pay to secure workers to undertake dangerous employment. *See* Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 605-07 (1996). Employers avoid paying wage premiums because workers do not have other comparable job opportunities, and they lack knowledge concerning workplace risks, particularly health risks. Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1244-50 (1984).

Employers avoid paying workers compensation for several reasons, including that payments are legally capped at low levels. Employers also avoid paying workers compensation because workers may not recognize that their injury or illness is job-related, may have difficulty meeting restrictive eligibility requirements, or may be unable to prove causation. *Id.* at 1245-47; *See* Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 173 (1994). Employers also may engage in claims-avoidance strategies, rather than injury prevention. *Id.* at 220. Moreover, there is little economic incentive to prevent occupational disease because "decisions concerning how much to spend on prevention are not based on current workers' compensation costs, which are the result of past actions." Schroeder & Shapiro, *supra*, at 1245.

10. *See* MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 26-27, 188-89.

11. *See* Earle Eldridge, *Study Links Job Deaths to OSHA Failure*, USA TODAY, Sept. 5, 1995, at B1.

and the long-run economic interests of the enterprises."[12] Firms may "sense that the long-run gains of retaining a reputation as a law-abiding corporate citizen may outweigh the short-run gains from regulatory non-compliance."[13] Bankers and institutional investors, for example, may regard a firm with a reputation for environmental irresponsibility as poorly managed and prone to trouble, legislators may give it a "cold shoulder" to avoid the appearance of cooperating with corporate lawbreakers, and consumers could boycott the firm if it is publicly attacked by environmental or consumer groups.[14] Although these results are not inevitable, the fact that they might occur encourages "risk-adverse corporate managers" to seek a conservative, trouble-avoiding policy.[15]

Social incentives also mitigate the impact of short-run economic considerations. Corporate managers are not just "value maximizers — of profits or of reputation" but they "are also often concerned to do what is right, to be faithful to their identity as law abiding citizens, and to sustain a self-concept of social responsibility."[16] Professional training may also provide a source of norms that encourage compliance.[17] Employees concerned with regulatory matters, such as biologists, environmental engineers, industrial hygienists, lawyers, occupational physicians, safety experts, and toxicologists, are interested in reducing the costs of regulatory compliance, but they also are loyal to the standards of their profession.[18] The compliance advice given by these professionals is likely to reflect these norms.

3. The Impact of Enforcement Policies

A business's long-term incentives might induce it to comply with agency regulations even when there are short-term incentives to disobey, but government enforcement policies determine whether managers will comply. If the government punishes companies in circumstances where managers believe there has been good faith compliance, corporate officers may react by being less cooperative with regulatory agencies.[19] Managers are likely to

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12. BARDACH & KAGAN, *supra* note 3, at 64.

13. *Id.* at 61.

14. *Id.* In addition, the firm might have a more difficult time working with other regulatory agencies besides the Environmental Protection Agency (EPA), such as zoning boards and government contract offices. *Id.*

15. *Id.*

16. AYRES & BRAITHWAITE, *supra* note 3, at 22.

17. *See* JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (describing role of organizational and professional influences in administrative decisionmaking).

18. *See* BARDACH & KAGAN, *supra* note 3, at 61-62.

19. *See* John BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY 100 (1985).

believe the government has ignored their good faith in two circumstances. When firms with good compliance records inadvertently violate regulations because the rules are complex or ambiguous, managers are likely to regard punishment by the government as unwarranted and unfair, particularly if the violation is minor.[20] When a firm finds it difficult or inappropriate to apply general regulations to their specific circumstances, managers are also likely to regard punishment as unreasonable because regulators fail to acknowledge that an exception from technical compliance is warranted.[21]

Managerial resentment reduces compliance in two ways. Managers may refuse to do anything more than comply with the agency's existing regulations.[22] For example, they may refuse to cooperate with regulators in identifying and solving new problems.[23] They may also actively resist agency enforcement efforts by contesting whether a violation occurred even if the firm's legal costs will exceed the size of the fine.[24] A firm or groups of firms may also "act politically against the object of resentment, thus threatening the political future of a program."[25]

OSHA's experience illustrates such behavior. The agency's early enforcement actions focused on "violations of the national consensus standards, many of which were hopelessly vague or 'needlessly detailed' and some of which were plainly ridiculous."[26] Vigorous enforcement of these

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20. *See* BARDACH & KAGAN, *supra* note 3, at 105-106. Bardach and Kagan cite the reaction of one plant manager upset at OSHA as typical: "The fines, to Jones [the person interviewed], were an injustice not merely because they were disproportionate to the offense, but also because they symbolized official blindness to his efforts and motives." *Id.* at 106. *See also* STEVEN KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY 205 (1981).

21. *See* BARDACH & KAGAN, *supra* note 3, at 58 (noting inevitability of mismatches between uniform rules and diverse circumstances).

22. *See id.* at 107; *see also* KELMAN, *supra* note 20, at 205-207.

23. *See* BARDACH & KAGAN, *supra* note 3, at 109; *see also* Robert A. Kagan & John T. Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies, in* ENFORCING REGULATION 67, 74 (Keith Hawkins & John M. Thomas eds., 1984) (finding legalistic enforcement diminishes opportunities for cooperation); John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 L. & SOC'Y REV. 179, 184 (1984) [hereinafter *Ecology of Regulatory Enforcement*] (stating firms are more likely to share information concerning newly discovered problems with regulators who are cooperative).

24. *See* BARDACH & KAGAN, *supra* note 3, at 112-13; KELMAN, *supra* note 20, at 207, 211-12; Kagan and Scholz, *supra* note 23, at 71.

25. KELMAN, *supra* note 20, at 205.

26. MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 42. Employers also claim that because OSHA slavishly enforced the consensus standards, it ignored potentially more serious problems. Kagan & Scholz, *supra* note 23, at 73, citing HERBERT NORTHRUP ET AL., THE IMPACT OF OSHA 44-46, 228-83 (1978) (noting that private safety engineers claimed OSHA focused on minor safety problems and ignored more important ones).

standards stimulated "a culture of resistance" which at times "border[ed] on the hysterical in exaggerating OSHA's bad points."[27] The steel foundry industry, for example, "organized for political action, formed a political action committee, hired lobbyists, and challenged OSHA in the Supreme Court because of the depth of members' outrage at OSHA's legalistic enforcement practices."[28]

B. The Impact of Cooperative Approaches

Regulated entities may comply with agency regulations even when it is unlikely that the failure to comply will be discovered and punished. Agencies risk discouraging such cooperation if they engage in aggressive prosecution of minor offenses because managers are likely to feel that agencies do not credit their good faith efforts at compliance. In light of such attitudes, agency cooperation with regulated entities should increase compliance. There is little evidence, however, to verify this conclusion. Moreover, other evidence suggests that cooperative approaches may actually discourage cooperation if agencies permit lawbreakers to go unpunished.

1. Evidence of Increased Compliance

There is little empirical evidence on the relative effectiveness of cooperative and legalistic enforcement policies.[29] Most of the evidence is anecdotal and open to dispute. Bardach and Kagan, for example, suggest that eighty percent of regulated entities are strongly to weakly inclined to cooperate with regulatory agencies,[30] but this estimate is based on one limited study and seat-of-pants estimates by regulators and others.[31] An OSHA in-

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27. BARDACH & KAGAN, *supra* note 3, at 115.

28. Kagan & Scholz, *supra* note 23, at 74.

29. *See* John Mendeloff, *Overcoming Barriers to Better Regulation*, 18 L. & SOC. INQUIRY 711, 717 (1993) (reviewing IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992)).

30. BARDACH & KAGAN, *supra* note 3, at 64. According to these analysts, the firms comprising the 80% range over a spectrum of borderline to moderate to "really good apples." *Id.* The "good apples" are the companies with the strongest conception of the link between compliance and long-term self-interest and the most effective internal controls to achieve regulatory compliance. *Id.* There are also "reasonably good apples," which are also guided by long-term self-interest, but these firms are less efficient in anticipating and preventing problems on their own. *Id.* When government inspectors point out a violation, they will undertake compliance efforts, "rather than cold-bloodedly weighing the costs of compliance against the cost of a possible fine." *Id.* at 64-65. The "bad apples," which comprise the other 20% of firms, resist compliance solely on the basis of cost or inconvenience. *Id.* at 64-65. Some managers of bad apples are "selfish and asocial," while others cannot afford to take a long-term view because their firms are in desperate financial straits. *Id.* at 65.

31. *Id.* at 64. The study of housing code enforcement in New York found that 65% of

spector, by comparison, estimates that there is significantly more noncompliance than Bardach and Kagan indicate.[32]

International studies also support the efficacy of cooperative approaches, but these studies are also impressionistic. A study of environmental compliance in Great Britain, for example, found that the vast majority of dischargers complied with regulatory requirements despite the fact that less than one percent of violators were prosecuted and fines were minimal.[33] The rates of compliance were estimates by regulatory inspectors and were without empirical verification.[34] Moreover, another study found that the available evidence indicates that the cooperative approach used in Great Britain produced "roughly similar environmental outcomes" to the less cooperative enforcement approach used in the United States.[35] Finally, cultural and institutional differences often mean that a foreign program that emphasizes cooperation can not be transplanted successfully to the United

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recorded violations were attributed to 12% of all multiple-dwelling buildings, and "on the general picture painted ... by numerous people both in regulated industries and in the regulated agencies, who said or implied, '[t]en percent of the fines cause 90 percent of the problems.'" *Id.* at 65 (citing MICHAEL TEITZ AND STEPHEN ROSENTHAL, HOUSING CODE ENFORCEMENT IN NEW YORK CITY 34 (1971)). Two FDA officials claim that officials "have long recognized that at least 95 percent of compliance comes voluntarily and that this is the major source of consumer protection." *Id.* (quoting JAMES TURNER, THE CHEMICAL FEAST 123 (1970)). A wage price administrator estimated that "20 percent of the population would automatically comply with World War II price regulations because it was the law of the land, 5 percent would attempt to evade it, and the remaining 75 percent would go along with it as long as they thought the 5 percent would be caught and punished." *Id.* at 65-66 (citing CHESTER BOWLES, PROMISES TO KEEP: MY YEARS IN PUBLIC LIFE 1941-1969, at 25 (1971)).

32. *See* DON J. LOFGREN, DANGEROUS PREMISES: AN INSIDERS VIEW OF OSHA ENFORCEMENT 207 (1989) (noting that "[i]t appears from my vantage point that of the supercompliers, compliers, noncompliers, and those in between, the *noncompliers* constitute a significant percentage. Among this group are a surprising number of companies in hazardous industries that do not have even the rudiments of an injury and illness prevention program").

33. KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 177 (1984). The study attributes the high compliance rate to the inspectors' skillful exploitation of the firms incentives to voluntarily comply with pollution regulations. *Id.* British inspectors were able to gain compliance by appealing to the polluter's sense of social responsibility, by "exploiting the desire of most commercial organizations for an unsullied public image," and by reminding company officials of the influence that the inspectors have on other public authorities upon which the polluters were dependent for licenses and similar privileges. *Id.* at 141, 148, 151.

34. *See* Richard Brown, *Theory and Practice of Regulatory Enforcement: Occupational Health and Safety Regulation in British Columbia*, 16 LAW & POL'Y 63, 71 (1994).

35. DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES 192 (1986). Although the outcomes were the same, there was far less conflict between business and government in Great Britain than in the United States. *Id.*

States.[36]

An empirical study of OSHA enforcement did find that OSHA can increase the effectiveness of regulatory enforcement by administering less stringent penalties,[37] but it used a test of efficacy that is suspect. The study correlated injury rates with an index of enforcement stringency that was based on the number of inspections, citations for serious violations, and penalties per worker.[38] This measure is questionable, however, because a cooperative enforcement program will have a large number of citations for serious violations and a small number of citations for nonserious violations.[39]

This evidence suggests that cooperative enforcement policies can improve compliance with agency regulations, but the evidence does not indicate the extent of such improvement. Moreover, as discussed next, additional evidence indicates that too much reliance on cooperative enforcement policies can decrease compliance.

2. *Evidence of Decreased Compliance*

A mix of anecdotal and empirical evidence warns that cooperative approaches can decrease compliance if agencies permit law breakers to go unpunished. A Canadian study, for example, found that the same employers continued to violate health and safety regulations despite lenient treatment.[40] Another empirical study which compared compliance in the pulp

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36. *See* KELMAN, *supra* note 20, at 229. Sweden, for example, follows a more cooperative approach, but it also has normative values and institutions that create significant incentives for employers to comply with workplace safety and health regulations. *Id.* It has high rates of unionization of workers and institutional roles for worker representatives in setting health and safety policy. *Id.* These processes produce a situation where, in contrast to the United States, employer leaders accept government regulations and employer organizations help seek compliance by member firms. *Id.* at 199.

37. John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115, 128 (1991) (concluding that, "[d]espite the potential difficulties that could minimize the effectiveness of collective enforcement, states with more concentrated enforcement associated with the cooperative enforcement strategy are more likely to have effectiveness scores when the level of enforcement is controlled").

38. *Id.* at 120.

39. *See* Mendeloff, *supra* note 29, at 718 (questioning study's reliance on citations for serious violations). As explained below, this pattern indicates that regulators are reserving punishment for significant, rather than insignificant violations. *See also infra* Part II.B.

