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The Jack Pemberton Lecture Series March 2010

Learning from Troubled Times: Pursuing Equality Outside an Anti- Discrimination Law Frame by Rethinking the Promotion of Safe Work During the Bush Administration*

By SUSAN BISOM-RAPP**

Introduction

GREETINGS DEAN BRAND, faculty, staff, students, alumni, and guests. I will start by thanking Professors Tristin Green, Maria Ontiveros, and Michelle Travis and the University of San Francisco's School of Law for inviting me to give this lecture, which is named for the late Jack Pemberton, a warrior for worker justice. It is a singular honor to deliver a lecture in his memory.

* This essay is based on a lecture delivered on March 4, 2010 at the James R. Browning Courthouse, U.S. Court of Appeals for the Ninth Circuit, in San Francisco.

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Today's conference panels at the law school, organized by my colleagues as a precursor to my lecture, were wonderful opportunities for intellectual exchange. The panels' theme, *Moving Equality Foreword: Present and Future Directions of Lawyering for Equality*, represents a fitting tribute to Jack Pemberton's work. I found the deceptively simple title intriguing because, over the last few years, I have concluded that in order to meet the immensely challenging goal of ensuring equal opportunity for traditionally disadvantaged groups, we need to think beyond a standard anti-discrimination law framework.¹

This is because traditionally disadvantaged groups may labor in conditions better addressed by laws and legal protections other than our prototypical anti-discrimination law statutes—Title VII of the Civil Rights Act of 1964,² the Age Discrimination in Employment Act of 1967,³ and the Americans with Disabilities Act of 1990.⁴ Mind you, I am not arguing that anti-discrimination law protection is unnecessary. It is necessary. Rather, I am arguing that exclusive reliance on anti-discrimination law is not sufficient to guarantee workplace equality or social justice.

Nor is exclusive reliance on traditional lawyering, litigation, and law reform sufficient to guarantee workplace justice and equality. Although all three tasks are terribly important, in today's challenging economic and political environment we must think broadly about strategy and tactics.

Indeed, the global recession has thrown the market-friendly aspects of American workplace law, the extent to which the social safety net remains under-subsidized, and the difficulty our political system has in promulgating and deploying corrective measures, into stark relief.⁵ As the recession hit, employers—in general unbound by legal

1. My thinking is influenced, *inter alia*, by the recent work of a number of extraordinary scholars who have written about unsettling the traditional boundaries of labor and employment law. See, e.g., Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163 (2007); Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights and the Low Wage Worker*, 2009 U. CHI. LEGAL F. 103; Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008); Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments*, 2009 U. CHI. LEGAL F. 1.

2. 42 U.S.C. § 2000(e)–(e)(17) (2006).

3. 29 U.S.C. §§ 621–634 (2006).

4. 42 U.S.C. §§ 12101–12213 (2006).

5. For a discussion of how the global recession has affected older workers in the United States see Susan Bisom-Rapp, Andrew Frazer & Malcolm Sargeant, *Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the*

strictures on terminating employees and unburdened by potential costs such as mandatory severance pay—shed workers at a rate unprecedented since the Great Depression.⁶ The nation's unemployment rate peaked at 10.1% in October 2009;⁷ California's unemployment rate was 12.4% in December 2009.⁸

Moreover, although press coverage and political discourse on the subject is muted, we know labor market outcomes are not distributed equally in the present crisis. Gaps between the unemployment rates of vulnerable workers and the majority increased dramatically during this recession and track lines of race, ethnicity, age, and sex.⁹ Turning to California, for example, the Economic Policy Institute reports that in the third quarter of 2009, while the unemployment rate for white workers was 9.6%, the unemployment rate for African Americans was 15.4%, and the unemployment rate for Hispanics was 15.6%.¹⁰

Such data reveal the need to think beyond a traditional equal employment opportunity law framework to safeguard the gains of the past and move equality forward. Achieving those goals requires isolating the aspects of our “new economy” that amplify vulnerability, studying their effects, and creating traditional and more experimental legal and extra-legal strategies to protect employees.

With this in mind, my topic for this evening is: *Learning from Troubled Times: Pursuing Equality Outside an Anti-Discrimination Law Frame by Rethinking the Promotion of Safe Work During the Bush Administra-*

United Kingdom, and the United States, 15 EMP. RTS. & EMP. POL'Y J. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699447.

