Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

Another Friendly Response

TO THE EDITOR:

William A. Niskanen acknowledges that American tort law in its present form is seriously flawed ("Do *Not* Federalize Tort Law: A Friendly Response to Senator Abraham," *Regulation*, 1995 No. 4). His solution: a federal conflicts rule that would dictate that product liability cases be adjudicated under the law of the state in which the defendant firm has the largest employment.

I think this is a useful contribution to the legal reform debate. Ironically, this is true because Niskanen's conflicts rule addresses a problem at the heart of my argument for federal tort reform—the problem of negative externalities. In the *Policy Review* piece Niskanen is answering, I argue that it is proper for Congress to reform certain aspects of our tort laws (punitive damages and joint and several liability) largely because our present conflicts morass combines with the plaintiff's forum-shopping prerogative to create a systemic pro-plaintiff bias. Competition and other factors prevent companies from charging more for their products in states that routinely allow excessive damage awards. This means that all Americans must pay higher prices—a classic case of negative externalities.

Niskanen argues that such negative externalities are not sufficiently targeted at out-of-staters to constitute "tariffs" and thereby permit congressionally enacted tort reform under the Commerce Clause. I disagree. I believe it is sufficient that our present regime permits states to externalize the costs, but not internalize the savings of their tort systems. This situation is similar enough to the ones the Framers sought to address in making the Commerce power available to make these reforms a legitimate exercise of that power. What is more, to the extent that Niskanen's argument is based on a constitutional theory of the Commerce power, it invalidates his own proposal as well as mine, since conflicts rules different from those advocated by Niskanen are not necessarily discriminatory against out-of-staters. To the extent that his argument is prudential, we are no longer dealing with permissible versus impermissible reforms, but with a continuum of relatively desirable reforms. And the reforms I recommend deserve consideration for the same reason Niskanen's do: because they address the worst effects of negative externalities.

In my view, the best argument for a federal conflicts rule such as Niskanen's is that it is the least intrusive means by which the federal government can prevent states with excessively pro-plaintiff rules from applying those rules to companies with most of their employees in another state. This would short-circuit the process of fleecing out-of-state defendants. What is more, by using the law of the state in which the company has the largest number of employees, the rule would encourage in-state defendants to vote with their feet if state tort rules got too far out of hand. Combined, these factors would minimize negative externalities and make our federal system work much better as a market for tort law. And we need not fear unfairly "anti-plaintiff" results. Elections, local sympathies, and the continuing presence of "deep pockets" will maintain a fair level of protection and recompense for plaintiffs.

Early in the last session of Congress, a number of us interested in legal reform considered the route of a federal conflicts rule much along the lines Niskanen suggests. Ours would apply somewhat more broadly than Niskanen's, so as to give small businesses, charities, farmers, local communities, and indeed all our people protection from litigation brought by opportunistic out-of-staters. We decided not to move ahead at that time for two reasons: feasibility and the apparent opportunity to enact other desirable proposals to which long-time legal reform proponents were strongly committed. For quite some time, the focus of the reform movement had been on limiting punitive damages awards and joint liability excesses. These reforms seemed legitimate and appropriate areas for congressional intervention for the reasons noted above and addressed in greater depth in the *Policy Review* piece. Moreover, supporters had worked hard to build political backing for these reforms, which accordingly seemed more likely to pass than a federal conflicts statute, the virtues of which, while perhaps clear enough once explained, require significant explanation.

These remedial reforms now seem unlikely to be adopted in this Congress, at least in any broad-based fashion. This may well warrant looking at other legal reform options, including a federal conflicts law—which would be a neutral, programmatic reform not susceptible to the charge of aiming to protect rich, guilty corporations. We may also, for that matter, want to see if there is any room to explore Paul Rubin's suggestions (in the same issue of *Regulation*) about "de-tortifying" contracts. The existence of these good ideas, however, does not in my view mean that we should reject other desirable reforms such as those I advocated in my *Policy Review* piece (the desirability of which I

do not believe Niskanen challenges) that may be more likely to gain passage. We need to keep sight of the ideal, but effective legislators must also have strong theories of the second-best. With these caveats in mind, I welcome the Niskanen rule as a valuable contribution to the ongoing effort to restore predictability and fairness to our civil justice system.

Sen. Spencer Abraham
(R-Mich.)

Needed: A National Solution

TO THE EDITOR:

In his article on federal civil justice legislation, William A. Niskanen begins promisingly enough by recognizing that "American tort law, especially as it has developed during the past 30 years, should be changed." He apparently recognizes (as would any rational observer) that our liability system is careening dangerously out of control. By most responsible estimates, the direct costs of our tort system exceed $150 billion a year, and indirect costs drive that price into the stratosphere. Punitive damages—a chief propellant behind the tort juggernaut—have become routine, and multimillion dollar verdicts are commonplace. Liability costs adversely and unnecessarily affect American jobs, innovation, and competitiveness.

Congress is on the verge of passing federal tort reform legislation. Although the watered-down bill that is likely to emerge from the House-Senate conference will provide no relief to most victims of excesses in our tort system, it will at least symbolize the legislative determination that the liability crisis must be addressed at the federal level. Niskanen asserts, however, that "not all nationwide problems . . . demand national solutions."

Niskanen's halfhearted suggestion that Congress may lack the constitutional authority to enact civil justice reform lacks any basis in law. As he acknowledges, the Supreme Court would almost certainly find that federal civil justice reform legislation is authorized by the Commerce Clause because excesses in state tort systems are imposing immense burdens on interstate commerce. Niskanen nonetheless argues that the tort system does not impose a "specific barrier to commerce among the states" and, therefore, that federal legislation might be invalidated by "a more strict constructionist Court."

Simply put, Niskanen has closed his eyes to the facts. For example, the threat of outrageous punitive damage awards in Alabama courts has forced businesses to stop selling products in Alabama and some insurance companies to stop writing policies in that state. A state legal system that prevents the sale of goods and services is, thus, a direct impediment to interstate commerce. Niskanen also recognizes that "there is ample evidence that courts favor in-state plaintiffs over out-of-state defendants"; it is disingenuous to suggest that such systematic discrimination against foreign businesses and individuals can be anything other than a "specific barrier" to interstate commerce. (For this and other reasons, I agree with Niskanen's observation that states should not be permitted to "opt out" of a federal regime.)

Niskanen also points out that states have an incentive to reform their own tort systems and that, indeed, several states have already done so. The scope and effect of these reforms vary widely, however, and the result is a patchwork of inconsistent state laws providing varying levels of protection to litigants. While some measure of inconsistency itself is not a problem (and, indeed, is inevitable in our federal system), the gross disparities among the states have yielded bizarre results. For example, the identical conduct may not be subject to any punitive damages in some states, may give rise to a limited amount of punitive damages in others, and may serve as a basis for virtually unlimited punitive damages in still other states.

Moreover, the states that have not enacted civil justice reforms may never do so, leaving in place the possibility of astronomical awards in any case in which the plaintiff can satisfy the minimal due-process requirements to establish personal jurisdiction. This anomaly leads to national forum-shopping in which plaintiffs' lawyers bring lawsuits in "favored" states where punitive damages are readily available. Alabama juries, for example, award six times the amount of punitive damages as juries in the neighboring states of Tennessee, Mississippi, and Georgia combined. And Alabama, because of the political power of the trial bar, regularly rejects reforms to its system.