40. *See* Brown, *supra* note 34, at 83-84 (finding that the Workers Compensation Board of British Columbia, which is responsible for health and safety enforcement, seldom used its authority to punish repeat violators or violators who committed high risk offenses, despite large number of both categories of violators). According to computerized enforcement records, repeat violations accounted for 30.9% of the approximately 200,000 violations recorded between 1984 and 1986, but inspectors seldom penalized an employer for a repeat

and paper industries in Canada and the United States found lower compliance rates in Canada, which the author attributed to the fact that Canadian enforcers were more lenient than their American counterparts when addressing noncompliance.[41] An Australian analyst came to a similar conclusion based on his observations of efforts to enforce mine safety and health in Australia.[42]

OSHA's experience likewise suggests caution concerning cooperative approaches.[43] The ineffective nature of the largely cooperative state enforcement programs was one reason why Congress created OSHA.[44] Moreover, OSHA's effort at cooperation in the early 1980s was followed by a sharp increase in the number of workplace injuries. The Reagan administration, which believed that OSHA inspectors would be more effective as "consultants" than as "enforcers," took a number of steps to reduce the level of enforcement in the early 1980s.[45] By 1983, a previous downward trend in accident statistics reversed, and the accident rates continued to climb for the remainder of the decade.[46]

Two factors appear to explain these results. First, if a regulated entity lacks sufficient incentives to comply voluntarily with agency regulations, a cooperative enforcement approach is not likely to induce compliance. To

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violation. *Id.* at 77, 81. In light of these results, Brown concludes that the limited use of penalties is the result of institutionalized tolerance of widespread violations, rather than the result of the vast majority of firms being good apples. *Id.* at 83 (noting that many employers who did not comply were not punished, and fewer than one-fifth of employers with poor compliance records, averaging five or more repeat orders per inspection, were punished).

41. *See* Kathryn Harrison, *Is Cooperation the Answer? Canadian Environmental Enforcement in Comparative Context*, 14 J. POL. ANAL. & MAN. 221, 240 (1995).

42. *See* NEIL GUNNINGHAM, SAFEGUARDING THE WORKER: JOB HAZARDS AND THE ROLE OF THE LAW 272 (1984) (theorizing that history of Australian regulation "confirms that a policy of self-regulation, of voluntary standards supported by advice and persuasion from State Departments of Labour, Mines and Health, results in an unacceptably high toll of occupational diseases and deaths").

43. *See* JOSEPH V. REES, REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY 180 (1988) (noting that "[i]f there is an overriding shortcoming characteristic of cooperative regulatory enforcement, it is the problem of lax enforcement").

44. *See id.* at 182; *see also* BENJAMIN W. MINTZ, OSHA: HISTORY, LAW, AND POLICY 6-8 (1984). In California, for example, where cooperative enforcement "had triumphed over time by pushing punitive enforcement almost completely out of the regulatory picture," the legislature found that the state had not "adequately" enforced existing workplace regulations. REES, *supra* note 43, at 181 (citing STATE OF CALIFORNIA, SELECT COMM. ON INDUSTRIAL SAFETY, REPORT (Jan. 25, 1972)).

45. MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 139-43. As a result, there was a dramatic reduction in the number of citations for serious and willful violations as compared to the period immediately before these policies were implemented and after they were modified. *Id.* at 145-47.

46. *Id.* at 10-11, 148.

the contrary, the agency's failure to punish the firm results in its continued noncompliance. Unless the firm's incentives are shifted by the imposition of penalties, its managers have no reason to change their behavior.[47] Second, the failure to punish violators can lead to less voluntary compliance. If regulatory agencies fail to detect and punish violators, other firms will decline to comply because cooperation will put them at a competitive disadvantage with the noncompliers.[48] In her examination of tax enforcement, for example, Margaret Levi stresses that active prosecution of violators is crucial because perceptions of "exploitation" will encourage noncompliance.[49]

C. *Cautious Experimentation*

Most analysts are convinced that both cooperation and punishment are necessary to optimize enforcement efforts. For these analysts, the crucial question is "not which enforcement strategy regulators should use — cooperative or punitive — but when."[50] Thus, regulators must "distinguish between 'bad' and 'good' firms ... and employ the tools of punitive and cooperative enforcement ..., thereby maximizing the virtue of each approach while minimizing their vices."[51]

The evidence indicates, however, that agencies do not yet know the ideal approach to accomplish this task. Existing evidence is equivocal concerning the extent to which cooperation increases enforcement. It is known, however, that too much cooperation contributes to a lack of compliance. In light of the limited knowledge about the impact of cooperation, it seems appropriate for agencies to expand their efforts at cooperation but to do so cautiously.

II. METHODS OF COOPERATIVE ENFORCEMENT

This section addresses the desired role of regulatory beneficiaries in the implementation of cooperative enforcement and describes and evaluates two methods for determining when to employ cooperation or punishment. A regulatory agency can allocate more discretion to inspectors to make appropriate judgments about when to be cooperative and when to seek pun-

47. If a firm is disobeying agency regulations, managers are more influenced by short-term incentives to disobey than long-term incentives to comply. Thus, the only way to promote compliance is to change short-term incentives by detecting and punishing the violations. *See supra* Part I.A.1.

48. *See* Kagan & Scholz, *supra* note 23, at 76.

49. MARGARET LEVI, OF RULE AND REVENUE 53 (1988).

50. Rees, *supra* note 43, at 176.

51. *Id.*

ishment. The regulatory agency can also use a "tit for tat" approach which involves cooperation with a regulated entity until it attempts to avoid compliance.

A. More Discretion for Inspectors

An agency can delegate to inspectors the responsibility to make appropriate judgments about when to be cooperative or when to seek punishment.[52] An inspector can take one of three roles: aggressive enforcer, persuasive politician, or informative consultant. The inspector would emphasize aggressive enforcement for a firm that carefully weighs the costs and benefits of compliance "lest the firm be tempted to try to 'get away with more.'"[53] The inspector would act like a "politician" to persuade a firm normally inclined to obey the law about the rationality of a regulation when it doubts the regulation is reasonable. In this role, the inspector would also adapt the law to legitimate business problems created by strict enforcement.[54] Finally, the inspector would serve as a "consultant" to educate a firm that fails to obey regulations because of incompetence or organizational failures.[55]

This recommendation is problematic. The extent to which governmental officials should exercise discretion is a topic of longstanding debate. Completely rule-bound behavior removes any chance for flexibility to tailor a general rule to a specific situation.[56] The other extreme, however, may be unjust because the power to decide arbitrarily is also the power to discriminate.[57]

A second problem is that the conditions that foster the evolution of cooperation are also the conditions that promote industry capture of the enforcement process. An inspector can commit two types of errors: errors of omission, such as overlooking or failing to report a violation; and errors of commission, which include citing a lawful condition as a violation. In the absence of externally supplied motivation, such as agency pressure to engage in aggressive enforcement, an inspector is likely to be lenient because regulatees are prone to complain to the agency or its political overseers

52. *See* BARDACH & KAGAN, *supra* note 3, at 123.

53. Kagan & Scholz, *supra* note 23, at 67-68.

54. *See id.* at 68.

55. *Id.* The inspector would assist the firm to identify "feasible technologies and management systems that would best ensure compliance in the future." *Id.*

56. *See* HOWARD, *supra* note 4, at 34.

57. *See* MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY (1980); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1969) (analyzing how public employees who work directly with the public may abuse their discretion).

about errors of commission.[58] A cooperative enforcement policy will accentuate this tendency because an agency sets out to reduce complaints from regulatory beneficiaries by being more lenient and cooperative. In addition, inspectors are influenced by "the sense of empathy or allegiance bred by personal contact or professional kinship with individuals within the regulated firm."[59] This tendency may be reinforced by a cooperative enforcement policy which is intended to encourage such empathy among its inspectors.[60]

A final problem is that the delegation of discretion to inspectors makes it easier for them to engage in corruption.[61] A cooperative enforcement policy can increase this possibility. For example, Professor Schuck's analysis of corruption among meat inspectors found that inspectors believed that accepting small bribes was important to maintaining a cooperative relationship with regulated entities.[62]

Kenneth Culp Davis suggests eliminating "unnecessary" discretionary power, not discretion altogether, by structuring and checking the discretion that should exist through legislative rules, advisory opinions, written guidelines, and similar approaches.[63] What constitutes "unnecessary" discretion, of course, admits of no easy definition. More fundamentally, those who would "reinvent" government reject Davis's premise that discretion should be limited by such rules. They contend that new methods of accountability, which permit employees to exercise judgment and "common sense," should be employed.[64] Under this approach, an agency would rely on experience and appropriate training to deter capture or corruption,[65]

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58. *See* Robert Kagan, *On Regulatory Inspectorates and Police*, *in* ENFORCING REGULATION 37, 56 (Keith Hawkins & John M. Thomas eds., 1984).

59. Colin S. Diver, *A Theory of Regulatory Enforcement*, 28 PUB. POL. 257, 286 (1980).

60. In situations that involve a foreseeable risk of catastrophic injury or harm, however, risk-adverse inspectors will weigh heavily the difficult situation that they will be in if such an accident occurred. Kagan, *supra* note 58, at 54.

61. AYRES & BRAITHWAITE, *supra* note 3, at 55.

62. Peter H. Schuck, *The Curious Case of Indicted Meat Inspectors*, HARPERS, Sept. 1972, at 83.

63. DAVIS, *supra* note 57, at 220.

64. *See* HOWARD, *supra* note 4, at 180; DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

65. *See* GUNNINGHAM, *supra* note 42, at 347 (noting that "[d]iscretion is only capable of being used constructively by an inspectorate with sufficient training and expertise to identify unsafe conditions generally, to determine whether it is technically or economically feasible to implement certain safeguards, and so on"); *see also* BARDACH & KAGAN, *supra* note 3, at 128 (noting inexperienced inspectors are often cause of legalistic enforcement because they lack experience and confidence to make such judgments).

rather than detailed instructions to inspectors concerning which violations should be cited.

B. Tit for Tat

An agency can also use a "tit for tat" (TFT) strategy to seek the optimal mix of cooperation and enforcement.[66] This strategy is based on modeling enforcement as a prisoner's dilemma in which the regulated entity seeks to minimize compliance costs and the regulator seeks to maximize compliance outcomes.[67] If each side pursues its goal, both will reach a suboptimal result. Under a TFT approach, a regulator addresses the dilemma by cooperating with a regulated entity until it defects and seeks to avoid compliance. Because the regulated entity expects punishment if it defects, "today's temptation is outweighed by tomorrow's punishment."[68] A range of sanctions can increase the potential of this strategy because a regulated entity is less likely to defect from cooperation "when it faces an enforcement pyramid than when confronted with a regulator having only one deference option."[69]

A TFT strategy will be successful, however, only if an agency detects and punishes violations of its rules. As discussed earlier, without punishment, some firms will find it profitable to defect.[70] Further, when some lawbreakers go unpunished, other firms will decline to comply because cooperation will put them at a competitive disadvantage with noncompliers.[71]

C. Regulatory Beneficiaries

An agency can obtain a mixed enforcement strategy by training its inspectors to cooperate with regulated entities, and by employing a TFT strategy to punish violators. Before an agency can implement these approaches, it must also consider what role regulatory beneficiaries should

66. *Ecology of Regulatory Enforcement*, *supra* note 23, at 189; John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 L. & POL. 385, 386 (1984).

67. *See* ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984) (proposing that TFT can lead to cooperation in many prisoner dilemma situations).

68. AYRES & BRAITHWAITE, *supra* note 3, at 62.

69. *Id.* at 16. Ayres and Braithwaite recommend that regulatory actions would occur at the base of the pyramid, where the regulator initially attempts to coax compliance by persuasion. *Id.* The next step is a warning letter; and, if it fails to secure compliance, the regulator would impose civil penalties. *Id.* If this step fails, the regulator would engage in criminal prosecution, temporary suspension of a license, or the temporary shutdown of the entity. The ultimate sanction is a permanent license revocation or shutdown of the entity. *Id.*

70. *See supra* note 47 and accompanying text.

71. *See supra* notes 48-49 and accompanying text.

play in cooperative enforcement initiatives.

Ayres and Braithwaite advocate "regulatory tripartism" as a way to secure the advantages of cooperation while averting evolution of capture and corruption.[72] Under tripartism, regulatory beneficiaries have full access to agency information, a seat at the negotiating table with the agency and regulated entity, and standing to sue or prosecute under the regulatory statute as the regulator.[73] Regulatory tripartism is also likely to increase the legitimacy of the program among regulatory beneficiaries. The opportunity to participate in policy decisions is consistently recognized as a key element in public acceptance.[74]

The results of a cooperative workplace safety program in California illustrate the potential benefits of tripartism. Under the experimental program, labor-management safety committees assumed many of the state's normal enforcement responsibilities at seven construction projects, including inspections and the investigation of complaints.[75] As compared to similar work sites that did not participate in the experiment, the program sites had lower accident rates.[76] An analysis of the experiment attributes this success to two factors. The committees had greater flexibility and discretion to respond to potential problems than the state regulators, and the participants were free to withdraw at any time.[77]

Tripartism, however, faces two significant hurdles. First, if regulatory beneficiaries distrust cooperation, they will exercise their rights under tripartism to block cooperative enforcement efforts. Mendeloff expresses concern that this might happen at OSHA because organized labor historically opposes attempts at cooperation.[78] Second, if regulatory beneficiaries are unorganized or weak, they cannot serve as effective participants in enforcement programs.[79] The lack of a unionized workforce in an industry, for example, could inhibit, if not prevent, the use of tripartism by OSHA.

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72. AYRES & BRAITHWAITE, *supra* note 3, at 56.

73. *See id.* at 57-58.

74. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, & LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

75. REES, *supra* note 43, at 181 (citing STATE OF CALIFORNIA, SELECT COMM. ON INDUSTRIAL SAFETY, REPORT (Jan. 25, 1972)).

76. *See id.* at 3.

77. *See id.* at 196, 233.

78. *See* Mendeloff, *supra* note 29, at 719-20 (stating that participation of workers in cooperative enforcement programs may force OSHA to be less cooperative).

79. *See* AYRES & BRAITHWAITE, *supra* note 3, at 59 (noting that "[w]here there is no power base and no information base for the weaker party, tripartism will not work").

D. Recommendations

Agencies can obtain a mix of cooperation and punishment by training inspectors to cooperate with regulated entities when appropriate and by employing punishment when regulated entities demonstrate their lack of good faith compliance with agency regulations. Cooperative approaches are more likely to be effective if agencies involve regulatory beneficiaries, but this step may be difficult to accomplish.