6. A recent study indicates that the serious labor market effects witnessed since the recession began in December 2007 are out of proportion to the economic distress experienced by corporations. ANDREW SUM & JOSEPH MCLAUGHLIN, CTR. FOR LABOR MKT. STUDIES NORTHEASTERN UNIV., HOW THE U.S. ECONOMIC OUTPUT RECESSION OF 2007–2009 LED TO THE GREAT RECESSION IN LABOR MARKETS: THE ROLE OF CORPORATE DOWNSIZING, WORK HOUR REDUCTIONS, LABOR PRODUCTIVITY GAINS, AND RISING CORPORATE PROFITS 2, (2010), http://www.clms.neu.edu/publication/documents/How_the_U.S._Economic_Output_Recession_of_20072009_Led_to_the_Great_Recession_in_Labor_Markets.pdf.

7. RICHARD W. JOHNSON ET AL., URBAN INST. PROGRAM ON RET. POLICY, UNEMPLOYMENT STATISTICS ON OLDER AMERICANS, at tbl.2 (2010), http://www.urban.org/uploadedpdf/411904_unemploymentstatistics.pdf.

8. Alana Semuels, *California's Unemployment Rate Stays Flat at 12.4%*, L.A. TIMES, Jan. 22, 2010, at 1, <http://articles.latimes.com/2010/jan/22/business/la-fi-caljobs23-2010jan23>.

9. See generally Algernon Austin, *Uneven Pain: Unemployment by Metropolitan Area and Race*, ECON. POL'Y INST. ISSUE BRIEF No. 278, at 1 (June 8, 2010), http://epi.3cdn.net/91dea2086a6f00e2a_afm6bnshh.pdf.

10. Kai Filion, *Downcast Unemployment Forecast: Targeted Job Creation Policies Necessary to Offset Grim 2010 Projections*, ECON. POL'Y INST. ISSUE BRIEF No. 270, at 1, 6–9 tbls.2, 3 & 4 (Jan. 14, 2010), http://epi.3cdn.net/d9904b716d3cf62538_psm6bnec9.pdf.

tion. In addressing this subject, I will be drawing from a study I completed during the summer of 2009 on the relationship between two key federal agencies: the Occupational Safety and Health Administration (“OSHA”) and the National Institute of Occupational Safety and Health (“NIOSH”).¹¹ I will also be drawing from a chapter I authored in 2008 as part of an international team that produced a comparative law report for the Italian Labour Ministry on occupational safety and health in the new economy.¹²

Occupational Safety and Health (“OSH”) provides an interesting example for two reasons. First, OSH is a fertile area for demonstrating the adverse effects of the new economy and how they exacerbate worker vulnerability. More specifically, for at least a decade specialists here and abroad have been concerned about the OSH challenges arising from the increasing use by employers of contingent workers such as temporary workers, independent contractors, and part-time workers.¹³

Similar concerns center around new forms of work organization, such as telecommuting, work in call centers, and new trends, such as increasing workplace stress and increasing working hours.¹⁴ New forms of employment contracts and new models of work organization are proving to have significant occupational safety and health ramifications. Within this broader area, experts remain especially concerned about vulnerable groups, including racial minorities, immigrants, women, and young and older workers, who may be disproportionately affected by increases in precarious work and new workplace trends.¹⁵

Second, OSH serves our purposes well because it is an area where, during the Bush administration, despite a prevailing ethos of deregulation and regulatory capture by industry of OSHA, quite a bit

11. Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy*, 55 WAYNE L. REV. 1197 (2009) [hereinafter Bisom-Rapp, *Deregulation and Safe Work*].

12. Susan Bisom-Rapp, *The United States, in WORK ORGANIZATION AND NEW FORMS OF EMPLOYMENT: EMPLOYEE PARTICIPATION AND GOOD PRACTICES IN RELATION TO HEALTH AND SAFETY AT WORK 1* (2008) [hereinafter Bisom-Rapp, *NEW FORMS OF EMPLOYMENT*] (unpublished comparative law report prepared for the Italian Ministry of Labour; U.S. chapter on file with author).

13. See, e.g., J. Benach & C. Muntaner, *Precarious Employment and Health: Developing a Research Agenda*, 61 J. EPIDEMIOLOGY & CMTY. HEALTH 276 (2007); Kristin J. Cummings & Kathleen Kreis, *Contingent Workers and Contingent Health: Risks of a Modern Economy*, 299 JAMA 448 (2008).