Even when state legislators recognize the need for civil justice reform, state judges—who are often elected and depend for campaign contributions on the very lawyers who profit from the status quo—may declare such reforms unlawful. As a justice of the West Virginia Supreme Court has explained: "I'm not the only appellate judge in America who wants to sleep at night. As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, their families and their friends will re-elect me." Again, Alabama is a perfect example, where the elected Supreme Court has invalidated most of the state's civil-justice reform provisions on questionable state constitutional grounds, including holding that a $250,000 cap on punitive damages violated the right to trial by jury.

Niskanen suggests that the liability crisis can be solved by a federal choice-of-law rule that would require state courts in product liability cases to apply the law of the state in which the manufacturer has the largest number of employees. This proposal would not even address the vast majority of civil cases, leaving homeowners, municipalities, service providers, nonprofit organizations, volunteers, and most small businesses subject to the current crazy-quilt of liability rules. Even in products cases, it would be utterly unworkable if (as is often the case) there is more than one defendant. The trial lawyers would make a joke of Niskanen's remedy. It is doubtful that he has studied their tactics.

As Judge Robert Bork, a staunch defender of the rights of states, has pointed out, the power of Congress to control impediments to and discrimination against interstate commerce is a principal reason for the creation of our Constitution. It would be ironic to fail to use that power for the very purpose it was created—to rein in state-imposed barriers to the flow of goods and services.

Theodore B. Olson
Gibson, Dunn & Crutcher

Better, Not Less

TO THE EDITOR:

William Niskanen ("Is Regulatory Reform Dead? Should Anyone Care?" *Regulation*, 1995 No. 3) is correct that painful concessions have been made in the ongoing effort to pass the Dole-Johnston bill in the Senate, a weaker version of a reform bill passed in March 1995 by the House as part of the "Contract with America." But Niskanen seems to be confused about the objective of regulatory reform, which causes him to overlook the attractive features of the Dole-Johnston bill and embrace some dubious alternatives.

The purpose of reforming risk regulation is to provide *more protection* of public health and the environment at *less cost* than is being accomplished under current laws and regulations. The Dole-Johnston bill advances this objective by requiring agencies to (1) make better use of science in regulatory risk assessment; (2) rank risks prior to setting regulatory priorities; and (3) demonstrate that the benefits of major rules "justify" their costs. The major weakness of the bill is not the needed discretion inherent in the word "justify," but the failure of the Senate bill to supersede all existing laws with this "soft" cost-benefit test. Niskanen is correct that the Dole-Johnston bill is not a potent force for deregulation, but that is because the objective of reform is a smarter regulatory process, not necessarily less regulation per se.

After questioning the ability of lay judges to evaluate the technical issues in risk regulation, Niskanen urges a lay Congress to play a greater role in risk controversies by writing highly specific mandates and insisting on affirmative approval of each new regulation. Since when were elected officials trained in environmental science and welfare economics? A more realistic strategy is for Congress to provide administrative agencies with qualified powers to reduce risks under a uniform statute rooted in the principles of "scientific peer review," "risk-based priorities," and "benefits justify costs."

Interestingly, Niskanen and Senator Dole now appear to be in agreement on a key tactical point: no more concessions on the principles of regulatory reform should be made to desperate defenders of the status quo. The country may have to wait until after the 1996 elections to achieve regulatory reform. But we should not lose sight of our objective: more protection of public health and the environment at less cost to the public and private sectors.

John D. Graham
Director
Harvard Center for Risk Analysis

Scrap the Tort System

TO THE EDITOR:

I read Paul Rubin's "Fundamental Reform of Tort Law" *(Regulation*, 1995 No. 4) with particular interest. Since Rubin's article is remarkably similar to an article I wrote last year, entitled "Litigation: The Missing Piece of the Productivity Puzzle," it invites comparison and comment. (A much condensed and simplified version of my own article, entitled "Contorting America," appeared in the January 1996 issue of *The World & I* magazine.)

In covering many similar issues (international comparisons, the American judiciary's shift away from the predictable enforcement of contractual arrangements, and other related matters), Rubin and I appear to agree on much of what has gone wrong with the tort system, but part company on what it will take to bring about effective reform, and more fundamentally, about whether or not tort law was ever a workable construct to begin with.

In writing, "If policymakers wish to lift a burden on the economy as well as provide cost-effective protection for consumers, they must undertake major reforms that restore rational tort law and, most importantly, the rights of contract," Rubin makes two faulty assumptions. The first is that rational tort law ever existed; the second is that policymakers (I'm assuming he means legislators here) are capable of restoring rights to contract, much less the nebulous, so-called rational tort law. Indeed, he appears to suggest that if policymakers can just manage to get all the tort doctrines aligned correctly, and get the courts to behave, American tort law would serve us efficiently. (As Rubin has noted, juries and judges eroded, by consistently failing to enforce, contractual arrangements of all sorts in the United States, beginning in the 1960s and 1970s, and legislators can hardly will the civil juries of today simply to do an about-face and begin enforcing contracts in a predictable manner once again.)

The economic considerations of tort law must be clarified and understood before we can reach any resolution of the conflicting viewpoints that fuel the debate over tort reform. The objective of tort law should be to compensate victims for damage sustained by them due to the intentional or negligent actions of others. Instead, tort law as sanctioned by the American courts has adopted the alleged objective of eliminating risk to human life, or at least reducing risk as far as possible, regardless of the cost. One irrefutable fact of life, however, is that it is, has been, and always will be fraught with risk. Progress does not come without risk to human life, and sane public policy development, therefore, necessitates facing the inevitable trade-offs involved. This is a given in

economic analysis, but one that is often forgotten or ignored in both the legislative and judicial systems in this country.

According to Thomas S. Ulen, University of Illinois professor of finance, the objective of tort law should be to minimize the sum of the three costs associated with accident reduction in the use of products: (1) the cost of manufacturing safer products; (2) the cost of accident damages; and (3) the cost of judicial processes to compensate victims—in other words, to weigh the tradeoffs among these costs. For example, we could produce a car that would be "safe" in 99.9 percent of the circumstances in which it is used, but it might well cost a million dollars or more per car produced. We are clearly not willing to pay this price, nor can we afford it.

Once we realize that products cannot be made completely "safe," it behooves us as a rational people to face the inevitable tradeoffs that must be made. This, according to Ulen, was the original rationale behind law and economics theory. The reason law and economics, in the words of former New Zealand prime minister Geoffrey Palmer, "still dwells at the level of theory and remains in the academy, where it should remain until it gets practical," is that in the real world we, and by extension the courts, find it distasteful, to say the least, to place a rational (monetary) value on pain and suffering or loss of life. If we could do this, we could fairly readily determine fair compensation for accidents and the amount we would be willing to pay to improve the safety of products we use. Manufacturers would know the approximate cost of compensating victims for product defects that caused accidents; they would therefore have an economic incentive to make products "safer" to the degree that increased product development costs would be balanced by compensation costs avoided.