Agencies should avoid delegating too much discretion to inspectors to cooperate with regulated entities and should provide guidelines and other guidance to inspectors to deter cooption and corruption. At the same time, agencies should train inspectors to make appropriate judgments on when to be cooperative. This step is necessary because agencies usually are not able to write inspection guidelines that will cover every situation that an inspector might face. Experimentation appears to be the only viable method to find the best mix of discretion and control.

Although regulators should cooperate with firms that attempt in good faith to comply with agency regulations, they must also aggressively punish lawbreakers that do not act in good faith. Such enforcement is necessary to deter firms that do not intend to comply and to ensure continued compliance by those firms that voluntarily comply. In other words, there is an enforcement paradox. An agency will not be able to engage in effective cooperation unless it is committed to aggressive pursuit of serious lawbreakers, or if it has the resources to accomplish this task. The best way to ensure adequate enforcement is to rely on graduated punishment of firms that refuse to obey agency regulations.

III. OSHA ENFORCEMENT POLICIES

This section compares OSHA's current enforcement policies to the previous recommendations for achieving a combination of cooperation and punishment. We first explain the statutory framework under which OSHA enforcement takes place. This exercise indicates OSHA's discretion to choose between cooperation and punishment. We then examine how OSHA employed its discretion to mix its enforcement approaches. Our analysis reveals that OSHA has considerable discretion to employ cooperative approaches, and that it altered its approach to enforcement during the last decade to include more cooperation.

A. Statutory Framework

Legislative history and statutory interpretation of the Occupational

Safety and Health Act[80] (OSH Act or Act) provide a useful starting point to discuss OSHA's authority to experiment with cooperative enforcement strategies. The Act clearly requires that OSHA issue citations for violations which its inspectors identify; this requirement is one to which OSHA tries to carve out exceptions. Despite the requirement, OSHA has considerable legal discretion to adopt cooperative approaches because it can alter its policies concerning the disposition of citations and the assessment of penalties.

1. Statutory Language

The OSH Act requires the Secretary to issue "first-instance citations" or citations for violations of the Act identified during inspections or investigations of a workplace,[81] except for two narrow exceptions.[82] The Act

80. 29 U.S.C. § 651 (1994).

81. Section 9(a) provides that "[i]f, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to this chapter, he *shall* with reasonable promptness issue a citation to the employer." 29 U.S.C. § 658(a). Other sections of the statute provide a further indication that Congress imposed a mandatory duty to issue citations when violations of the Act are observed. First, during the course of an inspection, section 8(f)(2) permits employees to notify the Secretary, in writing, of violations at the workplace. *Id.* § 657(f)(2). Section 8(f)(2) further requires that informal procedures be established to review allegations that representatives of the Secretary failed to issue citations for violations observed in the workplace. *Id.*; *see also* 29 C.F.R. § 1903.14(c) (1996).

The informal review procedures required by the Act and OSHA's regulation make sense only if the obligation to issue citations when violations are observed is mandatory. Second, whenever the Secretary or representatives of the Secretary visit a workplace, an inspection is being conducted under the Act, triggering the mandatory duty to issue citations and appropriate penalties. Section 8(a) of the Act authorizes the Secretary, upon presenting appropriate credentials, "to enter without delay" a workplace "to inspect and investigate." 29 U.S.C. § 657(a).

82. Section 9(a) of the Act authorizes the Secretary to issue "notices in lieu of citations" only for *de minimis* violations, i.e., those violations having no direct relation to safety and health. For this category of violations, no penalties may be imposed and no duty to abate the violation arises. 29 U.S.C. § 658(a); *see also* 29 C.F.R. § 1903.14(a). In addition, there is one statutory exception to the Secretary's duty to issue citations if violations of the Act are observed during an inspection. Section 6(d) authorizes the Secretary to issue a permanent variance from a standard "after an opportunity for an inspection where appropriate," if an employer demonstrates that alternative compliance approaches "will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard." 29 U.S.C. § 655(d).

An employer likely would seek a variance where compliance has not been achieved, yet the Act does not contemplate the issuance of citations during variance proceedings. *Compare* 29 U.S.C. § 655(d) (authorizing Secretary to issue permanent variance, after opportunity for inspection if employer demonstrates that alternative compliance means will provide employment as safe and healthful as that which would otherwise be provided by

further mandates that the Secretary propose penalties for serious violations, but penalties for other-than-serious or nonserious violations of the Act are discretionary.[83] The Act specifies four factors that the Secretary is required to consider in assessing penalties: the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.[84] Because the Act is silent on the weight the Secretary is required to give each factor, the Secretary has unreviewable discretion to assign whatever weight is appropriate to these factors.[85]

While the Secretary must issue citations for violations of the Act observed during inspections and must assess penalties for any violations characterized as serious, these nondiscretionary duties stand in sharp contrast to the Secretary's unreviewable discretion to withdraw citations, enter into settlements with employers, change the characterization of the violation, or reduce or eliminate penalties for violations of the Act.[86] Thus, while the

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standard) *with* § 655(b)(6)(a) (authorizing Secretary to issue temporary variance of limited duration but not specifically authorizing Secretary to conduct inspection to verify employers' representations).

83. While the Secretary is required to issue citations when violations of the Act are observed during an inspection, the Secretary is not required to assess penalties in all cases unless the violations are *de minimis*. Section 10(a) provides that if the Secretary issues citations "he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, *if any*, proposed to be assessed under section 666 ...." (emphasis added). *Compare* 29 U.S.C. § 659(a) (providing notification to employer of penalty, if any, to be proposed) *with* § 659(b) (providing notification to employer of penalty for failure to abate).

The Secretary is required to *propose* penalties of up to $7,000 for each serious violation of the Act, but the Secretary has discretion to propose penalties of up to $7,000 for each "other than serious" violation of the Act. *Compare* 29 U.S.C. § 666(b) (requiring that any employer who has been cited for a serious violation of the Act "shall be assessed a civil penalty of up to $7,000 for each such violation") *with* § 666(c) (providing that any employer who has been cited for an other-than-serious violation "may be assessed a civil penalty of up to $7,000 for each such violation"). *See* Brennan v. Occupational Safety and Health Review Comm'n., 487 F.2d 438 (8th Cir. 1973). If an employer does not contest a citation and notification of proposed penalty issued by the Secretary within 15 days, they become a final order of the Commission by operation of law. 29 U.S.C. § 659(a).

84. 29 U.S.C. § 666(j) (1994).

85. *See id.* Further, while the Secretary must issue a citation within six months of a work site inspection, the Secretary can delay issuance of a notification of proposed penalties, thereby allowing the Secretary to assess a lower penalty if the employer has demonstrated good faith by promptly abating a cited hazard. *Id.* § 658(c). In settlement, the Secretary has complete discretion to compromise penalties. However, the Occupational Safety and Health Review Commission (OSHRC), which adjudicates whether an employer has committed a violation of the Act, has final decisional authority over what, if any, penalty an employer must pay. *See* Metzler v. Arcadian Corp., No. 96-60126, 1997 U.S. App. LEXIS 12693 (5th Cir. Apr. 28, 1997).

86. *See* Oil, Chem. & Atomic Workers Int'l Union Local 3-499 v. OSHRC, 671 F.2d 643 (D.C. Cir. 1982); Dale M. Madden Constr. Inc. v. Hodgson, 502 F.2d 278 (9th Cir.

Secretary must issue citations and assess penalties for serious violations, the Secretary can settle such cases on any terms.[87]

A decision by the Secretary to withdraw a citation, however, may affect OSHA's legal authority to order abatement of a hazard. Section 11(b) of the Act requires the Secretary to file a petition for enforcement with a federal appellate court to enforce final orders of the Commission.[88] If the Secretary withdraws a citation as part of a settlement, no final order of the Commission will issue. Without such a final order, an employer is under no obligation to abate a hazard, and the Act provides no other basis for the exercise of federal court jurisdiction to enforce a settlement. Thus, to create an enforceable abatement obligation on an employer, any settlement must be based upon a citation.

2. *Legislative History*

The legislative history confirms that Congress consciously chose the "first-instance sanction" approach in the OSH Act, and that this concept was not controversial at the time.[89] Subsequent legislative history confirms

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1974).

87. For many years, employee representatives challenged the Secretary's authority to withdraw or settle citations and compromise penalties. The Supreme Court effectively ended that debate in *Cuyahoga Valley Ry. v. United Transp. Union*, where the Secretary cited the employer for violations of the Act, but later moved to withdraw the citations over the protests of the affected union. 474 U.S. 3 (1985). The Court, reversing a decision of the Sixth Circuit, which authorized OSHRC to review the Secretary's decision to withdraw a citation, held that the Secretary has the sole enforcement responsibility under the Act. *Id.* at 6. In the Court's view, a necessary adjunct of the Secretary's power to issue citations "is the authority to withdraw a citation and enter into settlement discussions with the employer." *Id.* at 7.

88. 29 U.S.C. § 660(b). Under the Act, a violation cited by the Secretary may become a final order of the Commission by operation of law if the employer fails to challenge the Secretary's citation within fifteen days; if the employer later withdraws its challenge to the citation; or after a final decision of the OSHRC affirming, vacating, or modifying the citation. *See id.* § 659(a), (c).

89. The Senate considered three safety and health bills. Senate Bill S. 2193, introduced by Senator Williams, Chairman of the Senate Labor Committee, required the Secretary of Labor to hold a hearing, and issue appropriate orders, where he had reasonable grounds to believe a violation of a regulation existed. Appropriate penalties could be assessed. SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d CONG., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, PUB. L. NO. 91-596, at 11-12, 14-15 (Comm. Print 1972).

The language of Senate Bill S. 4404, introduced by Senator Dominick on behalf of the Nixon administration, closely resembled section 9(a) of the Act, by providing that the Secretary shall issue citations for violations, unless the violation was *de minimis*. *Id.* at 96. The principal difference between the two bills — indeed, the principal issue debated before the Senate — was whether the Secretary or an independent board would adjudicate chal-

that Congress understood the OSH Act to require the Secretary to issue citations for each observed violation and concluded that citations should be mandatory unless the violation was *de minimis*.[90] During the Ninety-

lenges to citations issued by the Secretary. Senate Bill S. 2788, introduced by Senator Javits, was the only proposal which clearly provided that the Secretary with discretion as to whether to issue citations. In section 7(a) it provided the Secretary "in his discretion, may petition the standards board to determine whether an employer has violated the Act." *Id.* at 47.

S. 2193 required that where the Secretary determines an employer has violated a requirement of the Act, "he shall issue forthwith a citation" and an employer who has received a citation "shall be assessed a civil penalty of not more than $1000 for each such violation." *Id.* at 254, 265-66. The Senate report accompanying S. 2193 indicates that the Committee intended first-instance sanctions for violations, except those considered *de minimis*. *Id.* at 154. The issue of first-instance sanctions received scant attention on the Senate floor.
In the House of Representatives, the report of the Committee on Education and Labor reflects careful consideration of the first-instance sanction issue. The bill reported by the Committee on Education and Labor contained three types of violations: mandatory citations would issue for each type of violation, but the duty to assess penalties varied. *See id.* at 737-38, 745-46; *see also id.* at 853, 856. The legislation passed by the House required the Secretary to issue a citation in every instance where there is a violation of the Act's requirements, unless of course it is *de minimis*. *Id.* at 996.

90. Congressman Steiger, a principal author of the Act, rejected a consultative approach for OSHA. To the suggestion that Congress establish a six month to one year education period "in which [Department of Labor] officials can enter the premises and help the citizens to comply," he explained:

> OSHA is not, however, in a consultative business to the exclusion of the private sector. A major responsibility for such consultation rests with the insurance industry, the National Safety Council, trade associations, the States, and private consulting firms which have the necessary expertise to aid employers in understanding the act and its compliance requirements. Indeed, the consultative role of these organizations is of paramount importance since the language of the act generally prohibits the presence of OSHA personnel in the workplace unless full enforcement procedures, such as the walk-around and issuance of citations for alleged violations, are in effect. The act requires that OSHA personnel must take note of violations disclosed while on any work site and take appropriate enforcement action including the issuance of citations and the proposal of penalties, as necessary. It is this requirement of sanctions rather than warnings that gives real meaning to the enforcement provisions.

118 CONG. REC. 10,838, 10,843 (1972). *See id.* at 29,164 (explaining that Department of Labor is legally precluded from providing any consultation visits on employer's premises without triggering act's enforcement procedures). Congressman Steiger also stated that first-instance sanctions were an important element of OSHA enforcement.

> Why is the act structured for immediate enforcement action, rather than for consultation first and enforcement later? This question goes to the heart of the reasons for the passage of the act itself. The uneven past efforts of private industry, insurance companies, and of the States proved generally ineffective in dealing with the growing occupational safety and health problem. Many State programs ... were based on a system of making inspections and warning employers of violations, with penalties only proposed after subsequent visits showed that action was not being taken. Were we to have adopted this concept, there would be little reason for an employer to comply

second Congress, the Congress which came after the passage of the Act, efforts to eliminate the first-instance sanction policy failed.[91] During the Ninety-third Congress, Congressman William A. Steiger (R-WI), championed the concept of state-provided, on-site consultation as an effort to preserve the first-instance sanction policy of the Act.[92] Congress again addressed the issue of first-instance sanctions in 1975 when it debated H.R.

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with the act until after an inspection .... Congress therefore provided for citations and, where appropriate, penalties when violations, even in the first-instance, were found to exist.