14. See, e.g., Bisom-Rapp, *NEW FORMS OF EMPLOYMENT*, *supra* note 12, at 9–18.

15. See *id.* at 13–18, 27–32.

of important work was done. These accomplishments, however, were the work of OSHA's much less well-known sister agency, the National Institute of Occupational Safety and Health, an agency without regulatory enforcement authority.¹⁶ In fact, a broad array of stakeholders—from the Chamber of Commerce to the AFL-CIO—gave good marks to the Institute during the Bush administration.¹⁷

Reviewing the disparate performance of the sister agencies, however, not only reveals NIOSH's innovative mechanisms for increasing OSH—mechanisms that have nothing to do with traditional lawyering, litigation, and law reform—it also contributes to our evolving understanding of the relationship between hard and soft law. To that end, the academic debates surrounding new governance scholarship provide a backdrop.

New governance theory, broadly defined, criticizes traditional, top-down, command and control legal regulation as ossified, and to some extent, outdated.¹⁸ Alternatively, new governance theorists recommend regulatory techniques that are more cooperative, responsive, and participatory.¹⁹ Critics of new governance, in contrast, wisely caution that the results of these new techniques are mixed and that they may promote cosmetic rather than actual compliance.²⁰

Situating the safety agencies' recent records within those debates reveals the pitfalls of traditional and new approaches to regulation and the synergies between them. In order to promote OSH for America's increasingly vulnerable employees, both approaches are necessary and ideally should be linked.²¹ But those links may be more diffuse than many assume. During periods when deregulation predominates, agencies like NIOSH, which lack enforcement power, may be better positioned to obtain substantive results than their regulatory counterparts.²² That insight argues for preserving and strengthening soft law intermediaries like NIOSH, even during times, like the present, when the regulatory tide has apparently turned.

16. See *The National Institute for Occupational Safety and Health (NIOSH): About NIOSH*, CENTERS DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/about.html> (last updated Nov 24, 2009).

17. Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1237–38.

18. See Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 1, 1–3 (Gráinne de Búrca & Joanne Scott eds., 2006).

19. See *id.* at 3.

20. Kimberly D. Krawiec, *The Return of the Rogue*, 51 *ARIZ. L. REV.* 127, 144–45 (2009).

21. See Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1227.

22. *Id.* at 1264.

Below, I will rethink the promotion of safe work during the Bush administration in three steps. First, I will review and then reframe Congress's fractured system for producing OSH law, including the roles of and relationship between OSHA and NIOSH. Next, I will compare OSHA's and NIOSH's records during the Bush administration. Finally, I will draw some lessons from the exercise.

I. The Fractured System for Producing OSH Law

Fully comprehending the roles and relationship between OSHA and NIOSH requires considering the Occupational Safety and Health Act of 1970 ("the OSH Act").²³ The OSH Act aims "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions"²⁴ To accomplish that goal, Congress created a strange regulatory structure. Heavy-duty standard setting and enforcement responsibility was given to the Secretary of Labor; OSHA is the regulatory agency responsible for carrying on those activities.

Activities of scientific research to assist OSHA in standard setting were located in a different executive department. NIOSH, responsible for carrying on that research and making OSH standards recommendations, was located in the Department of Health, Education, and Welfare, the precursor to the Department of Health and Human Services ("DHHS").²⁵ The director of NIOSH reports directly to the director of the Centers for Disease Control, who reports directly to the Secretary of DHHS.²⁶ The Institute is headquartered in Washington, D.C. and Atlanta with labs and offices in seven states.²⁷ NIOSH maintains a staff of about twelve hundred.²⁸

There is also a third piece in this fractured system. Congress created an independent federal agency, the Occupational Safety Health Review Commission, as the body that adjudicates disputes over citations issued by OSHA.²⁹

The relationship between OSHA and NIOSH has often been described as awkward. Although NIOSH's research has led to notable

23. 29 U.S.C. §§ 651–678 (2006).

24. *Id.* § 651(b).

25. Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 *YALE J. ON REG.* 1, 57–58 (1989).

26. Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1204.

27. John Howard, *Informing Public Health Policy and Practice: The Strategic Management of Research Processes and Organizations*, 22 *GOVERNANCE* 203, 206 (2009).

28. *Id.*

29. *Home*, U.S. OCCUPATIONAL SAFETY & HEALTH REV. COMMISSION, <http://www.oshrc.gov/> (last updated Jan. 31, 2011).

OSHA regulatory success—for example, the elimination of brown lung disease³⁰—OSHA has frequently been unreceptive to regulating based on NIOSH's findings.³¹ In thinking about this checkered inter-agency relationship, scholars have long been concerned about the location of these two agencies in different executive departments.