Were we willing to attach a rational (monetary) value to human life and pain and suffering, we would have the rational tort law Rubin seeks. (In fact, under such circumstances, there would be little need for tort actions except to establish "willful neglect" on the part of either the consumer or the producer of the product.) The costly part of establishing "just compensation" in the judicial system would be eliminated. (Of course, if compensation was set too high, it would present powerful disincentives to innovation and progress.) Absent the human life value factor, law and economics theory cannot be expected, now or in the future, to have much real-world value except as faulty intellectual support for retention of our tort system. A system that is, by the admission of most, both economically corrosive and vastly unsuited to the tasks of restoring and compensating accident victims.

Rubin's article may mislead readers new to the tort reform issue into thinking that with enough effective "tweaking" of the tort doctrines, the American liability problem would disappear. Since the tort doctrines don't stay "tweaked" in the hands of judges and juries (as evidenced by the eroded sanctity of contract and alleged distortion of previously "rational" tort law), the academic explanations and distinctions of the sort that Rubin makes (liability standards, differing categories of damage payments, contractual and precontractual relationships, and the dubious efficiency and deterrent capabilities of tort law) seem unfortunately to make little real-world difference in the courts, where juries can, through the process of jury nullification, simply throw out the evidence and award whatever amount they feel constitutes "justice" in the case at hand.

Critics argue that the reason that tort law has retained its intellectual support over the past three decades of its stormy history in America is simply that while it hasn't been proved that tort law "works," neither has it been proved that it doesn't. The premises that tort law deters negligent behavior (by making the one responsible or ostensibly responsible for accidents liable for victim restitution and compensation); that accidents are largely preventable, and that tort law can help; and that tort law eliminates or reduces risk, are all theories that have yet to be verified in the context of any practical framework. Unfortunately, without proof that such ideas and assertions are not true, they have languished here in America, where unfortunately, a kind of Gresham's Law of impractical ideas has served to drive out the serious consideration of better ones. It is said that only a theory can replace a theory, and so far none has developed to shove tort law and its intellectual underpinnings off the stage.

Continued discussion of the sorts of issues Rubin has presented serve only to confuse and delay the far more important debate over whether or not tort law in general, and its uniquely American permutation in particular, have any constructive role at all to play in modern society.

A tour through the American academic literature on the tort system and tort reform is enlightening. The majority of articles on reform discuss the various, familiar "pruning back" methods of taming the tort monster. These are frequently supported by circular sorts of law-and-economics related or based debates over gradations of negligence and accident deterrence under tort law. This would not be so startling were it not for the fact that the American tort problem so greatly outdistances those of other countries where more effective remedies have been sought (and found) for a far smaller problem.

Because, as Peter Huber and others have noted, tort law in its American per`mutation never developed anywhere else in the world, the international cost comparisons Rubin presents are potentially misleading. He writes, "there is no obvious reason why the United States should now spend more on tort law than other countries." I agree, there is no reason why we *should*, but there are identifiable reasons why we *do*. The American civil justice system retains the following elements that every other country worldwide has either never adopted or has by now eliminated:

1. Utilization of civil juries for personal injury cases;
2. Contingency-based attorneys' fees (recently reduced in

"We'll be needing a lawyer."

England from a criminal offense to grounds for lawyer disbarment); and

3. Unlimited noneconomic ("punitive" and other) damage awards.

Although much has been made in the American legal reform debate over lawyers' contingency fees and unlimited punitive and other noneconomic damage awards, rarely is it mentioned, publicly at least, that the civil jury is the single dynamic driving our overheated tort system. Former tort practitioners and legal scholars willing to speak frankly on the American tort system claim that the civil jury lies at the heart of the problem. (Richard Epstein has said that just three things: jury nullification of existing contracts, the already weakened contract, and the "non-compliance double whammy" [the prevailing situation wherein producers are successfully sued for product-related harms even after complying fully with all applicable regulations] are responsible for most of the dysfunction in the American civil justice system.) Evidence indicates that the American tort system's heavy reliance on jury decisions was not accidental. Yale's George Priest writes in *History of Modern Tort Law* that Fleming James (who along with Friedrich Kessler provided the intellectual underpinnings for the American tort system in the 1940s and 1950s) preferred juries, "because he believed them to be more inclined to grant judgement to plaintiffs."

Unlimited punitive and other noneconomic damages and lawyers' contingency fees would likely cease to be problematic—if indeed they continued to exist—were judge-only and expert panels (now used in all other common-law countries) to replace civil juries here in America. The unfavorable international civil jury experience provides some valuable insight. Every other common-law country, including England (over 100 years ago) and Ireland, most recently (in 1988), has abandoned the use of civil juries for personal injury cases when juries were determined to be unsatisfactory for service in complex modern societies which necessitated nonamateur, non-emotion-driven opinions. (It took over 60 years and an act of Parliament, but England finally dispensed with civil juries for personal injury cases; and Ireland has made it an impeachable offense for a judge even to allow such juries.)

It is in a way understandable that legislators might find criticism of the civil jury system, rooted as that system is in the American cultural psyche, unpalatable. However, the facts are that while the purpose of the criminal jury is to mitigate the power of the state over the individual, the purpose of the civil jury, in the modern world at least, is unclear, and the effect is to limit the power of individuals or groups of individuals, and to enhance the power of the state.

The only fundamental tort reform may well be tort system replacement. Possibly the most important recent writing on the merits (or lack thereof) of tort law exists in an article by former New Zealand prime minister Geoffrey Palmer ("New Zealand's Accident Compensation Scheme: Twenty Years On.") in the *University of Toronto Law Review* (44 1994, 244) in which he writes extensively on the accident-compensation experience of his country since it dispensed with its tort system more than two decades ago. The former prime minister observes: "Corrective justice may provide some arguments as to why tort law exists, but not, I think, as to why it should be retained." Further on, he writes, "More than twenty years ago, New Zealand decided tort law could not achieve its objectives for personal injury. It did not compensate enough people. It did not deter carelessness nor make an adequate contribution to accident prevention. . . .Common law damages did not respond in a

principled way to the plight of those who needed help when they needed it."

New Zealand has replaced its costly tort system with a no-fault program run by a government statutory commission. The program provides virtually every injured New Zealander with salary compensation and medical-care coverage to cover his or her losses—regardless of how injuries occur. Such a government-run entitlement might seem incongruent with New Zealand's current strong pro-market bent. But the fact that it eliminates the economically destructive tort system makes it a relatively positive factor in the country's overall reform scheme. While no one, including the lawyers, gets rich under the system, the injured are reportedly reliably and fairly compensated, with little or no distortion of the economy. And the system's administrative costs, according to the former prime minister, run to just 7 percent, as opposed to over 50 percent for the American tort system.

Lastly, Cato chairman William Niskanen's "Do Not Federalize Tort Law" (also in 1995 No. 4) should serve to advance intelligent, if not rapid, tort reform in America. The article was particularly outstanding because of the author's thorough understanding of the role of unintended consequences in American public policy formulation. (This seems particularly appropriate for this topic, because the developmental history of American tort law is nothing if not a textbook collection of unintended consequences.) Niskanen suggests that states have strong economic incentives to enact effective liability reforms, and since most of America's tort crisis is properly addressed by the states, and since the states are not bound by the Constitution to guarantee the jury trial right in civil cases (The Seventh Amendment guarantee of this "right" applies only to the [approximately 4 percent of] cases brought in the federal courts), it is not beyond the realm of possibility that progressive states will in the future test the solution suggested by former tort lawyer William Matchneer, who now serves as chief counsel at OSHA's Review Commission. In a 1995 article in *Common Sense*, Matchneer recommends trying in individual states a version of the New Zealand system. He suggests that states, in cooperation with private insurance carriers, could administer a system of covering all accidental injuries, regardless of how those injuries occur. Such efforts could amount to the first real experiments in fundamental tort reform here in America.