118 CONG. REC. 10,844, 10,845 (1972).

91. 118 CONG. REC. 29,164 (1972). The efforts of Congressman Steiger and the Department of Labor to gain legislative authorization to provide on-site consultation — or, phrased another way, to avoid first-instance sanctions for small business — were reflected in a report by the House Select Small Business Subcommittee on Environmental Problems. In its report, the Subcommittee noted that "voluntary compliance with the standard set forth by the Labor Department under the 1969 act cannot be achieved under the existing approach." 1972 CONG. QUARTERLY ALMANAC 790-91. Further, the subcommittee noted:

> [I]f, understandable and accurate information could be made available to small businessmen, if initial or requested on-site inspections could be made without incurring a penalty, if standards could be promulgated for separate industries and categories within industries, and finally if standards have a direct and meaningful, and not merely illusory, relationship to employee safety ... small businesses should continue to be included under the act, as recommended by nearly all the witnesses testifying before the subcommittee.

Id.

Congress responded to business complaints about OSHA by attaching an amendment to the fiscal year (FY) 1973 Labor-HEW appropriations bill which would have prohibited OSHA from expending any monies to inspect businesses employing fewer than fifteen employees. President Nixon vetoed the bill. 1972 CONG. QUARTERLY ALMANAC 790. In the second FY 1973 Labor-HEW appropriation bill, Congress voted to exempt small businesses employing three or fewer employees from the enforcement provisions of the OSH Act — an exemption similar to one which had been included in the Nixon Administration safety and health legislative proposals. President Nixon vetoed that appropriation bill as well, leaving the 1970 OSH Act unchanged. *Id.*

92. 118 CONG. REC. 29,164 (1972). In introducing his amendment, Congressman Steiger reemphasized the importance of first-instance sanctions under the Act: "The first-instance sanction concept of OSHA requires that employers and employees be in compliance before they are inspected, not after. This concept makes sense, but only if information is readily available before inspection on the specific application of the standards in the workplace." *Id.* Through Congressmen Steiger's efforts, the House adopted an amendment to FY 1975 appropriations, authorizing the consultation services program. *Id.* at 21,661. *See also* 1974 CONG. QUARTERLY ALMANAC 101. The Senate agreed to the Program. *Id.* The Senate Appropriations Committee responded by earmarking $5 million for a new program authorizing OSHA to fund state on-site consultation services. *Id.* On the Senate floor, Senator Thurmond objected that the on-site consultation was not adequate to prevent OSHA from taking punitive action against employers and offered an amendment to prevent OSHA inspectors from issuing penalties for first time violators of the Act. *Id.* The amendment to repeal first-instance sanctions was defeated 36-55. *Id.* at 103-07.

8618, a bill to authorize OSHA to provide on-site consultation to employers.[93] In reporting H.R. 8618, the Committee on Education and Labor reiterated its conclusion that the Act prohibits federal OSHA officials from advising employers and stressed its "conviction that the integrity of first-instance sanctions under the Occupational Safety and Health Act be maintained."[94]

3. *Administrative Interpretations*

Generally, OSHA adheres to the requirement of first-instance citations. After small businesses began complaining to Congress about OSHA citations shortly after passage of the Act, George Guenther, OSHA's Administrator at that time, testified that the OSH Act barred the Secretary from providing on-site consultation to employers.[95] In 1981, an OSHA lawyer

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93. H.R. 8618, introduced by Congressman Daniels, Chairman of the Subcommittee on Manpower, Compensation, and Health and Safety of the Committee on Education and Labor, with bipartisan support, established a program of federal on-site consultation. Many business groups and the Department of Labor supported the bill. *On-Site Consultation Hearings Before the Subcomm. on Manpower, Compensation, and Health and Safety of the Comm. on Education and Labor*, 94th Cong. 23, 48, 63 (1975). Organized labor and the Chamber of Commerce opposed the legislation. *Id.*

94. The Committee continued:

> Experience in the operation of OSHA since its enactment in 1970 has shown that this provision is essential to insure effective implementation of the Act. The Committee intends that the Federal on-site consultation program in no way derogate from the application of first-instance sanctions or dilute the full enforcement of the Act.

H.R. REP. NO. 94-654, at 1-2 (1975); *see id.* at 7 (explaining that Committee remains firmly committed to first-instance sanctions under section 9). H.R. 8618 passed the House of Representatives by a vote of 115-15 on November 17, 1975. 121 CONG. REC. 36,911 (1975). Indeed, only one member of Congress, Rep. Bill Ford (D-Mich) spoke against the legislation. *Id.* at 36,914. The Senate Labor Committee never reported any companion legislation, and the Senate never debated action on legislation to establish a federal on-site consultation program.

95. Secretary Guenther testified:

> [W]henever a Department official goes into an employer's premises for any purpose under the act, except for an inspection in connection with the issuance of a variance, he or she is required to note any violations, and, as provided by section 9 of the act, an appropriate citation and proposed penalty shall be issued. Since section 8 makes it clear that any entering upon the employer's premises is regarded as an inspection as provided for in section 9, we have been legally precluded from providing any consultation in the workplace.

Occupational Safety and Health Act of 1970: Hearings Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong. 349 (1972). Department of Labor officials further explained "we do have authority to go into the workplace and ... consult. However, our interpretation of the law is that we would be required upon going into the workplace and seeing hazardous working conditions to issue appropriate citations and

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> This view was first stated by Assistant Secretary Guenther and Solicitor Richard Hubert before the Select Subcommittee on Labor of the House Labor Committee in hearing in September 1972; it was stated again in a letter from Solicitor William H. Kilberg to Congressman Steiger on June 26, 1974, which was placed in the Congressional Record of that day; and again, by Deputy Assistant Secretary Marshall Miller, in testimony before the Select Subcommittee on Labor of the House Labor Committee on July 19, 1975. This position has not been modified since that time.[96]

OSHA's inspection regulations echo this interpretation.[97]

OSHA, however, carved out some exceptions. It does not apply the first-instance citation requirement when it conducts inspections for purposes of evaluating an employer's request for a permanent variance from a regulation.[98] Similarly, OSHA does not follow this requirement when its representatives make site visits to work places which are potentially affected by a new standard to gather information on employee exposures or available engineering controls. OSHA also waived the first-instance citation requirement for compliance assistance programs in which OSHA officials determine whether an employer's engineering control strategy meets permissible exposure limits.[99] Another exception is the agency's policy of

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propose appropriate penalties, if violations were discovered by our compliance officers." *Id.* at 355.

96. *See* Memorandum from Benjamin Mintz to T. Timothy Ryan, June 1, 1981 [hereinafter Mintz Memo].

97. The regulations require: "An appropriate citation or notice of *de minimis* violations shall be issued even though after being informed of an alleged violation by the Compliance Safety and Health Officer, the employer immediately abates, or initiates steps to abate such alleged violation." 29 C.F.R. § 1903.14(a) (1996). Further, if the OSHA Area Director declines to issue a citation following an inspection initiated in response to an employee complaint, the Assistant Regional Director must informally review that decision relying on a procedure established to comply with section 8(f)(2) of the Act. *See id.* § 1903.14(d). After concluding such a review, the Assistant Regional Director either "shall affirm the determination of the Area Director [that a citation is not warranted], order a re-inspection, or issue a citation if he believes that the inspection disclosed a violation." *Id.*

98. The Act authorizes "inspections" for the purpose of evaluating an employer's request for a permanent variance. 29 U.S.C. § 655(d) (1994). The Secretary has never interpreted such "inspections" to require that citations be issued if violations are observed. *See supra* note 82 and accompanying text.

99. An example is OSHA's efforts to resolve outstanding feasibility issues arising under the lead and arsenic standards in primary lead smelters and under the lead standard in the secondary smelting and battery manufacturing industries. Under this program, an OSHA official, accompanied by employer and employee representatives evaluated each affected facility and agreed upon an engineering control strategy which OSHA deemed to be compliance with its standard even if the engineering controls implemented did not reduce exposures to the permissible exposure limit. During these site visits, OSHA issued no citations for violations of the Act. *See generally* 54 Fed. Reg. 29,142 (July 11, 1989).

providing consultation assistance to the American territories in the Pacific Islands (Guam, Samoa, Marianas) that have no established consultation programs.

OSHA's voluntary protection program (VPP) also conflicts with the rule that work site visits by OSHA personnel trigger the mandatory enforcement provisions of the Act.[100] Under VPP, OSHA employees from the national and field offices visit work sites applying for the program to assess safety and health conditions at the site, and periodically thereafter to ensure that a site continues to meet the VPP criteria.[101] No citations are generated by such visits, however, and "information gathered in such reviews will not be made available to enforcement personnel."[102]

With one exception, OSHA offered no legal justification for these departures from the first-instance sanction requirement. OSHA defended its practice of not issuing sanctions during site visits to gather information for purposes of rulemaking as authorized by section 6(b)(1) of the Act.[103] This section allows the Secretary to initiate rulemaking for a new standard on "the basis of information developed by the Secretary or otherwise available to him."[104] This claim appears dubious because section 6(b)(1) does not authorize inspections to obtain information for rulemaking.[105]

B. Current Cooperative Policies

Both the OSH Act and its legislative history strongly indicate that Congress intended to require the imposition of first-instance sanctions for violations of the Act or its regulations unless the violation bore no relation to employee safety and health. OSHA's regulations echo the requirement that citations be issued for each violation of the Act; yet, in the past, OSHA took some unexplained and apparently indefensible departures from the first-instance sanction requirement. On the other hand, OSHA adopted significant cooperative policies that are fully consistent with its legal authority. This section describes and evaluates these programs. The analy-

100. The VPP is a program where OSHA recognizes employers who complement health and safety programs that go beyond those required by OSHA regulations. Companies qualifying for the program are removed from OSHA's general schedule inspection list. 47 Fed. Reg. 29,025 (July 2, 1982).

101. *See id.*

102. *Id.*; *see also* 50 Fed. Reg. 43,804 (Oct. 29, 1985).

103. 29 U.S.C. § 655(b)(1)(1994).

104. *See* Mintz Memo, *supra* note 96.

105. Section 6(d) of the Act expressly authorizes OSHA to conduct "inspections" for the purposes of evaluating variance applications, but section 6(b)(1) makes no mention of "inspections" by the Secretary to develop information for standard setting. *See* 29 U.S.C. § 655. Thus, section 6(b)(1) appears to be a slim reed on which to rest an interpretation that OSHA officials can visit a workplace without triggering the duty to issue citations.

sis considers the focus of inspections, the linkage between cooperation and inspections, the assessment of penalties, and the role of consultation.

1. The Focus of Inspections

As part of an attempt to make its inspection process more cooperative, OSHA made two changes. First, it refocused inspections from small employers and insignificant hazards to larger employers and significant workplace risks. Second, it changed the incentive structure for inspectors to focus on the most serious workplace hazards. OSHA's efforts to refocus inspections recognized that the agency's inspection activity in its early years gave it a reputation within both the business community and Congress of "nitpicking." During this period, OSHA rapidly increased the number of inspections[106] and focused on smaller workplaces and nonserious hazards.[107] After 1976, OSHA began to shift its resources toward larger employers and more serious hazards,[108] and the downward trend in the number of inspections continues to the present with only one interruption in the early 1980s.[109]

Likewise, the change in the incentive structure recognized the agency's failure to reward good faith behavior by employers. During the 1970s, OSHA evaluated its inspectors on the basis of the number of citations issued, which rewarded inspectors for citing a large number of small violations.[110] It now encourages inspectors to find significant workplace hazards that cause injuries and illnesses.[111] As Figure 1 indicates, OSHA enforce-

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106. *See* U.S. DEPARTMENT OF LABOR, TWENTY YEARS OF OSHA FEDERAL ENFORCEMENT DATA 5 (Jan. 1993) [hereinafter ENFORCEMENT DATA].

107. *See* MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 42.

108. The largest decline in inspections during the Carter administration was among the smallest employers. *See* ENFORCEMENT DATA, *supra* note 106, at 5.

109. *Id.* OSHA inspections increased sharply during the early 1980s when the Agency adjusted its "records only" inspection policy. Under this policy, an inspection was closed by OSHA after reviewing injury and illness records if recorded accidents were below or equal to the national average rates. MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 139-41. *See* ENFORCEMENT DATA, *supra* note 106, at 6 (noting OSHA also increased its inspection of small workplaces during this period). In the late 1980s, OSHA abandoned records only inspections and it increased its emphasis on "quality inspections" resulting in serious or willful citations. MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 48. With these changes, the number of inspections again began to decline. ENFORCEMENT DATA, *supra* note 106, at 6-7.

110. *See* NEW OSHA, *supra* note 7, at 8.