Professors Sidney A. Shapiro and Thomas O. McGarity, longtime scholarly critics of OSHA, thus trace coordination difficulties to, among other things, there being no single cabinet-level secretary to whom the agencies report and to whom they can turn to resolve disputes.³² Dr. Ted Greenwood, presently program director of the Alfred P. Sloan Foundation, has noted that NIOSH's budget and research priorities are determined separately from OSHA's regulatory agenda, increasing the odds that NIOSH's efforts will be unresponsive to OSHA's needs.³³ Professor Mark Rothstein has connected the agencies' coordination problems to OSHA's lack of professional scientific expertise; NIOSH generates much more scientific information than OSHA can consume.³⁴ Professors Marc Allen Eisner, Jeffrey Worsham, and Evan J. Ringquist, specialists in regulatory policy, tie coordination problems to the difficulty of integrating the work produced by professionals from different disciplines.³⁵

Some see the failure of the agencies to create a strong inter-agency relationship as hampering OSHA's ability to set standards.³⁶ Under this view, NIOSH exists only to conduct research that is used to make recommendations to its regulatory partner. Shifting one's focus to what NIOSH has accomplished because of its distance from OSHA provides a decidedly different perspective.³⁷ Indeed, framed correctly, common criticisms of how the agencies interact represent serendipitous virtues. The distance between OSHA and NIOSH may represent

30. See Cynthia Washam, *Working Toward a New NIOSH*, 104 ENVTL. HEALTH PERSP. 484 (1996).

31. Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1217–18.

32. Shapiro & McGarity, *supra* note 25, at 58.

33. TED GREENWOOD, *KNOWLEDGE AND DISCRETION IN GOVERNMENT REGULATION* 123 (1984).

34. See Mark A. Rothstein, *Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example*, 12 B.C. ENVTL. AFF. L. REV. 627, 653 (1985).

35. See Marc Allen Eisner, et al., *Contemporary Regulatory Policy* 195 (2d ed. 2006).

36. See, e.g., Andrew P. Morriss & Susan E. Dudley, *Defining What to Regulate: Silica and the Problem of Regulatory Categorization*, 58 ADMIN. L. REV. 269, 323 (2006).

37. See generally Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1207 (explaining that the agencies' lack of coordination "protected NIOSH during a period of strong deregulatory sentiment").

an ideal configuration when the idea of state regulation is under siege.

Conceptualizing NIOSH's mission more broadly is integral to rethinking OSH law and its fractured administration. John Howard, NIOSH director for six years during the Bush years and reappointed by the Obama administration, notes NIOSH plays dual roles regarding its research: (1) scientific translation, focused on conducting and then transforming its research into actual OSH improvements; and (2) scientific support for regulatory standard setting.³⁸ The latter relies on the traditional regulatory process in order to bring about change. The former clearly does not.

Having reframed Congress's fractured system and rethought the relationship between OSHA and NIOSH, I will now move on to analyze the sister agencies' records during the Bush administration, contrasting the poor performance of OSHA with the notable accomplishments of NIOSH.

II. A Study in Contrasts: Comparing OSHA's and NIOSH's Records

Comparing OSHA's and NIOSH's track records during the Bush administration produces striking contrasts. In fact, it reminds me of folktales about siblings whose motives and dispositions are diametrical: one sibling is greedy and only interested in self-advancement while the other is good natured and tries to do right. In OSHA's case, the agency's disposition during the Bush years is best characterized as deferential to corporate interests, often at the expense of workplace safety.

NIOSH, in turn, comes across as doing its best, given limited means and lack of regulatory power, to address emerging OSH issues and to get the results of scientific inquiry into the hands of those who can use it. In setting out these contrasting records, let us first consider the ideology of the agencies' leadership. OSHA has historically been sensitive to political change in the White House and Congress.³⁹ In turn, the ideology of agency leadership influences the ability of certain stakeholder groups, such as employers, to assert their own agendas given the political climate of the time.⁴⁰

38. Howard, *supra* note 27, at 205–06.

39. EISNER ET AL, *supra* note 35, at 199.

40. Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1234.

Turning to the ideological orientation of OSHA's leaders during the Bush years, we find John Henshaw, a former industrial hygienist for Monsanto,⁴¹ allegedly telling staff that employers are OSHA's real customers, withdrawing twenty-six draft regulations from OSHA's calendar in just his first two years on the job, and assisting with the rescission of the Clinton era ergonomics rule.⁴²

Henshaw's successor as Assistant Secretary of Labor for Occupational Safety and Health, Edwin Foulke, Jr., a management-side labor lawyer who, before his OSHA appointment, opposed OSHA regulations on behalf of the Chamber of Commerce, describes himself as a true Ronald Reagan Republican who believes in limited government.⁴³ Under his stewardship, OSHA primarily promoted voluntary compliance programs and corporate self-regulation.⁴⁴