Frieda Campbell

Restore Sanctity of Contract

RUBIN replies:

Frieda Campbell agrees with my diagnosis of what is wrong with the tort system. I do not think the areas where we do disagree are as fundamental as she seems to believe. My main prescription for tort law reform is to allow consumers and producers to contract for whatever terms of accident law they desire, and to enforce such contracts. It is quite possible that such contracts would entail many of the terms Campbell would like.

Campbell thinks that it would be impossible to get judges, and especially juries, to enforce such contracts. However, in the past judges enforced the law by not allowing juries to hear certain arguments. A judge would simply say that some issue was not relevant for the jury because it was a matter of law, not of fact. The judge would then rule on the matter directly. I believe that we could return to this system, with judges simply enforcing contracts.

I do not suggest that policymakers should "manage to get all the tort doctrines aligned correctly." Rather, I suggest that if contract were allowed, then the doctrines would be aligned correctly by the free flow of the market. I indicate what some doctrines might look like under this system, but I explicitly disavow any attempt to impose terms on transactors.

An important part of Campbell's proposal is that we establish a "rational (monetary) value to human life and pain and suffering." But in my article and in other writings I have shown that consumers would actually prefer not to be compensated for the value of life or for pain and suffering at all, and so there is probably no reason to establish such a value. If I am wrong, then consumers might well prefer a scheduled system of payments, as others have proposed.

I suspect that my ideal tort system and Campbell's would look rather similar. The major difference is that I would prefer to get there by allowing free choice and free contract in the marketplace, and she seems willing to mandate her preferred system directly. Although I think that Campbell is correct in many matters, we have gotten to our current situation in part by imposing the beliefs of other well-meaning reformers. I prefer to rely on consumer choice rather than on the beliefs of anyone (including myself) about what the system should look like.

Paul Rubin
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Emory University

Sunsetting Can Work

TO THE EDITOR:

In "Sunrises without Sunsets: Can Sunset Laws Reduce Regulation?" (*Regulation*, 1995 No. 4) Vern McKinley makes a number of important arguments questioning the viability of sunsetting, whether that sunsetting is intended for specific agencies, legislation, or regulations. Furthermore, he holds out little hope for the broader Regulatory Sunset and Review Act proposed in the House of Representatives. Though sympathetic to his reservations, I think it's too sweeping to conclude that sunsetting hasn't worked in practice and to dismiss it in favor of an even less likely "orgy of statute repeals": there's been too little experience to draw that conclusion.

McKinley discusses three instances of attempted agency

"According to the voice-stress analyzer, he's *not* going to lower taxes."

sunsetting: the Civil Aeronautics Board (CAB), the Resolution Trust Corporation (RTC), and the Commodity Futures Trading Commission (CFTC). But as McKinley himself illustrates, only the latter directly portrays a failure of sunsetting. The CAB and RTC sunsets were successful once Congress made explicit the intent to sunset. The single (late 1970s) comprehensive sunsetting legislation McKinley described that would terminate regulations on a government-wide scale never became law.

It's important to recognize that the regulatory state is a man-made institution, and therefore the particulars of any past sunsetting failure aren't facts of nature. The types of regulatory-control institutions devised will affect outcomes. For example, one would expect radically different outcomes from a balanced budget amendment with a supermajority requirement for tax increases, compared to one without—as last year's fight among rival balanced-budget amendment supporters made clear.

Given that there are an indefinite number of ways to design legislation, there will likely be easily graspable reasons why some of the earlier sunsetting attempts were uninspiring. It would be better to learn from the failures McKinley highlights and set up a sunsetting procedure that does a better job navigating around those and other potential failures. For starters, sunsetting efforts worthy of the name require a "hammer" to actually impose the sunset. Strictly speaking, for example, the CFTC "sunset" was not that: it was merely a requirement for an agency reauthorization review, rather than a preordained elimination of the agency. Nevertheless, the congressional approval that the CFTC secured is the correct approach; there should be no perpetual authority. (And despite its failure to vanish, the CFTC may be a somewhat smaller bureaucracy than it otherwise would have been with no review at all.)

But a sunsetting bill—in the CFTC case and others—should go even further and require congressional approval of the agency's major regulations as well, something that has never been required. The continuation of regulation ought not to depend merely on successful passage through a federal agency "review" as proposed in the now-hammerless House sunsetting bill. Continuation ought to hinge on congressional approval, bolstered by, but independent of, the agency's conclusions. (Even a simple untabulated voice vote would be an improvement.) Agencies exist to regulate; the objectivity of their reviews is suspect at the very least. Only self-annihilating behavior would induce an agency to continually urge that the regulations under its purview be sunsetted.

Sunsetting in various isolated instances, as in McKinley's examples, is an entirely different animal than sunsetting as a general, inescapable fact of bureaucratic existence. Generalized sunsetting could lessen the impact of the interest-group mobilization that McKinley rightly expects from an impending sunsetting deadline affecting a prominent agency. Government-wide sunsetting is one means of forcing agencies (or rules, or statutes) to compete with one another for a congressionally ordained "right" to persist. The entire process by its nature could help change the prevailing and harmful impression that regulation is primarily caused by agency excess, and somehow is out of Congress's hands.

If sunsetting is to work, it does depend on greater congressional involvement in the regulatory process. However, McKinley politely criticized the Competitive Enterprise Institute (my organization) for emphasizing that Congress should assume a greater role. He argued that Congress would resist precisely because today's comfortable arrangement allows Congress to blame agencies for abuses and take credit for whatever good regulations do.

McKinley is right that Congress will resist. Nevertheless, it's not clear how long Congress can perpetuate this ruse. For one thing, some think tanks intrigued by the issue of congressional accountability for regulation believe it has the potential raw appeal of term limits; in any case, "regulation without representation" will certainly have greater popular appeal than risk assessment and cost-benefit analysis, which have proved themselves

quite uninspiring as mobilizing issues. The effort to abolish "regulation without representation" simply needs one or two articulate and committed congressional champions. Played right, sunsetting can facilitate the campaign to end, or at least expose, the abuses stemming from Congress's delegation of power to unaccountable federal agencies.

What is more, the Senate last year actually took baby steps toward greater congressional accountability by passing 100-0 a bill that would require finalized major agency regulations to remain idle for 45 days, a window during which a member could offer a "resolution of disagreement" to be considered on a nonamendable basis. While a regulation would still become effective if Congress did nothing (unlike a preferable positive approval), the Senate's bill is a step in the right direction. Congress could less credibly blame particularly onerous regulations on agencies if it had sat by silently. At the very least, adding this provision to even a weak sunset bill could help change the perception of who bears ultimate responsibility for regulatory excess. (The Senate bill was that body's alternative to the House-passed regulatory moratorium; there has been no legislative conference to iron out differences. If the Senate bill were to pass the House as a component of sunsetting legislation, it could sweeten the prospects for sunsetting legislation in the Senate.)