111. *See id.* at 9. OSHA also told inspectors not to cite employers for paperwork violations observed during an inspection. *Id.* This policy, however, appears to violate section 9(a)'s command that OSHA issue citations whenever inspectors observe violations of the Act. *See supra* note 104 and accompanying text (establishing OSHA's obligation to cite violations observed during inspections). Further, OSHA adopted a policy of not citing em-

ment statistics reflect this change. Since fiscal year 1990, OSHA issued more serious citations than other-than-serious citations.[112]

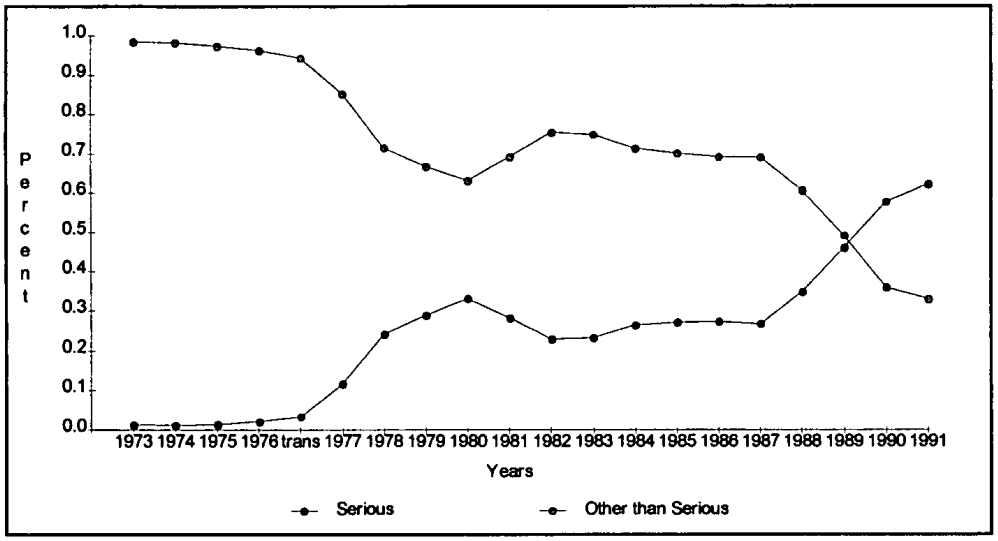

Figure 1: Serious and Other Than Serious Violations
Source: U.S. Department of Labor

Despite these changes, OSHA received little political credit for being more cooperative. One reason for this may be that the changes are relatively recent. Another reason may be that OSHA's efforts toward change are not consistent. During the Carter administration, OSHA moved away from inspecting small employers; but, starting in the Reagan administration, it returned to this practice for several years.[113] One explanation for this shift is the fact that small employers, who lack resources to invest in safety and health protections, may have worse injury and illness experience than large employers. Similarly, while OSHA's early inspections focused heavily on violations classified as other-than-serious, OSHA's post-1970s

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ployers who fail to display the required OSHA poster. NEW OSHA, *supra* note 7, at 9. The newly adopted posting policy also appears to violate the OSH Act. *See* 29 U.S.C. § 666(i) (1994) (prescribing mandatory penalty of up to $7,000 for each posting violation). The changes have reduced the total number of paperwork violations cited by the agency. NEW OSHA, *supra* note 7, at 8.

112. Almost all of the thousands of violations that the agency cited between FY 1972 and FY 1977 were for other-than-serious hazards. Beginning in FY 1972, OSHA issued 142,629 other-than-serious citations, but only 1,798 serious citations. Total violations peaked at over 383,000 in FY 1976, when over 95% of violations were for other-than-serious hazards. *See* ENFORCEMENT DATA, *supra* note 106, at Table 4 (OSHA Management Information System, Number of Violations by Type). This trend began to shift in 1977 when the number of serious citations began to rise substantially, but OSHA did not issue more serious than other-than-serious citations until FY 1990. *Id.*

113. *See* MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 42.

inspections concentrated more on citing serious violations.[114] OSHA's inspection policies of the early 1980s, however, interrupted the growing emphasis on serious hazards.[115]

One questionable change made by OSHA was to reduce the frequency of its inspections of small employers. Yet, as noted, injury and illness statistics suggest that employees of small businesses face greater risks than those of large businesses.[116] Further, OSHA recently proposed to partially exempt an increased number of small employers from the obligation to maintain records of injuries and illnesses.[117] OSHA's actions, however, reflect legislative preferences. Congress indicated a greater willingness to protect small businesses from OSHA inspections than it has shown toward large businesses.[118] Nevertheless, this preference is inconsistent with efforts to induce voluntary compliance among employers with uncorrected hazards.

2. *Waiver of Inspections*

OSHA supplemented changes concerning the focus of inspections with two programs that reward cooperation: the focused inspection program and the Maine 200 program. These programs limit the inspection of employers who voluntarily adopt health and safety programs. Furthermore, they favor a relationship based on compliance and cooperation.

In one program, OSHA will only conduct a limited inspection of a construction site if the employer has an "effective" health and safety program in place.[119] OSHA intends to expand this "reward" to other industries, by identifying and focusing inspections on the hazards that are most likely to cause serious injury.[120] OSHA, however, never adopted criteria to define what is an "effective" program. This oversight raises the issue of how much enforcement discretion should be delegated to OSHA employees. As

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114. *See supra* notes 105-08 and accompanying text (describing focus of OSHA inspections).

115. *See supra* note 108 and accompanying text.

116. *See* Barbara Marsh, *Chance of Getting Hurt Is Generally Far Higher at Smaller Companies*, WALL ST. J., at A1 (Feb. 3, 1994).

117. *Compare* 29 C.F.R § 1904.15 (1996) (exempting employers with fewer than 10 employees from record keeping requirements) *with* 61 Fed. Reg. 4030, 4042 (Feb. 2, 1996) (proposing to exempt employers with fewer than 20 employees from record keeping).

118. *See* MINTZ, *supra* note 44, at 691-92 (explaining Congress's protection of small businesses).

119. NEW OSHA, *supra* note 7, at 4. This limited inspection is confined to those hazards that are most likely to result in injury and illnesses in the construction industry, such as falls from heights, electrocution, crushing injuries, and being struck by material or equipment. If no such program is in place, OSHA will conduct a full-scale inspection. *Id.*

120. *Id.* at 5.

discussed earlier, guidelines are important in combating the problems that can occur when employees have significant discretion.[121] OSHA should be able to define general criteria for an "effective" program, while still empowering inspectors to use good judgment to apply the criteria in light of local circumstances.

In the Maine 200 program, OSHA developed a cooperative alternative to inspections. This program, which OSHA is expanding nationally,[122] began in 1993 as a pilot program in Maine and uses workers' compensation accident data to target attention on the two-hundred employers with the highest number of workers' compensation claims.[123] If these employers adopt a health and safety program, OSHA lists them as a low priority for an inspection, which means as a practical matter that they will not be inspected.[124]

A preliminary report evaluating the effectiveness of the Maine 200 program suggests that while the program was successful in targeting employers who OSHA would otherwise not visit, there is little evidence on the program's effectiveness in reducing the number of workplace hazards to which employees are exposed.[125] This discrepancy is not surprising because there are two potentially troubling aspects of this approach.[126] First, OSHA appears to be rewarding those employers with the worst safety records, which sends the wrong message. Because OSHA only rewards firms that adopt a health and safety program, it may be targeting the wrong employers. A cooperative approach may be appropriate, however, if a firm fails to obey OSHA regulations because of incompetence or organizational failures.[127]

Second, OSHA offers a more substantial reward to firms that adopt a

121. *See supra* notes 60-64 and accompanying text (discussing policy debate concerning extent of discretion).

122. NEW OSHA, *supra* note 7, at 4.

123. *Id.*

124. *See supra* note 11 and accompanying text (noting OSHA lacks resources to inspect most employers). OSHA might inspect the employer, however, in response to a formal complaint by an employee, a fatality, or an accident where five or more employees are hospitalized. If an employer fails to adopt a health and safety program, OSHA subjects the firm to a full scale inspection. *See* NEW OSHA, *supra* note 7, at 4.

125. *See* MENDELOFF, A PRELIMINARY EVALUATION OF THE "TOP 200" PROGRAMS IN MAINE (1996); *see also* 25 O.S.H. Rep. (BNA) 659 (1995).

126. *See* Speiler, *supra* note 9, at 211-12 (warning that claims experience may not correlate with the safety and health performance of an employer). OSHA, however, clearly assumes that firms with poor workers compensation records pose a risk to workers. Otherwise, it could safely ignore such firms.

127. *See supra* note 55 and accompanying text (recommending "consultation" when there is incompetence or organizational failures).

health and safety program in response to the threat of an inspection[128] than it does to firms that voluntarily adopt such programs in accordance with OSHA's published guidelines.[129] As noted, OSHA only limits inspections of construction firms that adopt such programs.[130] In addition, employers which have voluntarily developed and implemented safety and health programs are eligible for up to a twenty-five percent reduction of penalties assessed after an inspection.[131] By comparison, OSHA gives a practical exemption from inspections to firms that agree to start a program under the Maine 200 approach.[132] These firms, which may not effectively implement their programs, receive greater rewards than firms that implement effective programs without OSHA's prodding.

3. Penalties

Under the concept of an enforcement pyramid, the size of OSHA penalties should escalate based on the gravity of an employer's violations.[133] OSHA has ample legal authority to match penalties to the significance of a violation. While penalties are mandatory for serious and willful violations, the Secretary is not required to assess penalties for other-than-serious violations.[134] Moreover, because the Act is silent on the weight the Secretary is required to give each of the four factors in assessing a penalty, the Secretary has discretion to assign whatever weight he chooses to these factors.[135]

Generally, as the policy literature recommends, OSHA relies upon an enforcement pyramid.[136] As Table 1 indicates, OSHA imposed few, if any,

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128. *See* Report on the Comprehensive Occupational Safety and Health Reform Act, H.R. REP. NO. 103-825, at 40-47 (1994).

129. 54 Fed. Reg. 3904 (1989). OSHA's voluntary guidelines recommend that a plan have four components: hazard identification, hazard control, employee participation, and employee training. *Id.* at 3909.

130. *See* MINTZ, *supra* note 44, at 691-92.

131. *See* Report on the Comprehensive Occupational Safety and Health Reform Act, H.R. REP. NO. 103-825, at 45 (1994).

132. *See supra* note 9 and accompanying text (noting that OSHA lacks resources to inspect most employers).

133. *See supra* Part II.B (describing pyramid approach to penalties).

134. *See supra* text accompanying note 82.

135. The Act specifies four factors that the OSHRC is required to consider in assessing penalties, which the Secretary uses to propose penalties. 29 U.S.C. § 666(j) (1994) (requiring OSHRC to consider size of employer's business, gravity of violation, good faith of employer, and history of previous violations). *See* text accompanying note 84.

136. GENERAL ACCOUNTING OFFICE, OCCUPATIONAL SAFETY & HEALTH: PENALTIES FOR VIOLATIONS ARE WELL BELOW MAXIMUM ALLOWABLE PENALTIES (1992) [hereinafter GAO].

penalties for other-than-serious violations,[137] while imposing increasingly greater penalties for serious, willful, and related violations.[138] The agency, however, stopped well short of imposing its maximum penalties with the exception of a few cases involving egregious violations.[139]

Table 1: AVERAGE PROPOSED PENALTY BY TYPE OF VIOLATION

Years	Other Than Serious	Serious	Repeat	Willful	Failure to Abate
1973-1977*	$14	$548	$446	$3290	$397
1977-1981	$3	$239	$301	$2455	$679
1982-1986	$1	$171	$324	$2918	$471
1987-1991	$8	$296	$867	$9867	$1353

Source: U.S. Department of Labor (* transition quarter in 1977)

This record indicates that the extent of OSHA's punishment on average is related to the gravity of an employer's offense. Individual penalties, however, often reflect factors other than the gravity of the violation or the

137. Penalties for other-than-serious citations, which have always been low, never rose above an average of two dollars per violation between FY 1979-1989. Forty-eight percent of violations resulted in no penalty and almost all of these were other-than-serious violations. *Id.* at 7 n.10.

138. In addition, OSHA's adoption of egregious penalties in 1986, consisting of instance-by-instance sanctions for employers who most flagrantly disregard OSHA requirements, have made the penalties for the "worst actors" more severe. When an employer's conduct is egregious, OSHA may penalize the employer for each instance of a violation, which maximizes the size of the fine that the agency can assess. In other cases, the agency treats multiple violations of a requirement as one violation, which reduces the size of the fine because the agency assesses only one penalty for one violation. *See* MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 217 (describing this egregious policy). The OSHRC upheld OSHA's authority to issue instance-by-instance sanctions in cases where the corrective action required curing a violation specific to an individual employee, but instance-by-instance penalties may not be used when an employer is cited for a violation of the general duty clause. *Compare* Secretary of Labor v. Caterpillar, 15 OSHC (BNA) 2153, 2172 (Rev. Comm. 1993) (holding employer may be separately penalized for each instance of record keeping violations) *with* Metzler v. Arcadian Corp., No. 96-60126, 1997 U.S. App. LEXIS 12,693 (5th Cir., Apr. 28, 1997) (holding employer may not be penalized for each employee's exposure to general duty clause violation where citation does not require individual abatement action).

139. The General Accounting Office has found that OSHA *proposes* the maximum penalty in only 2.1% of all violations with penalties and it *actually imposes* the maximum penalty for less than 1% of the violations. GAO, *supra* note 136, at 6.

employer's good faith.[140] OSHA does not have guidelines concerning the extent of penalty reduction granted during either informal conferences or litigation settlements, but factors such as the caseload of individual lawyers in the Solicitor's office, whether the employer has retained counsel, and the strength of the Secretary's case obviously come into play at this stage. Of course, these factors bear little relation to the gravity of the violation or the employer's good faith.

4. Consultation Program

OSHA's cooperative efforts are not limited to detecting and punishing violations. OSHA pays for ninety percent of the cost of state programs that consult with firms employing fifty or fewer persons about their compliance obligations.[141] Although employers who consult are not immunized from later OSHA penalties for uncorrected serious hazards, OSHA still rewards firms that seek such services. If an employer provides the consultant's report to OSHA, the agency can reduce any penalties because of the firm's good faith.[142] OSHA also exempts from general inspections those employers who abate hazards identified during a consultation visit and who develop a comprehensive safety and health program.[143]

Despite its efforts, OSHA gets little political credit for providing employers with free advice on how to comply with its regulations. One reason may be that OSHA funds, but does not directly provide, the consultation services. They are actually provided to employers either by state officials or their designees. Employers may not realize that OSHA does not use in-

140. For example, employers who elect an informal conference with OSHA to question a citation receive on average a 45% penalty reduction. *Id.* at 8. Those employers who formally contest a citation before OSHRC receive, on average, a 57% reduction. *Id.* OSHA has no control over penalty reductions by OSHRC, which is a separate and independent agency. OSHA and OSHRC have disagreed over the years concerning the implementation of the OSH Act. *See* MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 244-53 (describing OSHA\OSHRC conflicts).

141. Consultants are not OSHA inspectors, or even OSHA employees, but they must refer any imminent danger to OSHA that an employer refuses to abate immediately, and they must seek eventual elimination of serious hazards. 40 Fed. Reg. 21,935-36 (1975). If serious hazards are not eliminated within a reasonable time, the consultant must report them to OSHA. *Id.* Other than this requirement, the results of the consultation visit are confidential.