OSHA under these two men evidenced a strong deregulatory, pro-industry ideology. Reports by career staff reveal the withdrawal of proposed regulations, deliberate delay of others, and the modification of safety warnings in response to industry pressure.⁴⁵ Congressional hearings reveal legislators aghast at how poorly the agency performed.⁴⁶ Recent Government Accountability Office ("GAO") reports indicate poor oversight and administration of enforcement programs during the Bush years.⁴⁷

The ideological orientation of NIOSH's leadership was far different. For six of the eight years of the Bush administration, NIOSH was led by John Howard, a career public health administrator and former medical school professor.⁴⁸ A review of Dr. Howard's writings and

41. Monsanto is a large, multinational agricultural biotechnology corporation that has seen its share of controversy. For more information, see *Who We Are*, MONSANTO, <http://www.monsanto.com/whoware/Pages/default.aspx> (last visited Feb. 23, 2011).

42. R. Jeffrey Smith, *Under Bush, OSHA Mired in Inaction*, WASH. POST, Dec. 29, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/28/AR2008122802124.html>.

43. Stephen Labaton, *OSHA Leaves Worker Safety in Hands of Industry*, N.Y. TIMES, Apr. 25, 2007, http://www.nytimes.com/2007/04/25/washington/25osha.html?pagewanted=1&_r=1&th (quoting Edwin Foulke, Jr.).

44. *Id.*

45. Smith, *supra* note 42.

46. See, e.g., *Is OSHA Failing to Adequately Enforce Construction Safety Rules?: Hearing Before the H. Comm. on Educ. and Labor*, 110th Cong. 3-5 (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=F:43026.pdf.

47. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-395, OSHA'S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVERSIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY (2009) [hereinafter VOLUNTARY PROTECTION PROGRAMS].

48. James Nash, *John Howard Appointed New Director of NIOSH*, EHS TODAY (June 25, 2002, 12:00AM), http://ehstoday.com/news/ehs_imp_35587/.

speeches reveals a highly nuanced view of the regulatory challenges attendant to safeguarding employees in the twenty-first century and evidences an orientation that puts worker welfare at the center.⁴⁹

Moreover, the occasion of Dr. Howard's untimely ouster by the Bush administration, which in 2008 declined to reappoint him to a second term, provides a glimpse of the esteem in which he and NIOSH were held by a broad array of stakeholders who argued for his retention. These groups include the AFL-CIO, the Chamber of Commerce, the American Society of Safety Engineers, the American Industrial Hygiene Association, then New York Governor David Patterson, and several of New York's congressional delegation.⁵⁰ Decrying the Bush administration's decision, *The New York Times* called Dr. Howard's removal "[a] [p]ointless [d]eparture."⁵¹

In addition to ideology, however, the agencies' records can also be compared by examining OSHA's and NIOSH's adherence to their traditional missions during the Bush years. To this end, it is interesting to review OSHA's and NIOSH's responses to the emergence of the rare and devastating lung disease, *bronchiolitis obliterans*, linked to inhaling butter flavoring by microwave popcorn workers and known popularly as "popcorn lung."⁵² In confronting the hazard, which emerged in 2000 at the end of the Clinton administration, NIOSH, during the early years of the Bush administration, worked expeditiously to isolate the hazard and its cause, identify safeguards against it, inform workers and employers affected by it, and pass onto OSHA all relevant data.⁵³

OSHA, in contrast, attempted to address the crisis through voluntary employer self-regulation, assertions that the data on diacetyl's health effects was "murky," and a refusal to consider rulemaking until forced to do so by union-initiated litigation and proposed legislation,

49. See, e.g., John Howard, *The Future of Occupational Safety and Health* (Nov. 11, 2008) (paper presented at the 75th Anniversary of the International Safety Equipment Association), available at <http://www.4cornerssafety.com/uploads/Dk5qf0J4FwZ7vPSLFqjtB5mM3kNYSJkV.pdf>.

50. Editorial, *A Pointless Departure*, N.Y. TIMES, July 11, 2008, http://www.nytimes.com/2008/07/11/opinion/11fri3.html?_r=1&ref=john_howard.

51. *Id.*

52. See generally Andrew Scott Dulberg, *The Popcorn Lung Case Study: A Recipe for Regulation?*, 33 N.Y.U. REV. L. & SOC. CHANGE 87 (2009) (providing a chronological overview of regulatory efforts).

53. David Michaels, et al., *A Case of Regulatory Failure — Popcorn Workers Lung*, PROJECT ON SCIENTIFIC KNOWLEDGE OF PUBLIC POLICY, http://www.defendingscience.org/case_studies/A-Case-of-Regulatory-Failure-Popcorn-Workers-Lung.cfm (last visited Jan. 22, 2010).

seven years after the first cases emerged.⁵⁴ In short, the popcorn lung case is a tale of a regulatory agency abandoning its mission while NIOSH, its research counterpart, remained true to its task.