It's worth being prepared for the fact that—assuming one does credit the public-choice argument that regulation typically emerges to benefit producer groups—the real opposition to sunsetting can be expected to come not so much from generalized congressional opposition, but from politically connected producer groups who have the most to fear from losing "custom-made" regulation through a sunset procedure.

Regulatory sunsetting would also complement other regulatory process reforms of which it would probably be a part. Sunsetting could be used in conjunction with Sen. Phil Gramm's (R-Tex.) proposed regulatory reduction commission, which could potentially take a meat-axe to the $647 billion regulatory state long before distant sunsetting deadlines force the issue. Other important features could help make a sunsetting bill more workable, such as Common Cause's insistence that committee chairmanships be rotated, which would help prevent pork-gathering committee chairs from hardening in place.

In most concrete instances of sunsetting legislation, I'm sure I would agree with Vern McKinley. I would join him in opposing the House bill if it ultimately arrives for floor consideration without a hammer. But despite the skepticism I share with McKinley, I tend to look for the half-full glass. Even seemingly modest institutional reforms can create transparency and accountability, and thus possibly a flurry of reform. Procedures biased against the continuation of regulations—such as properly designed sunsetting—beat the status quo, and they compromise nothing. The deeper premise underlying aggressive sunsetting is that the regulatory state is primarily Congress's own creation, rather than that of the agencies Congress loves to blame. Creating institutional reforms based on that premise can get the "delegation backlash" camel's nose under the tent.

Clyde Wayne Crews Jr.
Competitive Enterprise Institute

A Legislative Gimmick

MCKINLEY replies:

I appreciate Wayne Crews's comments but must respectfully disagree with his major points.

I find it highly suspect to label the CAB and the RTC examples of sunset successes, as they do not in any way resemble the legislation currently in the House or the sunset bill with a "hammer" that Crews envisions. Both of the bills underlying the elimination of these agencies, as discussed in my article, acted as repeals (delayed or otherwise). I would argue that it is inappropriate to say they represent in any way examples that proponents of either the House bill or Crews's proposal can point to as an indication of how well their proposals will work.

The much better analogy to the House bill or Crews's proposal is the CFTC example, as it exemplifies the idea of a periodic review. In fact, the CFTC example is clear evidence of the likely result of Crews's proposal. For example, the most recent reauthorization of the CFTC in 1995 saw little energy expended on an extensive review of the agency, and the bill sailed through the House and Senate on voice votes. No changes were made to the structure of the agency and the bill itself was so short it not only could fit on a postcard but could probably fit on a postage stamp. I fail to see how such a review of all significant agency regulations in such a manner could be considered "an improvement." I also find Crews's statement that the CFTC is "a somewhat smaller bureaucracy than it otherwise would have been with no review at all" one that evades proof.

I agree that the current environment may not allow for an "orgy of statute repeals" given the current resident of the White House, but I am encouraged by the recent repeal of the 55 mile per hour speed limit. Our president did not want to repeal this law, but the repeal was forced through nonetheless. One can only hope that come January 1997 the political environment will shift at least marginally in favor of deregulation.

The idea of sunsetting is largely a gimmick, and the energy and political capital being used to support it could be used more constructively in other ways. I am certainly willing to be proved wrong if sunsetting can be used to trim back the regulatory state, but I am not very hopeful.

Vern McKinley

Just the Facts

TO THE EDITOR:

Toward the end of "Abolishing

OSHA" (*Regulation*, 1995 No. 4), Thomas J. Kniesner and John D. Leeth take to task those people who enjoy telling OSHA horror stories, citing the "tooth fairy" story as an example of a complete distortion of the facts. Unfortunately, their article contains its own errors, faulty analyses, and unsupported assertions—and these lead to a distorted view of the need for and impact of OSHA. (Regarding horror stories, the same issue of *Regulation* includes "OSHA Targets Bridge Painters," by Sarah J. McCarthy. Readers interested in the other side of the story should review the agency's briefs filed with the United States Court of Appeals for the Sixth Circuit, Docket No. 94-3698 and No. 95-3981.)

Kniesner and Leeth assert that workers are safer at work than at home. Their assertion is based on relative fatality rates at work and at home. However, because they use the wrong data and perform an incomplete analysis, this assertion is wrong. In fact, workers are safer at home than at work.

Kniesner and Leeth's Figure 1, entitled "Workplace Fatalities: 1928-1993," purports to show the trend in death rates based on information from the National Safety Council's (NSC) 1994 edition of *Accident Facts*. The figure shows a decline from approximately 16 workplace fatalities per 100,000 workers in 1928 to 3.5 per 100,000 workers in 1993—an 80 percent reduction. Based on these and other NSC data, Kniesner and Leeth conclude that in 1993 the "chance of dying in an accident at home was over two times greater (8.7/100,000) than the chance of dying in an accident at work."

Unfortunately for the authors (and the readers of *Regulation*), Kniesner and Leeth have mixed up their data sources and pulled workplace fatality data from the wrong *Accident Facts* table. The data they use to derive Figure 1 has mistakenly been taken from the (unnumbered) table on pages 26-27 of *Accident Facts*, which provides fatality rates per 100,000 *population*, not per 100,000 *workers*. The data they should have taken from *Accident Facts* can be found in the upper table on page 37 of that source. These data show that the fatality rate declined from 37/100,000 in 1933 to 8/100,000 in 1993. Thus, although the trend reduction over time is similar to what Kniesner and Leeth report, the workplace fatality rate is more than twice as high as they report.

There are also problems with the "at-home" part of Kniesner and Leeth's data. Instead of comparing the risk workers face on the job with the risk they face at home, the authors compare their risk at work with the risk that the entire population confronts at home—including the elderly, who account for a disproportionate share of at-home deaths (page 100, *Accident Facts*). Kniesner and Leeth's errors are compounded further by their failure to adjust the "at work/at home" comparison for the number of hours actually spent in each place.

NSC data show 8,500 home deaths for the age group 15-64 (this age group accounts for about 97 percent of all employment). Census data for 1993 show about 148 million persons aged 15-64 (*Statistical Abstract of the United States 1995*, U.S. Department of Commerce, September 1995, Table 14), yielding a home fatality rate of about 5.7 per 100,000 for the working-age population, compared with the rate of 8.7 per 100,000 used by Kniesner and Leeth.

In 1993 the average workweek (for persons at work in nonagricultural industries during the survey weeks) was 39.4 hours (*Employment and Earnings*, January 1994, Table 30). (The average would be lower if it included employed persons who were not at work [e.g., sick or on vacation] during the survey weeks.) A rough estimate of time spent at home can be derived from a study by Juster and Stafford ("The Allocation of Time: Empirical Findings, Behavioral Models, and Problems of Measurement," *Journal of Economic Literature*, June 1991, Table 1) based on 1981 time-diary data for men and women aged 25-64. Summing all or a fraction of the hours spent on activities expected to occur mostly or partially at home (e.g., sleep, personal care, TV, social interaction) yields an estimate of over 90 hours for men and over 110 hours for women. The diary data show that men and women spend about 40.5 and 21.9 hours per week at work, respectively. Although these numbers may have changed somewhat since 1981, it is doubtful that they have changed dramatically enough to affect the basic conclusion that men and women spend at least twice as much time at home as they do at work.