142. 29 C.F.R. § 1908.7(c)(4) (1996).

143. 49 Fed. Reg. 25,082 (1984). The employers' exemption from general schedule inspections appears to conflict with legislative intent. Congressman Steiger, when describing an amendment to the FY 1975 Labor-HEW Appropriations bill noted that employers seeking consultation "would not be immunized from regular inspection activity." 120 CONG. REC. 21,297 (daily ed. June 26, 1974).

formation gathered during a consultation visit for enforcement; rather, employers may perceive that a consultation visit will result in penalties being assessed. Another reason may be that employers have no immunity from citation for imminent hazards or uncorrected serious violations identified during a consultation visit. Although this policy is important to protect workers, employers who expect a safe harbor after a consultation visit may instead regard the process as punitive. Another explanation could be that OSHA simply failed to educate employers and its political overseers about the nature and benefits of this activity.

C. OSHA's Record

OSHA now uses a mix of cooperation and punishment to induce regulatory compliance. It focuses its inspections on larger employers and the most dangerous hazards, and its reward structure for inspectors focuses on significant hazards. The agency also limits inspections of employers who voluntarily adopt health and safety programs, and it administers punishment that is related to the gravity of an employer's offense. Finally, the agency pays for a significant consultation program administered by the states. These activities have some flaws, particularly regarding the treatment of some employers with poor safety records and the exclusion of regulatory beneficiaries from participating in many cooperative programs. The agency, however, complies with the recommendations of the policy literature: it rewards good faith behavior by employers, it trains inspectors to cooperate with employers, and it maintains a TFT approach to punishment.

As stated, OSHA's record is not perfect. In reaction to legislative pressure, OSHA attempts to be extremely cooperative with small business even if the safety and health risks at such employers are often greater than at larger employers. Similarly, some of OSHA's initiatives create perverse incentives that reward firms with poor safety records. Finally, OSHA maintains several cooperative programs that appear to be inconsistent with the legally mandated first-instance citation requirement.

IV. ADDITIONAL COOPERATIVE POLICIES OSHA CAN ADOPT

OSHA's record belies the claims of critics that OSHA does not cooperate with employers. Nevertheless, there are additional cooperative approaches that OSHA can adopt consistent with its legal authority. This section, which identifies and evaluates these policies, determines that OSHA should experiment with additional cooperative efforts.

A. Imposition of Citations

The OSH Act requires the Secretary to issue citations, described as "first-instance citations," for all but *de minimis* violations of the Act identified during workplace inspections or investigations.[144] Nevertheless, there are several additional cooperative strategies OSHA could implement that are consistent with the first-instance sanction policy. OSHA could employ a "warning citation" with little or no penalty as a reward for good behavior. OSHA can also reclassify violations from serious to other-than-serious, in which case an assessment of penalties is not required. It could also avoid issuing marginal citations in an effort to "throw the book" at reluctant employers.

1. Warning Citations for Nonserious Violations

OSHA can establish a category of citations described as "warning" citations by using its legal discretion not to assess a penalty for nonserious violations.[145] A warning citation would have no penalty associated with it if an employer promptly abated the hazard for which it was cited. OSHA could delay issuance of a notice of a penalty until it received confirmation of abatement.[146] If the violation was promptly corrected, no penalty would be assessed.

Under this proposal, an inspector would issue a citation for any nonserious violations, but the employer would be told at the conclusion of the inspection that OSHA will not assess a penalty for specified (or all) nonserious violations if the employer abates the cited hazards within a fixed period of time.[147] When the abatement is complete, the employer would mail a

144. *See supra* notes 81-82 and accompanying text. Other sections of the statute provide a further indication that Congress intended for OSHA to issue citations when violations of the Act are observed to be mandatory. *See* 29 U.S.C. §§ 657(a), (f)(2) (1994) (stating that OSHA presence at workplace constitutes "inspection," triggering its mandate to issue citation); *see also* 29 C.F.R. § 1903.14(c) (1996) (naming review procedures to determine if OSHA complied with its mandate to issue citation).

145. *Compare* 29 U.S.C. § 666(b) (1994) (requiring OSHA to propose penalties for serious violations) *with* §§ 666(a), (c), (d) (offering OSHA discretionary duty of assessing penalties for other types of violations).

146. *See supra* text accompanying note 84; *see also* Underhill Constr. Corp. v. Secretary of Labor, 526 F.2d 53 (2d Cir. 1975). In this case, the Commission affirmed a citation although the notice of proposed penalty was not issued until more than three months after the citation because the employer failed to prove that it was prejudiced by the delay. *Id.* at 58. This precedent would appear to sanction delaying the assessment of a penalty until OSHA could determine if the employer had abated a hazard as it promised. In this circumstance, the employer is hardly prejudiced by the delay.

147. The citation could be issued immediately or later. 29 U.S.C. § 658(a) (1994). The number of days required for abatement could be determined by the inspector based on the

postcard to OSHA verifying that the hazards were abated. If OSHA does not receive the postcard before the end of the period set for abatement, a penalty for unabated hazards would be assessed.[148]

A warning citation conveys the idea that OSHA is prepared to cooperate with the employer by not seeking a penalty for every violation.[149] This approach also mitigates one adverse reaction that employers have concerning at least some nonserious violations. To the extent that such violations are perceived by employers as involving trivial health or safety problems, employers are likely to resent being penalized. If OSHA does not assess a penalty, it addresses this reaction. Finally, OSHA makes it easier for employers to verify abatement and thereby reduces their paperwork burden.

Warning citations would be undesirable if they resulted in increased health or safety risks for workers. This risk, however, does not appear to be significant. OSHA would condition any decision not to assess a penalty on abatement of a hazard. Further, because a citation was issued, an employer would be under a legally enforceable duty to abate the hazard even if no penalty were assessed. A "warning citation" policy should be restricted to nonserious hazards or hazards that present no direct threat to workers. OSHA would still assess penalties for serious violations which

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nature of the abatement, or OSHA could require abatement within a preset period.

148. The use of a postcard reduces the paperwork that an employer must complete to indicate that abatement has occurred, but it might increase the risk that an employer will not abate a hazard. OSHA can reduce the risk that employers will falsely claim to have abated a violation by adopting a verification standard which would empower the agency to assess civil penalties for false statements by employers, such as that abatement has occurred. *See* GENERAL ACCOUNTING OFFICE, OSHA POLICY CHANGES NEEDED TO CONFIRM THAT EMPLOYERS ABATE SERIOUS HAZARDS (1991) (recommending that OSHA adopt regulation requiring notification of hazard abatement). OSHA recently adopted a regulation requiring that employers notify the agency when abatement occurs. 29 C.F.R § 1903.19 (1996). The OSH Act establishes criminal penalties for such false statements. 29 U.S.C. § 666(g). Nevertheless, OSHA has had little luck convincing the Justice Department to pursue criminal penalties. *See* MCGARITY & SHAPIRO, WORKERS AT RISK, *supra* note 9, at 219 (noting Justice Department's reluctance to bring criminal prosecutions against employers for willful violations). Because of this problem, a verification standard would give OSHA a practical remedy for false statements by employers concerning abatement. If OSHA detects that an employer has failed to abate a hazard as agreed, OSHA can also subject the employer to more frequent inspections as a high-risk employer. In taking this step, OSHA could include other places of employment owned by the employer.

149. An employer seems more likely to consider assessment of a penalty for a nonserious violation, even if it is reduced or withdrawn, as punishment than if no penalty were assessed in the first place. Even if the employer does not make this distinction, a warning citation still constitutes a reward for good faith behavior. OSHA can reduce or withdraw a penalty, but the employers must first undertake negotiations with OSHA. This step imposes costs on the employer, such as the need to hire a lawyer, which could be avoided if no penalty is assessed.

should blunt any inference by an employer that it can avoid its obligation to protect workers.

If OSHA decides to use warning citations, it must have some method to determine which employers are eligible for such treatment. As noted earlier, cooperative enforcement policies can lead to lax enforcement, but the opposite result might also occur. If inspectors are part of a regulatory culture that emphasizes a legalistic approach, they might resist new policies that focus on cooperation.[150] Moreover, when inspectors have unstructured discretion, the enforcement decisions that result may be inconsistent in similar cases. OSHA can address these problems by creating general criteria that identify which employers merit a warning citation.[151]

OSHA's criteria should recognize the situation where good faith compliance by employers is not enough to prevent a violation. As noted earlier, firms with good compliance records can inadvertently violate a rule because it is exceedingly complex or ambiguous or because it is difficult to apply general regulations to specific circumstances.[152] In light of these possibilities, an OSHA inspector could assess good faith compliance by considering the employer's past history on previous violations, a demonstrated commitment to safety and health, and the extent of employee involvement in workplace safety and health activities.

Before OSHA issues a warning citation, OSHA inspectors should consult union representatives or individual employees.[153] The inspector could seek information about the good faith efforts of the employer in meeting OSHA regulations, discuss the possibility that the employer might not receive a penalty, and seek the workers' input concerning whether this step is appropriate. Such consultations would probably be easier in a unionized workplace, but the importance of having this conversation may be greater in nonunionized workplaces.[154] One method of implementing this consultation requirement would be to give workers the right to veto a decision by

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150. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 91-93 (1989) (discussing that organizational culture influences behavior of persons in that organization).

151. The OSH Act authorizes the agency to give due consideration to the good faith of an employer in assessing a penalty. 29 U.S.C. § 666(j) (1994).

152. *See supra* notes 20-21 and accompanying text.

153. Although not required to consult workers on the question of what, if any, discretionary penalty to propose, OSHA is permitted to do so. *See supra* text accompanying notes 81-84.

154. The General Accounting Office has observed that OSHA's inspectors do not believe that employees are adequately involved in the inspection process and has recommended action to strengthen employee participation. GENERAL ACCOUNTING OFFICE, OCCUPATIONAL SAFETY AND HEALTH: OPTIONS FOR IMPROVING SAFETY AND HEALTH IN THE WORKPLACE 43-45 (1990).

OSHA not to impose a penalty,[155] but this may prevent the agency from increasing its level of cooperation.[156] OSHA, however, steadfastly resists giving workers the right to veto settlement agreements and most likely opposes linking warning citations to worker agreement.

Workers can also be informed of the inspector's action after a penalty decision is made.[157] Since OSHA already requires employers to post information concerning citations, a requirement that separate notices regarding penalties also be posted would add little burden.[158] Some additional explanation of OSHA's action might add legitimacy to its efforts, although it would not be as effective as consultation before a penalty, if any, is assessed. In addition, if informed, workers can monitor an employer's abatement of hazards covered by the citation.[159]

3. Reclassification

OSHA might also consider whether it can reclassify some violations that are currently characterized as serious to nonserious violations, thus making those violations eligible for a warning citation. Employer hostility to OSHA remains intense despite the fact that the agency shifted its focus away from nonserious violations and toward serious violations. Although employer antipathy is not a reason to downgrade citations, OSHA might evaluate whether this hostility is based on legitimate concerns that the agency is characterizing violations as serious in marginal or inappropriate cases. In particular, OSHA might consider whether there are certain types of violations where the risk of an accident or illness is so remote that workers are unlikely to be endangered.[160] Some paperwork violations might

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155. One of the ground rules for the Cooperative Compliance Program (CCP) in California was that the employers or unions could drop out at any time. This possibility made it easier for workers to agree to implement the CCP program, and it gave them bargaining power in the employer-employee safety committees. *See supra* note 44 and accompanying text.

156. *See supra* note 43 and accompanying text.

157. This explanation shows that OSHA and the employer reached an agreement concerning certain violations and that OSHA will not issue any penalties in return for abatement of the problems. The explanation would be most helpful if the inspector indicated the nature of the violations.

158. If posting is not feasible, OSHA might develop a simple written explanation that it distributes to employees (or to a union in an organized workplace) or that it requires employers to distribute.

159. Information about warning citations could also educate workers concerning the right to request OSHA inspections. 29 U.S.C. § 657(f) (1994). If an employer did not abate a hazard, workers could complain to OSHA through this method. OSHA, however, could also distribute to workers a toll free number to report the employer's failure to abate hazards.

160. States operating OSHA plans issue a substantially lower percentage of serious vio-

also be viewed as nonserious.

The danger of reclassifying violations as nonserious is that it would weaken the deterrent effect of OSHA penalties. If OSHA proposed high penalties based on a serious violation, then it obviously has more leverage to obtain the employer's agreement to abate a hazard. If, however, OSHA is overplaying its hand, the outcome may be less compliance by employers who are operating in good faith. Reclassifying violations might also send a signal to employers that compliance with some OSHA regulations is not as important as compliance with others.

4. Inappropriate Citations

When OSHA inspectors find a hazard for which OSHA has no standard and which is not a violation of the general duty clause, they may cite the employer for any other violations that are found. Although OSHA attempted to minimize this practice, the inappropriate citation of employers may be another cause of employer resentment.

The citation of minor violations to compensate for the inability to cite for observed hazards can have an impact beyond the immediate employer. OSHA's action concerning a trenching accident in Idaho is a good example.[161] The agency cited a subcontractor when some of its employees rescued an employee who was trapped in a collapsed trench. OSHA cited the subcontractor because its employees had failed to wear their hard hats during the rescue attempt, even though OSHA's real concern was that proper training is necessary for rescue efforts. Even if the subcontractor violated OSHA regulations, OSHA's action appears to be extremely legalistic, even silly. This approach makes it more difficult for the agency to convince employers, and members of Congress, that it cooperates with employers. How OSHA can police such efforts to push the envelope is not apparent.[162] The agency might discuss this issue with its regional managers and have them consider the disadvantages of inappropriate cases.

B. Disposition of Citations

While OSHA must issue citations for violations observed during inspections and assess penalties for any serious violations, these nondiscretionary duties stand in sharp contrast to the agency's unreviewable discretion to withdraw citations,[163] enter into settlements with employers,[164] and change

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lations than does Federal OSHA.