One might, however, argue this comparison is inapt. In other words, comparing OSHA's regulatory efforts to NIOSH's research efforts is like comparing apples and oranges. The study I completed during the summer of 2009 therefore also considers OSHA's and NIOSH's soft law or new governance efforts during the Bush years.

III. OSHA's and NIOSH's Soft Law Programming During the Bush Administration

Focusing on the sister agencies' new governance, or soft law programming, provides an alternative comparison. The study I completed in summer 2009 begins by examining OSHA's Voluntary Protection Program ("VPP"), a program launched during the Reagan years that became a centerpiece of the Clinton administration's reinventing government initiative.⁵⁵ The VPP allows employers, who develop their own comprehensive OSH systems and maintain below average numbers of occupational injuries and illnesses, to avoid OSHA programmed inspections.⁵⁶ During the Bush administration, VPP participants were also not subject to OSHA citations for regulatory violations which were promptly corrected.⁵⁷

OSHA's faith in this new governance program, which seeks to harness the self-regulatory capacity of employers and cooperatively engage them, is illustrated by the tremendous increase in the number of VPP participants during the Bush years. From 2003–2008, the number of VPP sites more than doubled, from a little over one thousand sites to close to twenty-two hundred sites.⁵⁸ Until recently however, good data was lacking on VPP outcomes. A recent GAO report provides definitive answers regarding the administration of the VPP during the Bush administration. In short, the GAO concluded OSHA lacked internal controls to ensure that only qualified employers became and remained VPP participants.⁵⁹ Both the minimal documentation re-

54. *See id.*

55. *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 343–44 (2005).

56. *See* OSHA FACT SHEET: VOLUNTARY PROTECTION PROGRAMS (2004), <http://www.safe-workplace.com/osha-vpp-factsheet.pdf>.

57. *Id.*

58. *See* VOLUNTARY PROTECTION PROGRAMS, *supra* note 47, at 7.

59. *Id.* at 12.

quirements of the VPP and OSHA's failure to ensure that regional offices complied with VPP policies were deemed significant failings.⁶⁰ These failings resulted in unqualified employers, those that had experienced on-site fatalities, remaining in the program when they should have been removed.⁶¹

A central critique of new governance efforts is that they may promote this exact type of outcome—compliance results that are symbolic and cosmetic rather than substantive.⁶² New governance scholars, in turn, while interested in the promise of programs like the VPP, also warn about such efforts operating as a cover for deregulation and counsel that accountability must be built into the efforts for them to succeed.⁶³ Such warnings proved prescient as applied to OSHA during the Bush administration. Not only did OSHA succumb to a deregulatory impetus regarding its traditional standard setting and enforcement role,⁶⁴ the agency also emasculated its new governance programming.⁶⁵ When one examines OSHA's record during the Bush administration, the pitfalls of hard and soft law are evident. Agency capture⁶⁶ disabled both hard and soft law.

Leaving OSHA behind, and keeping in mind that NIOSH lacks "hard law" regulatory authority, my study then turns to the Institute's soft-law efforts during the Bush years, focusing on NIOSH's Strategic Management of Research program, an effort launched by Dr. John Howard.⁶⁷ NIOSH used strategic management during the Bush administration to positively influence and incentivize beneficial safety and health outcomes.

Two techniques discussed in new governance literature enabled NIOSH, an agency lacking traditional enforcement power, to tackle significant OSH problems and catalyze real world change: (1) creative use of grant-making authority; and (2) collaborative problem solv-

60. *Id.*

61. *Id.* at 14.

62. See Krawiec, *supra* note 20, at 144–45.

63. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1112 (2005).

64. Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1210–13, 1235–37, 1239–43.

65. *Id.* at 1243–47.

66. "Agency capture" refers to agencies being "captured" by the industries they regulate due to the close working relationships they develop and the revolving door between agency officials and lobbyists.

67. See generally Howard, *supra* note 27 (describing NIOSH's programmatic efforts).

ing.⁶⁸ During the Bush years, NIOSH created a strategic management superstructure that guides and influences its research funding activities, thereby making creative grant-making one of two new governance techniques marshaled by the Institute. Collaborative problem solving, the second new governance tool, is integral to NIOSH's strategic management.