The simplest way to adjust the risk measure to account for relative time spent at work and at home is to reduce the home risk by half, from 5.7 to 2.8 per 100,000 working age individuals. In other words, using the same demographic group at home and at work and adjusting to account for the relative amounts of time workers spend at home and at work, the fatality risk is roughly three times higher at work than at home (8 vs. 2.8).

As Kniesner and Leeth note, the Bureau of Labor Statistics National Census of Fatal Occupational Injuries reports a workplace fatality rate of about 5.2 per 100,000 workers in 1993. However, even using this lower estimate, the fatality risk at work remains almost twice as high as the risk at home.

Kniesner and Leeth observe that OSHA may actually have slowed the downward trend in occupational fatality rates; but their analysis of the trend in occupational fatality rates provides a completely misleading view of the occupational fatality experience pre- and post-OSHA. In fact, the occupational fatality record has improved more rapidly since OSHA was established.

Kniesner and Leeth make the following statement regarding OSHA's impact on workplace safety: "Specifically, the pre-OSHA drop in the frequency of workplace fatalities from 1947 to 1970 was 70 percent larger than the post-OSHA drop from 1970 to 1993. OSHA might actually have slowed the downward trend in fatal injuries." Although I have been unable to replicate Kniesner and Leeth's 70 percent figure using their data, a review of NSC

fatality data shows that the downward trend in the fatality rate slowed to some extent post-OSHA. (The rate declined from about 31/100,000 in 1947 to 17.8/100,000 in 1970, an average annual reduction of 0.57, and declined further to 7.7/100,000 in 1993, an average annual reduction of 0.44.) However, this slowing of the downward trend was *not* because of OSHA. Rather, it is related to the fact that improvement becomes more and more difficult as the value of a variable approaches its absolute limit—in this case, zero. For example, I can guarantee that the downward trend in fatal injuries will slow even more during the next 23 years (i.e., the maximum improvement that can occur is from 7.7/100,000 to 0.0/100,000, an average annual reduction of 0.33).

Let's look at the numbers underlying these rates to determine what really happened over this period. NSC data (*Accident Facts*, top table on page 37) show that annual occupational fatalities dropped from 17,000 in 1947 to 13,800 in 1970, which means that 3,200 fewer lives were being lost annually in 1970 than was the case 23 years earlier in 1947. In the 23-year post-OSHA period, however, many more lives were saved every year: the number of job-related fatalities dropped to 9,100 in 1993, or 4,700 fewer than in 1970. Even more remarkable is the fact that this larger decline in the workplace death toll has been achieved despite a far greater increase in employment in the post-OSHA period compared to the pre-OSHA period—41 million vs. 23 million.

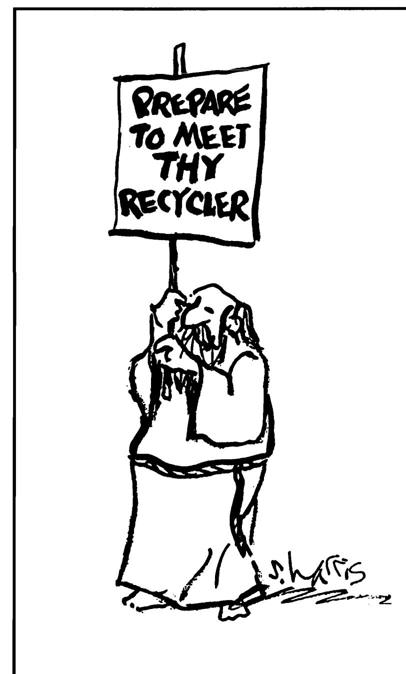
Kniesner and Leeth estimate that the cost of OSHA's current safety and health standards is $11 billion per year; but a review of the studies underlying Kniesner and Leeth's estimate demonstrates that it has no merit.

Kniesner and Leeth cite Hahn and Hird ("The Costs and Benefits of Regulation: Review and Synthesis," *Yale Journal on Regulation*, Vol. 8: 233, 1990) as the source of this (inflation-adjusted) $11 billion estimate. Hahn and Hird, in turn, cite studies by Denison (*Accounting for Slower Economic Growth: The United States in the 1970s*) and Crandall ("Whatever Happened to Deregulation?" in D. Boaz ed, *Assessing the Reagan Years*) for their estimate of OSHA costs in 1988—inflation-adjusted estimates of $9.0 billion and $8.5 billion, respectively. A review of these studies, however, completely undermines the validity of Kniesner and Leeth's $11 billion cost figure.

First, the Hahn and Hird $9 billion estimate derived from the Denison study does *not* pertain to OSHA-related costs; it is the cost of all "employee safety and health regulations." Specifically, it includes mining regulation by the Mine Safety and Health Administration and transportation regulation by the National Highway and Traffic Safety Administration. The regulations of these two agencies account for over 75 percent of the costs estimated by Denison. Adjusting Kniesner and Leeth's $11 billion estimate to reflect only OSHA-related expenditures yields a figure of $2.6 billion.

Second, the Denison estimates were based on McGraw-Hill surveys of plant and equipment expenditures that collected data on capital outlays for employee safety and health beginning in 1972. The surveys, which had response rates of only 10-12 percent (personal communication with Jill Thompson of McGraw-Hill, January 31, 1996), did not isolate incremental OSHA-related expenditures. Denison derived his estimates for OSHA-related capital and current costs by applying a series of assumptions to the McGraw-Hill data. It is not possible to determine whether his estimate of about $1 billion for OSHA-related costs in 1975 is even in the ballpark.

In sum, Kniesner and Leeth updated the wrong estimate from Hahn-Hird/Denison. Moreover, the original estimate was very weak, and it makes little sense to inflation-adjust an 18-year-old estimate when, on the one hand, additional standards have been promulgated (such as the cotton-dust standard Kniesner and Leeth mention) that impose new costs and generate new benefits, and, on the other hand, major



changes have occurred in the industrial mix, technology, and work practices that clearly affect OSHA-related costs.

Crandall stated (personal communication, January 23, 1996) that his data were also from the McGraw-Hill surveys and that he made no attempt to isolate OSHA-related safety and health expenditures. Thus the Hahn-Hird inflation-adjusted estimate relied on by Kniesner and Leeth has no relationship to actual OSHA-related expenditures.

Other statements made by Kniesner and Leeth also need to be addressed. They describe at length the Pymm Thermometer Company case, a real horror story, in which OSHA did not perform as it should have. Among their conclusions, Kniesner and Leeth state, "As the case of the Pymm Thermometer Company demonstrates, OSHA inspectors are often reluctant to close down a company, or even impose dramatic fines, when they find serious violations of health and safety standards. . . . Firms can avoid paying severe fines by simply agreeing to abide by OSHA's regulations in the future."

First, OSHA has no statutory authority to close down a company. (In contrast, its sister agency,

the Mine Safety and Health Administration, has the authority to order that miners be withdrawn from certain mining areas in specific situations.)

Second, the size of fines depends on a variety of factors, including among others, legal limits and administration policy. At the time of the Pymm inspections, OSHA penalties were limited to maximums of $1,000 for serious violations and $10,000 for willful and repeated violations. The Omnibus Budget Reconciliation Act of 1990 raised the maximums sevenfold and imposed a minimum proposed penalty of $5,000 for willful violations. The average penalty for a serious violation in FY1981 was $184; it was about $800 in FY1995.