161. 140 CONG. REC. S2675, S2679 (daily ed. Mar. 10, 1994).

162. *See supra* notes 58-59 and accompanying text (discussing difficulty of controlling actions of inspectors).

163. *See* Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3, 6-7 (1985).

the characterization of the violation.[165] Using this discretion to induce voluntary compliance with its rules, OSHA can alter the method of calculating penalties, withdraw citations, and increase communication with employers and employees.

1. Calculation of Penalties

OSHA uses the gravity of a violation as the starting point to calculate the size of a penalty and then makes adjustments for the size of the business, good faith, and compliance history.[166] The OSH Act, however, does not mandate that OSHA give any particular weight to these factors or that they be used in any specific manner.[167] Currently, OSHA seriously considers the size of the employer, giving smaller employers lower penalties and limiting consideration of the employer's good faith.

The penalty amount is initially determined by the type of violation, its magnitude, and the number of employees exposed, but it can be reduced or adjusted. The initial penalty, the amount that an employer should be fined, may be reduced based on factors having nothing to do with the employer's commitment to safety and health. In certain circumstances, an employer with a lower commitment to safety and health, may be rewarded with a reduced penalty because it is a small employer. Employer good faith and prior efforts to comply with safety and health rules have substantially less impact on OSHA penalties than the size of the business.

Instead of this skewed approach, OSHA could adopt good faith as the baseline for a penalty and adjust the penalty upward as appropriate. In this manner, the baseline penalty would be modest, in the mid-range of possible proposed penalties. The penalty would then increase based on criteria that measure activities that OSHA seeks to discourage. Such factors might include a lack of good faith, a high gravity of violation, and a poor compliance history. Using this method of penalty calculation, the assumption is that all employers act in good faith and no special bonus is awarded to any employer on the basis of factors having no relation to safety and health.

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164. Oil, Chem. & Atomic Workers Int'l Union Local 3-499 v. OSHRC, 671 F.2d 643 (D.C. Cir. 1982); Dale M. Madden Constr. Inc. v. Hodgson, 502 F.2d 278, 280 (9th Cir. 1974). The Secretary also has unreviewable discretion to enter into a settlement pursuant to which the cited hazard is not effectively abated. *See* UAW Local 588 v. OSHRC, 557 F.2d 607 (7th Cir. 1977) (affirming OSHRC decision extending abatement date).

165. *See* MINTZ, *supra* note 44, at 64-65 (noting Guidelines on question of employee participation in settlement discussions issued by Solicitor of Labor provide Secretary with discretion to adjust characterization of violation, i.e., change serious violation to other-than-serious violation).

166. OSHA Field Inspection Reference Manual IV-C, *reprinted in* 77 OSH Rep. (BNA) Reference File 0232 (Oct. 26, 1994).

167. *See supra* text accompanying note 135.

Specific negative attributes, such as a prior history of OSHA violations, would increase the size of the fine.

This approach is advantageous because it avoids initially high and unrealistic penalty calculations that may increase employer resentment. If, for this reason, this approach indicates to employers that OSHA cooperates with employers acting in good faith, they may increase compliance. OSHA could reinforce employer cooperation by the manner in which it defines good faith or lack of good faith. For example, if OSHA defines lack of good faith to include the absence of an employer-employee health and safety committee and the employers are penalized as a result, it might induce additional employers to form such committees.

This reorientation would be disadvantageous if it prevented OSHA from assessing significant penalties in appropriate cases. If OSHA retains the capacity to assess the same level of penalties, it is possible that a good faith baseline may not positively affect employers' attitudes because they would not discern a difference between the two approaches. Nevertheless, employers may consider a good faith baseline to be a better system even if OSHA assesses the same level of penalties against some employers. Employers may prefer the proposed good faith baseline because OSHA starts with a minimum penalty or even no penalty in appropriate cases, and increases the size of the penalty based on the lack of good faith and the gravity of a violation. As compared to the current system, the good faith baseline more strongly indicates to employers that OSHA recognizes and rewards cooperation. A good faith baseline also rewards companies that make significant expenditures for safety and health protections. By comparison, the present system rewards small employers regardless of their health and safety efforts.

2. *Withdrawal*

OSHA could also establish circumstances in which it would withdraw a citation if an employer agreed to abate a hazard. This approach to recognizing good faith behavior has two disadvantages. First, if OSHA withdraws a citation before the employer abates a hazard, OSHA could not legally require abatement.[168] Second, the withdrawal of a citation would

168. The agency's authority to order abatement depends on the existence of a final citation order. 29 U.S.C. § 660(b) (1994). A violation cited by the Secretary may become a final order of the Commission by operation of law if the employer fails to challenge the Secretary's citation within fifteen days, if the employer later withdraws its challenge to the citation, or after a final decision of the OSHRC affirming, vacating, or modifying the citation. *See id.* §§ 659(a), (c). If the Secretary withdraws a citation as part of a settlement, there will be no final order of the Commission. Without a final order, an employer is under no obligation to abate a hazard and the Act provides no basis for the exercise of federal court juris-

affect OSHA's subsequent authority to cite the same employer for a repeat or willful violation if it commits a substantially similar violation.[169] This constraint is significant. Under a TFT approach,[170] OSHA should escalate its response once it discovers that an employer is operating in bad faith.

3. *Increased Communication*

Employers may be more willing to cooperate with OSHA if they better understood the purpose and the necessary compliance requirements of OSHA's rules.[171] Current OSHA inspection policies provide an opportunity to articulate OSHA's goals to employers.[172] Prior to beginning each inspection, OSHA conducts an opening conference. During this conference an OSHA inspector explains to the employer and to employees, if they have been included, the scope of the inspection and how it will be conducted. OSHA also holds a closing conference at the end of each inspection.[173] During the closing conference, OSHA explains to the employer what violations were observed, whether citations are likely to be issued, and the employer's right to request an informal conference. The employer also has an opportunity to offer arguments to avoid citation or to reduce the penalties likely to be assessed. Each of these conferences presents an opportunity for OSHA to act as an educator to alert employers to the purpose of agency rules and the steps necessary to comply.

C. Related Options

OSHA has two other options related to the imposition and disposition of citations. It can improve its system of identifying employers with the worst health and safety records, and it can simplify its regulations to prevent employers from making unintended violations.

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diction to enforce a settlement without a final order. A settlement based upon a citation—whether modified, revised, or recharacterized — is a precondition to creating an enforceable abatement obligation on an employer. OSHA, however, could avoid this possibility by requiring abatement before the citation is withdrawn.

169. A willful violation may be justified based on the employer's knowledge gained from the prior violation. OSHA does cite for willfulness based on withdrawn citations. Since an employer's failure to abate a hazard would be a bad faith act, OSHA should retain the authority to cite the employer for a repeat or willful violation.

170. *See supra* Part II.B.

171. *See* Kagan and Scholz, *supra* note 23.

172. STEPHEN A. BOKAT & HORACE A. THOMPSON, III, OCCUPATIONAL SAFETY AND HEALTH LAW 206 (1988).

173. *Id.* at 211.

1. Target Resources on the Worst Violators

Employers are less likely to voluntarily comply with OSHA regulations if their competitors are permitted to violate OSHA standards without being punished. Thus, OSHA can bolster compliance by targeting the employers with the worst safety and health records for inspection. Its ability to take this step, however, is limited by two factors: first, OSHA lacks adequate data to distinguish "good" employers from "bad" employers; and, second, it has a statutory obligation to respond to formal employee complaints of safety and health violations. Since 1972, general schedule OSHA inspections were based on the "worst-first" principle; although the specific formula for identifying the worst employers varies, the basic policy remains unchanged.[174] Principally, OSHA relied on industry-specific, rather than employer-specific, injury data because employer-specific injury rates were unavailable to the agency.[175] Also, OSHA's policy of targeting inspections enjoyed limited success because each new administration of OSHA revised the targeting system to emphasize different factors. Thus, some employers received less enforcement attention under one administration and more in the next. Without a sustained enforcement effort, OSHA's targeting efforts are unlikely to be successful.

2. Simplification

As a final option, OSHA can simplify its regulations. Employers attempting in good faith to comply with OSHA regulations may nevertheless commit violations because of the complexity of some regulations. When OSHA assesses a penalty in this circumstance, the employer may resent OSHA enforcement. Some complexity is inevitable if OSHA is to achieve its objective of protecting workers, but the convoluted nature of some regulations is an unnecessary trap for the unwary.[176]

D. Recommendations

OSHA should take three steps to improve its efforts at cooperation. First, it should evaluate whether its current efforts actually improve workplace safety and health. In particular, OSHA should assess whether coop-

174. *See* MINTZ, *supra* note 44, at 401, 422.

175. OSHA's effort to obtain this data was invalidated by a court decision. American Trucking Ass'n, Inc. v. Reich, 955 F. Supp. 4 (D.D.C. 1997). OSHA now has the authority to compel employer specific data for inspection targeting. 29 C.F.R. § 1907 (1997).

176. OSHA has embarked on a program to: "Improve, Update, and Eliminate Confusing and Outdated Standards." NEW OSHA, *supra* note 7, at 7. *See* OSHA Regulatory Plan, 60 Fed. Reg. 59,503 (Nov. 28, 1995). Revised regulations in plain English have been proposed. 61 Fed. Reg. 47,661 (Sept. 10, 1996).

eration or punishment is the most effective way to encourage compliance by employers with high injury and illness rates. Second, OSHA should evaluate the role of workers in its cooperative programs and determine how worker participation can be increased and made more effective. Finally, OSHA should experiment with additional cooperative approaches including the adoption of a warning citation for nonserious violations. Such a citation would have no penalty associated with it if any employer promptly abated the hazard for which it was cited.

The new initiatives that we recommend attempt to avoid the problems identified with OSHA's current programs. In particular, these approaches do not automatically grant cooperation to small business. Instead, cooperation is based on whether a business, including a small business, is attempting in good faith to comply with OSHA regulations. For the same reason, these incentives also avoid the perverse incentive of rewarding firms with poorer safety records than other firms that do not receive the same type of cooperation.

V. COOPERATIVE APPROACHES PROPOSED BY CONGRESS

Although OSHA has ample authority to significantly increase its cooperative enforcement programs, the new Republican majority in the 104th Congress introduced numerous amendments to the OSH Act to promote, and often require, additional cooperation by the agency.[177] This section describes and evaluates these proposals.

A. Inspections

OSHA critics suggest that relief from OSHA inspections is one way to

177. During the 104th Congress, two principal bills were considered: House Bill H.R. 1834, the "Safety and Health Improvement and Regulatory Reform Act of 1995," introduced by Representative C. Ballenger (R-N.C.), Chairman of the Workplace Protections Subcommittee of the Economic and Educational Opportunities Committee; and Senate Bill S. 1423, the "Occupational Safety and Health Reform and Reinvention Act," introduced by Senator Gregg (R-N.H.) and co-sponsored by Senator Kassenbaum (R-KS), Chairman of the Labor and Human Resources Committee. Both H.R. 1834 and S. 1423, sponsored respectively by the Subcommittee and Committee chairs with jurisdiction over OSHA, garnered the most serious attention from interest groups and the media. *See* Frank Swoboda, *GOP Bills on OSHA Face Veto by Clinton*, WASH. POST, Feb. 20, 1996, at C1; John Greenwald, *Hauling UPS's Freight*, TIME, Jan. 29, 1996, at 59.

Several other OSHA reform proposals were pending before Congress, including: S. 592, "The Occupational Safety and Health Reform Act of 1995," introduced by Senator Hutchinson (R-Tex.); S. 526, "The Occupational Safety and Health Amendments of 1995," introduced by Senator Gregg (R-N.H.) who is also the author of S. 1423; and H.R. 707, "The Occupational Safety and Health Reform Act of 1995," introduced by Rep. Hefley (R-Colo.).

reward those who cooperate with OSHA. As discussed earlier, OSHA started two new programs that follow this principle.[178] Nevertheless, some members of Congress would legally require such cooperation and mandate its terms. The most drastic proposed change is to designate fifty percent of OSHA's annual appropriation for use in cooperative programs,[179] which would dramatically shift resources and personnel away from enforcement activities and toward inspections.

The policy literature[180] does not provide a basis for such a change because the optimal mix of cooperation and enforcement is unknown.[181] Moreover, given OSHA's already limited resources for inspections, this change could cripple the agency's ability to find violators.[182] Rather than dictate how OSHA manages with reduced resources, Congress should give OSHA the flexibility to shift resources into and out of cooperative enforcement efforts as appropriate and monitor its choices through oversight.

Others advocated statutory exemptions from routine inspections.[183] Because OSHA already gives exemptions from routine inspections in recognition of employer cooperation[184] and can extend such programs under its existing authority,[185] these proposals intend to prescribe the direction and

178. *See supra* Part III.B.2.

179. H.R. 1834, 104th Cong. § 4 (1995).

180. GAO, *supra* note 136.

181. *See supra* Part II.C.

182. *See supra* note 11 and accompanying text (noting employers are seldom inspected).

183. An exemption for employers that have better than average safety records has been proposed. H.R. 1834, 104th Cong. § 4 (1995) (exempting employers with "particularly effective" health and safety programs), *see id.* § 6(c) (exempting employers with not more than 50 employees with occupational injury or lost work case rates less than national average rate); *see also* S. 1423, 104th Cong. § 3(b) (1995) (exempting employers with not more than 10 employees and in category of employers with less than national average occupational injury or lost work date rates); *id.* § 4(a) (exempting employers with no employee deaths and fewer loss workdays than average for industry of which employer is part).