The strategic management system is based on five strategies that aim to make NIOSH's research and programming transparent, relevant, and outcome-oriented. Dr. John Howard, in a recent article, outlined those strategies.⁶⁹ The first step was NIOSH's creation of a program portfolio consisting of thirty-two outcome-oriented, grant-making programs.⁷⁰ The second strategy required each program to partner with stakeholders such as labor unions, employer groups, occupational safety and health professional groups, and academic researchers, to reach agreement on a research agenda with measurable outputs, measurable ultimate outcomes, or measurable intermediate outcomes.⁷¹ The third prong of these efforts is an emphasis on "research to practice."⁷² No matter how theoretical the science involved, each program is required to plan to transfer the results of its research into actual OSH practice. The fourth set up a funding process for emerging OSH risks like nanotechnology.⁷³ The fifth—and from my perspective as a relative skeptic of new governance efforts, the most exciting part of NIOSH's scientific management approach during the Bush years—was subjecting its programming to outside, independent evaluation by the National Academies, specifically to determine program relevance and impact.⁷⁴ Here, in fact, was the kind of accountability structure often lacking in new governance efforts, and it was initiated during the Bush administration, no less.

Work began in 2005 and ended in 2008, with eight programs—whose funding represents a majority of NIOSH's budget—receiving evaluation reports.⁷⁵ After evaluation, each program was responsible for developing an implementation plan based on the report's findings

68. See Susan Bisom-Rapp, *Puzzling Evidence from a Troubled Time: Rethinking State Promotion of Safe Work during the Bush Administration*, 14 EMP. RTS. & EMP. POL'Y J. 295, 312–13 (2010).

69. Howard, *supra* note 27, at 208.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 208, 210.

74. *Id.* at 211–13.

75. *Id.* at 211.

and recommendations, seeking stakeholder input on its plan, and then integrating the implementation plan into its strategic plan for the future.⁷⁶ The latter is reviewed annually to assess progress toward accomplishing the National Academies' recommendations.⁷⁷

While these actions are descriptively impressive, work by Professor Susan Sturm on the strategies used by the National Science Foundation ("NSF") in its innovative ADVANCE program, which seeks to increase the number of women on university science and engineering faculties, helps explain why NIOSH's strategic management efforts were effective and how they might be improved.⁷⁸ Sturm isolated three factors—reciprocity and peer review; capacity building; and leveraging networks and practice communities—that enable NSF to influence diversity outcomes at universities receiving NSF ADVANCE grants.⁷⁹ My study applies those factors to NIOSH's strategic management system.

NIOSH clearly uses reciprocity and peer review. During the Bush years it decided to apply to its own internal research a competitive grant process similar to the one used for extramural research.⁸⁰ And, as noted above, the National Academies independently evaluated the research corpus of eight NIOSH programs.⁸¹

NIOSH also uses the strategic management process to leverage its relationships through professional networks and practice communities. The Institute's ongoing participation in OSH consensus standard organizations, OSH symposia, and scientific meetings are opportunities for the diffusion of NIOSH's research-driven innovations.⁸²

Of Sturm's three factors, however, capacity building is the hardest to discern in NIOSH's strategic management system. To see whether a particular NIOSH program was able to promote capacity building, in my study, I describe NIOSH's Personal Protective Technology ("PPT") Program, which was favorably evaluated by the National Academies.⁸³ While extended discussion is not possible today, I will note that the PPT program involves NIOSH directly in capacity-

76. *Id.* at 211–13.

77. *Id.* at 213.

78. Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 18, at 323, 337–45.

79. Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 *HARV. J.L. & GENDER* 247, 314–22 (2006).

80. Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1251–52.

81. *Id.*

82. *Id.* at 1252.

83. *Id.* at 1254–59.

building efforts, although beefing up and extending those efforts might be advisable.⁸⁴

Conclusion: Learning from Troubled Times

Having reviewed OSHA's and NIOSH's records during the Bush administration, it is now necessary to consider what they signify. I think the story of the disparate performance of sister agencies OSHA and NIOSH during the Bush administration offers several lessons.

First, my study reminds scholars of administrative law and regulatory process that when we theorize about how agencies do or should work, we must remember that they may function quite differently depending on the political environment. Given the sensitivity to political or partisan change of at least some traditional regulatory agencies, like OSHA, it may be that soft-law structures like NIOSH play an important role in times of deregulation.