In terms of policy, the initial Pymm inspection was conducted in 1981, a year in which a new administration implemented major changes in enforcement strategy resulting in a large drop in the number of violations cited, a reduction in the average penalty per violation, and a more than 50 percent cut in the number of follow-up inspections to assure abatement of violations. In reaction to Pymm and other abuses, OSHA instituted its egregious violation policy in 1986, which is aimed at particularly bad actors. This policy has led to many very large penalties—in FY1995, there were 17 egregious cases with an average initial proposed penalty of $1.6 million. Anyone familiar with the trade press knows that the impact of such fines goes far beyond the specific company involved.

Third, Kniesner and Leeth are correct in stating that OSHA reduces proposed penalties during negotiations with companies. However, these reductions are not provided to firms "simply agreeing to abide by OSHA's regulations in the future." Instead, the firms must agree to a specific timetable for abating covered hazards and establish a comprehensive safety and health program in most cases. In the largest cases, firms may be required to correct violations throughout the corporation, including facilities that were not inspected, and hire consultants to assure that abatement is accomplished. OSHA and the Department's solicitor weigh the anticipated benefits and costs (including delayed abatement of hazards) of pursuing a contested citation through the legal process. When it makes sense to settle, OSHA does so.

Citing Pymm and "other case histories," Kniesner and Leeth assert that "OSHA inspectors frequently overlook dangerous working conditions." An assertion based on a 10-year-old case and unidentified other cases is hardly compelling. If Kniesner and Leeth really have evidence to support this statement, OSHA would like to obtain it.

One last remark regarding the Pymm Thermometer Company case. Kniesner and Leeth comment that the combination of wage differentials and workers' compensation provides an economic incentive to firms to improve safety and health that is 1,594 times higher than that provided by OSHA. Clearly, in addition to the inadequate response of OSHA, the Pymm case could just as easily be cited as an illustration of the failure of wage differentials and/or the workers' compensation system to protect workers.

Let me just briefly correct several other errors. OSHA's draft ergonomics proposal estimated annualized social benefits of $9.2 billion, not $100 billion. The pesticide incident cited by Kniesner and Leeth came under the Environmental Protection Agency's jurisdiction, not OSHA's. The Clinton health-care reform proposal would not have eliminated experience rating of workers' compensation premiums. It addressed medical treatment of workers' compensation cases and required the creation of a commission to "study the feasibility and appropriateness of transferring financial responsibility for all medical benefits (including... workers compensation...) to health plans." (Health Security Act, Title X)

The eventual fate of OSHA will be determined in the political arena. I hope that those participating in that process will make their decisions on the basis of better information than that presented by Kniesner and Leeth.

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OSHA's Impact

KNIESNER and LEETH reply:

Siskind suggests that the major reason we believe OSHA should be abolished is that more fatal injuries occur at home than at work. He then discusses whether the chance of dying in an accident at work is greater than the chance of dying in an accident at home, depending on whether one uses estimates generated by the National Safety Council or Bureau of Labor Statistics. To generate the ratio of fatal accidents at work to those at home, he excludes the elderly, "who account for a disproportionate share of at-home deaths," and divides the at-home death rate of the 15-64 age group in half to account for the roughly two times greater number of hours spent at home engaging in activities such as "sleep, personal care, TV, social interaction" than at work. Arguing that OSHA is necessary because the chance of dying in a workplace accident is greater than the chance of dying in an accident while asleep is absurd.

Regardless of the extent of government involvement, being awake will remain more dangerous than being asleep. Based on the study by Juster and Stafford cited by Siskind, men sleep 58 hours on average per week and women sleep 60 hours; therefore, the time spent awake at home for men is 30 hours (versus 40.5 at work) and for women it is 50 hours (versus 21.9 at work). The hours spent awake hardly argue for dividing the at-home fatal accident rate in half to provide a more accurate comparison with the at-work rate.

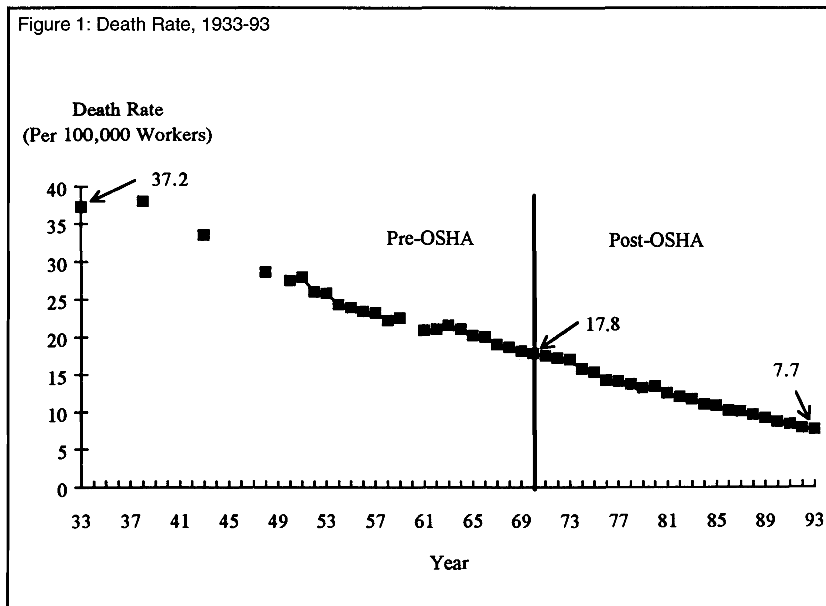
Are the risks people face at work tremendously greater than the risks they face outside of work? In 1993 the chance of dying in an accident on the job was 7.7 per 100,000 workers using National Safety Council estimates and 5.2 per 100,000 workers using Bureau of Labor Statistics estimates. The number Siskind cites for at-home accidents is 5.7 per 100,000 in the working-age population. In short, the chance of dying while engaged in such dangerous activ-

ities as personal care, social interaction, and watching television is roughly the same as the chance of dying while at work.

The real danger people face is not at the workplace, but behind the wheel of a car. In 1993 the motor-vehicle fatality rate was 16.3 per 100,000 population (National Safety Council, *Accident Facts*, 1994 Edition), more than twice the workplace fatality rate. For an accurate comparison of workplace hazards and driving hazards we need to make a few adjustments. First, we must adjust the workplace rate to account for only non-motor-vehicle accidents, because about 40 percent of workplace fatalities are motor-vehicle related. Next we must account for the age distribution of people killed in motor-vehicle accidents and also subtract work-related and pedestrian deaths. In 1993, 31,700 persons aged 15-64 died in motor vehicle accidents. Of that total, 3,500 were work related and 6,200 were pedestrian fatalities. With a population of about 168 million persons aged 15-64 (U.S. Department of Commerce, *Statistical Abstract of the United States, 1995*, Table 14) the fatal non-work-related, non-pedestrian motor-vehicle accident rate for working-aged individuals was 13.1 per 100,000 persons. Finally, we must correct for the relative difference between time spent in the car versus time spent at work. According to Juster and Stafford, men spend an average of 40.5 hours per week working and 3.5 hours commuting, and women spend an average of 21.9 hours working and 2.0 hours commuting. Using a 10 to one ratio, the "time-adjusted" rate of motor-vehicle fatalities for the working-aged population was a whopping 131.0 per 100,000 persons versus a 3.12 to 4.62 per 100,000 worker non-motor-vehicle fatality rate.