There are also proposals to exempt employers that are inspected by government consultants or private inspectors. *See* H.R. 1834, 104th Cong. § 4 (exempting employers inspected under government sponsored consultation program or by certified private inspector); *see also* S. 1423, 104th Cong. § 4(a) (exempting employers inspected under government sponsored or private consultation program or by certified private inspector). Some proposals include employer-employee health and safety committees. H.R. 1834, 104th Cong. § 4 (exempting workplaces with significant employee involvement). Other proposals adopt a model health and safety program designed by OSHA. S. 1423, 104th Cong. § 4(a).

184. *See supra* Part III.B.2.

185. The OSH Act currently does not contain any express exemptions from routine exemptions, but there is also no prohibition against OSHA using its prosecutorial discretion to adopt such exemptions. For example, annual appropriation riders to OSHA's budget have excluded workplaces with ten or fewer employees from routine OSHA inspections, but the rider was dropped when OSHA incorporated the exclusion into its regulations. *See* MINTZ,

the pace of these efforts. For example, one proposed exemption would cover employers that are inspected by private inspectors, although this idea has never been tried before.[186] A similar problem exists concerning a proposal to exempt small employers from routine inspections because it specifies the conditions for such exemptions.[187] In light of empirical evidence showing that injury rates are far higher at small businesses than at large businesses,[188] such a proposal would not encourage compliance behavior. These details are better left to OSHA's design.

Another drawback of the proposals to increase cooperation is that they fail to provide for employee participation. Private inspectors or consultants would be under no statutory duty to include employees in the inspection process and employees would have no right to obtain any information concerning the results.[189] Currently, these rights are guaranteed by the Act when OSHA conducts a traditional inspection.[190] Employee involvement in cooperative programs can enhance their success.[191]

Another proposal would restrict OSHA's authority to inspect a workplace in response to an employee complaint. Unlike current law, requiring OSHA to conduct a complaint inspection when there are "reasonable grounds to believe a violation or danger exists,"[192] OSHA would be authorized to conduct complaint inspections only if an employer refused an employee request to fix a hazard.[193] This requirement, however, invites

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supra note 44, at 697-98.

186. OSHA has never evaluated the effectiveness of its current consultation program. *See* GENERAL ACCOUNTING OFFICE, LABOR NEEDS TO MANAGE ITS WORKPLACE CONSULTATION PROGRAM BETTER (1978) *cited in* OFFICE OF TECHNOLOGY ASSESSMENT, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 238 (1985) (finding OSHA's management of consultation programs inadequate to determine effectiveness of such programs in protecting employee safety and health). Likewise, OSHA has never evaluated whether the voluntary protection program induces employers who would not otherwise invest in safety and health to comply with its regulations, or whether the program simply recognizes and rewards employers who would comply without any inducement. *See supra* notes 100-01 and accompanying text (describing VPP). Finally, relying on private consultants opens the door for potential fraud. If the opportunity for exemptions is extended to every employer, this potential will be significantly increased.

187. *See* H.R. 1834, 104th Cong. § 6(c) (exempting any employer of not more than 50 employees from routine inspections if the employer has less than average injury record for similar employers).

188. Marsh, *supra* note 116.

189. *See* H.R. 1834, 104th Cong. § 4; *see also* S. 1423, 104th Cong. § 4(c) (requiring that employers consult with employees to obtain exemptions from routine inspections). This requirement, however, does not require the steps mentioned in the text.

190. 29 U.S.C. § 657 (1994).

191. *See supra* Part II.C.

192. 29 U.S.C. § 657(f)(1).

193. *See* H.R. 1834, 104th Cong. § 6(a).

employer reprisals against employees who have little practical protection.[194] In general, Congress should be careful about restricting complaint inspections because they are at least as effective in reducing injuries as routine inspections.[195]

B. Eliminate First-Instance Citations

Along with reduced inspections, reformers view the elimination of mandatory first-instance citations as another way to reward and encourage cooperation. One proposal would prohibit OSHA from issuing a citation for a violation that did not involve death or serious injury unless a subsequent inspection reveals the employer did not abate the violation.[196] Another proposal is to grant OSHA discretion on whether to issue citations for violations and authorize it to issue a warning in lieu of a citation if a violation has no significant relationship to health or safety or if an employer promptly abates a hazard and the violation is not willful or repeat.[197]

These changes would force OSHA to be more cooperative by limiting the circumstances under which OSHA could cite an employer for a violation. Also, they would reduce employer antagonism towards OSHA, which might induce additional voluntary compliance. The changes, however, go too far towards mandating cooperation for two reasons. First, the elimination of first-instance citations significantly reduces an employer's economic incentive to comply with OSHA regulations. Second, these proposals reduce the pyramid structure of sanctions under the Act. As discussed earlier, the short-term incentives of a regulated entity to comply with agency regulations are tied to the significance of the penalty structure for noncompliance.[198]

The first-instance citation policy establishes significant economic incen-

194. The OSH Act protects employees against reprisal for initiating a complaint inspection. 29 U.S.C. § 659(c). Employees, however, do not have a private right of action and the Department of Labor brings very few on their behalf. *See* REPORT ON THE COMPREHENSIVE OCCUPATIONAL SAFETY AND HEALTH REFORM ACT, H.R. REP. NO. 103-825, at 104-07 (1994). While many states recognize a cause of action against an employer for discharging an employee in violation of public policy, and many of those states would find the right to request an OSHA inspection a public policy worthy of enforcing, an employee's right to bring an individual tort action against an employer is an ineffective remedy. *See* Speiler, *supra* note 9, at 220.

195. *See* Wayne B. Grey and John T. Scholz, *How Effective Are Complaint Inspections?* (June 1992) (manuscript on file with authors) (comparing impact of complaint and programmed inspections on injury rates during 1979-1985).

196. *See* H.R. 1834, 104th Cong. § 3(a) (1995). The limitation would also not apply in cases involving an imminent danger to any employee. *Id.*

197. *See* S. 1423, 104th Cong. § 7 (1995).

198. *See supra* Part I.A.1.

tives to comply with the Act. If no citation is issued when OSHA first uncovers a violation, the employer is safe from any penalty unless there is a death or serious injury. A similar disincentive exists if an employer can obtain a warning by abating a hazard after it is discovered. Further, by eliminating the certainty that an OSHA inspection that identifies violations will result in a citation and fine, these changes discourage voluntary investments in health and safety.[199]

The earlier discussion also established that a pyramid structure of penalties is most likely to induce compliance and minimize conflict between regulatees and an agency.[200] The elimination of first-instance citations reduces the pyramid structure of sanctions under the Act. A first-instance citation is necessary to create a record that a violation has occurred. Without such a record, OSHA cannot assess an increased penalty if an inspector observes the same violation on a subsequent visit.[201] The suggestion made earlier, that OSHA issue a "warning citation" for nonserious violations[202] would better preserve the pyramid structure of OSHA enforcement. Moreover, as recommended earlier, OSHA can recognize cooperative behavior concerning serious violations, such as prompt abatement of hazards, by penalty reductions.[203]

C. Limit Penalties

Legislators also proposed that Congress limit the size of the penalties that OSHA can assess. Other proposals would mandate reducing penalties in a variety of circumstances. These attempts by Congress to micromanage the enforcement process are likely to result in less compliance with the OSH Act.

Legislation was proposed that would eliminate criminal sanctions and penalties for "willful," "repeat," "general duty" and most record keeping

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199. In 1970, Congress sought to ensure that employers that make such investments were not placed at a competitive disadvantage to those who do not invest in safety and health until after they are caught by OSHA. S. REP. NO. 91-1282, at 4 (1970), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d CONG., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, PUB. L. NO. 91-596, at 144 (Comm. Print 1972).

200. *See supra* Part II.B.

201. *See supra* Part II.B (record of violation is necessary to require abatement and assess repeat violation citations).

202. *See supra* Part IV.A.1.

203. *See supra* Part IV.B.1. OSHA can also prompt cooperation by ensuring that reevaluating whether violations now classified as serious should be classified as other than serious. *See supra* Part IV.A.3. This action would make such violations eligible for warning citations.

and paperwork violations.[204] The justification for such changes is not apparent. As established earlier, OSHA assesses nominal fines, if any, for nonserious violations, has kept the average fine for serious violations relatively constant, and has escalated fines for willful and repeat violations.[205] In addition, penalties are almost always far less than the maximum amount allowed.[206] In other words, OSHA's approach to punishment is both reasonable and moderated.

Moreover, proposals to restrict OSHA's inspection and citation authority undermine cooperation by hindering the agency in identifying and punishing violators. OSHA's ability to punish violators is also tied to the size of the penalties it can assess. The escalation of penalties is crucial to establish a pyramid structure of punishment. In addition, the deterrent effect of OSHA punishment depends on the amount of penalties that OSHA can assess.[207]

Other proposals would require OSHA to reduce or eliminate penalties in the circumstances specified in the legislation.[208] Such changes would rob

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204. OSHA can currently assess penalties of up to $70,000 for willful and repeat violations. 29 U.S.C. § 666(a) (1994). If such violations are eliminated by the new proposals such as H.R. 1834 § 8(a), however, OSHA will only be able to assess fines for up to $7,000 for serious violations. *See* 29 U.S.C. § 666(b). H.R. 1834 would permit a special penalty assessment up to a multiplier of 10, but such enhanced penalties would be available only in cases where violations of a standard resulted in a death or an excessive history of serious injuries to employees. *See* H.R. 1834, 104th Cong. § 8(c). Because criminal sanctions exist only for "willful" violations, eliminating willful violations would also eliminate criminal penalties. 29 U.S.C. § 666(e). Penalties for record-keeping and paperwork requirements would be eliminated unless such violations had a direct relation to employee health or safety or the employer intended to mislead or deceive OSHA. *See* H.R. 1834, 104th Cong. § 3(a); S. 1423, 104th Cong. § 8. Finally, employers would be freed from any penalty for violation of this duty. H.R. 1834, 104th Cong. § 8(d). Employers have a "general duty" to furnish a place of employment which is "free from recognized hazards that are causing or are likely to cause death or serious physician harm." 29 U.S.C. § 654(a)(1).

205. *See supra* Part III.B.

206. *See supra* Part III.C.

207. A firm's direct economic incentive to obey regulations is a function of the likelihood of being inspected and the size of the fine that results from being caught. *See* ELDRIDGE, *supra* note 11. Because OSHA has so few inspectors relative to the number of employers OSHA's deferent effect is directly related to the size of the fines it imposes. *Id.* Moreover, smaller fines can make the cost of a violation less than the cost of complying with OSHA regulations, again undermining the deterrent effect of any punishment. *See* GAO, supra note 136, at 6 (recommending penalties just above cost of compliance to ensure that there is economic incentive to comply).

208. Both proposals would mandate penalty reductions in the amount that an employer spends to abate a violation, and would further reduce penalty amounts if the employer participates in a consultation program or adopts a health and safety plan. *See* H.R. 1834, 104th Cong. §8; *see also* S. 1423, 104th Cong. § 8 (requiring penalty reduction of at least 25% for employers that maintain health and safety program and by at least 50% if employer also has

OSHA of flexibility in applying these penalties. For example, although the agency now reduces penalties to reward cooperative behavior,[209] some proposed changes would lock in such reductions regardless of the particular circumstances of any case.

D. Evaluation

Legislative reforms under consideration in the 105th Congress, and which were under consideration in the 104th Congress, are at odds with the previous knowledge about regulatory compliance because reformers would mandate additional cooperation and reduce current levels of punishment. Such micromanagement would prevent OSHA from adjusting the mix of cooperation and punishment as more is learned about the effectiveness of each approach. Moreover, restricting punishment will reduce the pyramid-like structure of OSHA penalties which is essential to inducing and maintaining voluntary compliance.

The current statutory scheme — with its mandate of first-instance citations — satisfies the goal of assuring meaningful punishment for serious violations while providing OSHA with adequate discretion to adopt a balanced mix of cooperation and enforcement. Instead of micromanaging, Congress should support OSHA's current experiments with cooperative approaches, prod it to adopt additional experiments, and ensure that OSHA has the support to carry out these new initiatives.

CONCLUSION

It has become cliché for critics of regulation to tout increased cooperation as a means of curing what they perceive ails the regulatory process. While cooperation holds promise as an effective enforcement technique, the policy literature suggests that caution is due. Although a mix of cooperation and punishment is likely to be an optimal enforcement policy, the literature provides no clear guidance concerning what policy is optimal. OSHA's situation confirms that agencies should maintain a viable enforcement program while cautiously experimenting with additional cooperative approaches.

OSHA's early experiences confirm the importance of cooperation. In its

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"exemplary" health and safety record and further requiring penalty reduction of at least 75% for employers that had been reviewed or inspected under governmental or private consultation program or by private inspector). Under another proposal, OSHA, which currently bases the size of the penalty assessed on several factors would also take into account the "effect of the penalty on the employer's ability to say in business." *See* S. 1423, 104th Cong. § 8.

209. *See supra* note 128 and accompanying text.

early years, the agency antagonized employers by aggressively pursuing minor violations which created considerable ill will and discouraged voluntary compliance. Although OSHA has significantly increased its reliance on cooperative efforts, there are reasons to be skeptical about this approach. First, OSHA lacks evidence to show some of its recent cooperative programs have been successful. Second, OSHA has a number of additional options that it can implement under its existing legal authority; but until it experiments with these changes, their impact is difficult to predict. Finally, although the policy literature stresses that cooperative enforcement works better when regulatory beneficiaries are involved, OSHA has generally not yet found ways to integrate workers into its cooperative programs.

The policy literature also stresses that cooperation should be paired with punishment, structured in a pyramid-like fashion, with initial or minor violations treated leniently, while repeated or significant violations are punished with increasingly severe sanctions. Unless violators are subject to escalating penalties, employers will not voluntarily comply because they will be at a competitive disadvantage with noncompliers. Nevertheless, some legislators are prepared to reduce OSHA's capacity to enforce its regulations. This form of micromanagement would prevent OSHA from adjusting its mix of cooperation and enforcement as more is learned about the effectiveness of each approach. There is no reason to believe that such micromanagement would be any more justifiable at other agencies.