Second, the saga of OSHA and NIOSH during the Bush years may prompt scholars of OSH law and practice to rethink the common assumption that separation of the two agencies in different executive departments has hindered OSH outcomes on the ground. In fact, it appears likely that separation was a significant factor in NIOSH's good performance during the Bush administration. Had NIOSH been housed within the Department of Labor, its efforts on behalf of workers may have been much more vulnerable to attack. Regarding the popcorn lung case, for example, if NIOSH had resided in the Department of Labor, one imagines OSHA might have appealed to Secretary of Labor Elaine Chao to suppress NIOSH's research or call it into doubt.⁸⁵

Third, considering the disparate experiences of OSHA and NIOSH can inform new governance scholars and others interested in the relationship between hard and soft law. While under ideal conditions, new governance or cooperative programming may be tied directly to the threat of traditional enforcement efforts, such programs themselves are subject to sharp and effective political attack.⁸⁶ Moreover, during periods of deregulation, the regulatory agencies in which such innovative programs are housed may well be inclined, as was

84. *Id.* at 1256–57.

85. *Id.* at 1263–64.

86. Such an attack is described at length by Professor Orly Lobel, who details the demise of the Clinton administration's ill-fated Cooperative Compliance Program, which was invalidated by the U.S. Court of Appeals for the District of Columbia Circuit. Lobel, *supra* note 63, at 1118–23.

OSHA, to render both hard and soft law programming cosmetic.⁸⁷ True, the impact of soft-law public intermediaries may be less direct than hard-law regulators during the best of times. However, during troubled times, agencies like NIOSH may prove much more adept at pursuing their public missions.

Finally, NIOSH's work provides a lesson in pursuing equality through an alternative frame as well. Recall at the start of this discussion, I noted that OSH is a fertile area for demonstrating the adverse effects of the new economy and how they exacerbate worker vulnerability. Here too, NIOSH research has remained on the leading edge, with the agency exhibiting tremendous continuity in its work despite changes in presidential administrations.

Work began at NIOSH in 1996, during the Clinton administration, to better grasp how and why OSH may be affected by chronic job insecurity associated with new forms of employment contracts, new models of work organization, and new workplace phenomena more generally. A comprehensive report on the subject was published in 2002, early in the Bush administration.⁸⁸ Since then, NIOSH has engaged in and has funded significant extramural research to fill the knowledge gaps described in the report.⁸⁹

In addition and, in some cases, in conjunction with those efforts, NIOSH's Occupational Health Disparities Program promotes research on the particular OSH risks borne by older workers, racial and ethnic minorities, immigrants, and low-income workers and helps develop intervention programs to ameliorate those risks.⁹⁰ Created in 1996, the program has collaborated with community-based organizations, and for example, has funded projects involving Asian and Hispanic immigrants working in agriculture, poultry processing, construction, and the service industry.⁹¹ Focusing on women, recent program research has led to a 2008 compendium of measures to assist

87. *Id.*; Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11; *see also supra* text accompanying notes 63 and 64.

88. *See* STEVEN L. SAUTER ET AL., DEP'T OF HEALTH & HUMAN SERVS., *THE CHANGING ORGANIZATION OF WORK AND THE SAFETY AND HEALTH OF WORKING PEOPLE: KNOWLEDGE GAPS AND RESEARCH DIRECTIONS* (2002).

89. Bisom-Rapp, *Deregulation and Safe Work*, *supra* note 11, at 1263.

90. *Inputs: Occupational Safety and Health Risks*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, <http://www.cdc.gov/niosh/programs/ohd/risks.html> (last visited Jan. 29, 2011).

91. *See Activities: NIOSH Funded Research Grants*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, <http://www.cdc.gov/niosh/programs/ohd/grants.html> (last visited Jan. 29, 2011); *Activities: NIOSH Research Projects*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, <http://www.cdc.gov/niosh/programs/ohd/projects.html> (last visited Jan. 29, 2011).

researchers studying the effects of discrimination, harassment, and work-family issues on OSH.⁹²

These projects, which aim to achieve equality through the frame of occupational safety and health, contain an important lesson. Sometimes, assistance of those who are most vulnerable in an equality sense is best accomplished through laws, regulatory regimes, and tactics unrelated to EEO law. Those workers may achieve empowerment and amelioration of adverse working conditions by framing their harms and conceptualizing corrective measures in terms of safety and health or some other set of legal protections. Given the kind of occupational segregation we see in the labor market—conditions connected to inequality that are difficult to address through EEO law—we need to think expansively and creatively about how to achieve substantive equality for those who are most in need of it.

92. MEG A. BOND ET AL., NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, EXPANDING OUR UNDERSTANDING OF THE PSYCHOSOCIAL WORK ENVIRONMENT: A COMPENDIUM OF MEASURES OF DISCRIMINATION, HARASSMENT AND WORK-FAMILY ISSUES (Sherry Baron ed., 2008), available at <http://www.cdc.gov/niosh/docs/2008-104/>.