Let us be perfectly clear. We are not advocating setting up a federal transportation safety and health administration with the duty to visit people's garages to see if they are complying with federal automobile safety and health standards. In keeping with our original article, we offer the motor-vehicle fatality rate as a base of comparison to see if people on average are facing greater hazards at work than elsewhere. Whether one uses the at-home rate, the unadjusted motor vehicle rate, or the adjusted motor vehicle rate, OSHA is not the answer.

Figure 1: Death Rate, 1933-93



The argument in our article is not that OSHA should be abolished simply because the level of workplace fatalities is already low. Rather, we believe that evaluation of any government program should be based on considerations of effectiveness and efficiency. Unfortunately for Siskind and his fellow employees at OSHA, OSHA fails both criteria for good government policy. As an example of the very weak evidence of OSHA's effectiveness we presented in our article a graph showing the death rate per 100,000 population from 1928 to 1993. We thank Siskind for pointing out that we had inadvertently referred to this as the death rate per worker and so present the graph above using the per worker figures.

Whether one uses per population or per worker statistics, workplace fatalities have steadily dropped over time. The downward trend began well before OSHA and has continued since OSHA's inception. To credit OSHA with the entire post-1970 drop in fatalities—as was recently done by both Robert Reich, the secretary of labor, and Joseph Dear, the assistant secretary of labor for occupational safety and health—is similar to a physician taking credit for the health of a patient whom he did not start treating until two weeks after the patient began recovering on his own. The impact of the doctor, like the impact of OSHA, must be judged based on the counterfactual evidence of what the pace of recovery would have been without his intervention. Devising the counterfactual trend for OSHA is extremely difficult. Unlike cases involving medical procedures, in the case of OSHA, no control group exists to compare workplace fatalities with and without the agency. Simply looking at the graph above does not cause one to leap to the conclusion that OSHA has had a dramatic impact on the trend of workplace fatalities.

In an unpublished paper ("Safety Through Experience Rating: A Review of the Evidence and Some New Findings," July 1994) Richard Butler of the University of Minnesota examined the National Safety Council data on workplace fatality rates in some detail. He estimated how the logarithm of workplace death rates per 100,000 workers from 1947 to 1990 was related to measures of the unemployment rate, the occupational composition of the labor force, workers' compensation costs,

and the presence of OSHA. Siskind argues that we should be looking at OSHA's impact by comparing the percentage reduction in fatal injury risks and not the absolute reduction as we do in the paper. By using the logarithm of the death rate as the dependent variable, Butler used the framework advocated by Siskind. Butler summarizes his results on OSHA: "Not only is there an absence of an OSHA shift in death rates as reflected in Figure 3 trends, there does not appear to be any shift after controlling for other factors. Generally, the OSHA variable is statistically insignificant (consistent with the findings reported in Smith, 1992), and has a perverse sign. That is, the positive coefficient seems to indicate that the death rate actually rose in the OSHA period after controlling for other factors."

Butler's Figure 3 is essentially the graph we present above. As alluded to by his reference to Robert Smith's paper in *Research Frontiers in Industrial Relations and Human Resources* (Industrial Relations Research Association, 1992), most studies of OSHA's impact on workplace safety have found no statistically significant reduction in the rate of workplace fatalities or workplace injuries. To bend over backwards in giving OSHA the benefit of the doubt, we picked the two most favorable estimates of OSHA's impact to discuss in our article for *Regulation*. Based on the papers by W. Kip Viscusi in the *Rand Journal of Economics* (Winter 1986) and Wayne Gray and John Scholz in the 1993 edition of *Law and Society Review*, we argued that OSHA could have reduced injuries by 4.6 percent.

Considering the number of studies that have found no evidence of OSHA improving workplace safety, it is hard to conclude that OSHA passes even the minimum criterion for the establishment of any government program, namely, Is it effective? Does it have any impact on the problem it is supposed to address? Nevertheless, in our article we went on to examine whether OSHA was efficient by giving OSHA the benefit of the doubt and assuming that it actually had improved safety by 5 percent. Siskind takes exception to the study we relied on to generate the cost side in our cost/benefit calculation. He argues that the original estimates used by Hahn and Hird in their 1991 *Yale Journal of Regulation* paper included non-OSHA costs and were based on faulty survey data by McGraw-Hill. Attempting to generate the cost of any broad social program that permeates the economy is exceedingly difficult. One must account for expenses related to capital equipment, lost productivity, and compliance costs. Compounding the problem, regulations change over time, easing some burdens but creating others. In a 1986 paper published in *Law and Contemporary Problems*, Viscusi presents estimates that investments of $100 billion to $500 billion were required for firms to comply fully with OSHA regulations proposed during 1975-80 alone. The $100 billion to $500 billion range seriously overestimates OSHA's ultimate cost because most of the proposed regulations were ultimately withdrawn.

We believe the $11 billion per year figure we use is a relatively conservative estimate of OSHA's total cost to the U.S. economy. The prestigious Harvard Group on Risk Management Reform estimated that the annual cost of complying with all federal risk regulations was $600 billion per year (*Reform of Risk Regulation: Achieving More Protection at Less Cost*, Center for Risk Analysis, Harvard School of Public Health, March 1995). At $11 billion, OSHA would account for only 1.8 percent of all regulatory costs in the United States. In an early assessment of OSHA, Smith argues that compliance costs are difficult to estimate but "are probably large" (*The Occupational Safety and Health Act: Its Goals and Its Achievements*, American Enterprise Institute for Public Policy Research, 1976), a point reinforced by the continual and fierce lobbying efforts against OSHA by American business. Based on any reasonable cost estimate, the benefits of OSHA—which may very well be zero—fall far short of its costs.

Siskind wraps up his critique of our article by presenting a laundry list of supposed factual errors. It would be tedious for all concerned for us to explain why Siskind's claims are either wrong or trivial. To give the reader a flavor of what is required, consider the first supposed factual error on Siskind's list. In our article we say that "OSHA inspectors are often reluctant to close down a company." Siskind notes, "OSHA has no statutory authority to close down a company." He is quite correct, an inspector cannot close down a company, but he can appeal to the secretary of labor to seek a court injunction to close down a worksite if he believes that workers are in imminent danger of death or serious physical harm. Inspectors are reluctant to seek court injunctions to close down worksites.

Let us end with an area of agreement. As Siskind says, "Clearly, in addition to the inadequate response of OSHA, the Pymm case could just as easily be cited as an illustration of the failure of wage differentials and/or the workers' compensation system to protect workers." Precisely. No federal system of safety and health regulations, no state system of accident insurance, and no market system of wage differentials will ever be able to protect all workers from stupid or evil actions of employers. In other areas of life, people who are harmed by the intentional actions of others can sue to recover damages, including losses for pain and suffering. As we noted in discussing the Florida pesticide case, employees often find it difficult to sue their employers because of the strict but limited liability offered through workers' compensation legislation. We believe that in cases of gross employer misconduct, workers should be permitted to recover full damages. Allowing worker suits would deter firms from engaging in dangerous practices and would provide a measure of fairness to workers who are injured through the deliberate actions of their employers.

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