

Summer 1997

The Price of Killing a Child: Is the Fair Labor Standards Act Strong Enough to Protect Children in Today's Workplace?

Jeremy S. Sosin

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Jeremy S. Sosin, *The Price of Killing a Child: Is the Fair Labor Standards Act Strong Enough to Protect Children in Today's Workplace?*, 31 Val. U. L. Rev. 1181 (1997).

Available at: <https://scholar.valpo.edu/vulr/vol31/iss3/9>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



THE PRICE OF KILLING A CHILD: IS THE FAIR LABOR STANDARDS ACT STRONG ENOUGH TO PROTECT CHILDREN IN TODAY'S WORKPLACE?

*"[W]here the costs of accidents exceeds the costs of preventing them, the law will impose liability."*¹

I. INTRODUCTION

How much does it cost to injure or kill a child? Under workers' compensation law in the United States, employers and their insurers can calculate the amount of compensation that will be paid, either for the injuries or for the burial costs, to an injured child or surviving heirs when that child is injured or killed in the workplace.² All injuries and deaths are unfortunate, but they become atrocities when they occur because that child was performing a task designated so inherently dangerous for children that the activity has been restricted by the federal government.³ Asking the price of a child's life is a

1. *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 978 (E.D. Va. 1981). This is the classic statement of the principal purpose of tort law, namely, to maximize social utility. It originated from Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), in which he stated that a person's duty to prevent injuries "is a function of three variables: (1) The probability that . . . [the accident will occur]; (2) the gravity of the resulting injury, if [it] does; [and] (3) the burden of adequate precautions." See also, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 119-61 (1977); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

2. See *infra* notes 86-107 and accompanying text. For a definition of "oppressive child labor" under the Fair Labor Standards Act, see *infra* note 7.

3. The Fair Labor Standards Act (FLSA) provides the national source for child labor law regulations. 29 U.S.C. §§ 201-19 (1994). FLSA designates particularly hazardous occupations as too dangerous for minors to perform. The following agricultural occupations have been prohibited:

Operating a tractor of more than 20 power-take-off horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor; operating or helping to operate any of the following machines: corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, feed grinder, crop dryer, forage blower, auger conveyer, unloading mechanism of a nongravity-type, self-unloading wagon or trailer, power post-hole digger, power post driver, nonwalking-type rotary tiller, trencher or earth moving equipment, forklift, potato combine, and power-driven circular, band, or chain saw; working on a farm in a yard, pen, or stall occupied by one or more of the following: bull, boar, or stud horse maintained for breeding purposes, sow with suckling pigs, cow with newborn calf (with umbilical cord present); felling, bucking, skidding, loading, or unloading timber with a butt diameter of more than 6 inches; working from a ladder or scaffold (painting, repairing, or building structures, pruning trees, picking fruit, etc.) at a height greater than 20 feet; driving a bus, truck, or automobile when transporting passengers,

question not typically asked, nor typically considered. It should be.⁴

or riding on a tractor as a passenger or helper; working inside one of the following: a fruit, forage, or grain storage area designed to retain an oxygen-deficient or toxic atmosphere, an upright silo within 2 weeks of adding silage or with a top unloading device in operating position, a manure pit, a horizontal silo while operating a tractor for packing purposes; handling or applying agricultural chemicals identified by the word "Danger," "Poison" with a skull and crossbones, or "Warning" on the label; handling or using a blasting agent including (but not limited to) dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord; transporting, transferring, or applying anhydrous ammonia.

NATIONAL INST. FOR OCCUPATIONAL SAFETY AND HEALTH ALERT, PREVENTING DEATHS AND INJURIES OF ADOLESCENT WORKERS, May 1995, DHHS Pub. No. 95-125 [hereinafter NIOSH] (citing EMPLOYMENT STANDARDS ADMIN., WAGE & HOUR DIV., U.S. DEP'T OF LABOR, CHILD LABOR BULL. NO. 102, CHILD LABOR REQUIREMENTS IN AGRICULTURE UNDER THE FAIR LABOR STANDARDS ACT (1990)). See also Child Labor Relations, Orders and Statements of Interpretation, 29 C.F.R. § 570 (1996). NIOSH may be obtained either through the internet at <<http://ftp.cdc.gov/niosh/childlab.html>> or by contacting:

Public Dissemination
National Institute for Occupational Safety and Health
4676 Columbia Parkway
Cincinnati, Ohio 45226
(513) 533-8573
1 (800) 35-NIOSH

The following non-agricultural occupations have also been prohibited because of the danger posed to children under the relevant age:

Manufacturing and storing explosives, motor vehicle driving and working as outside helper, [garbage collection], coal mining, logging and sawmilling, operating power-driven woodworking machines, work involving exposure to radioactive substances, operating power-driven hoisting apparatus, operating power-driven metal-forming, punching, and shearing machines, mining, other than coal mining, power-driven bakery machines, slaughtering, meat-packing, processing, or rendering, operating power-driven paper products machines, manufacturing brick, tile, and kindred products, operating power-driven circular saws, band saws, and guillotine shears, working in wrecking, demolition, and shipbreaking operations, working in roofing operations, and working in excavation operations.

NIOSH, *supra* (citing EMPLOYMENT STANDARDS ADMIN., WAGE & HOUR DIV., U.S. DEP'T OF LABOR, WH 1330, CHILD LABOR REQUIREMENTS IN NONAGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT (1990)).

Providing an interesting contrast that illustrates the arbitrariness of the hazardous designation, the following is a list of other hazardous occupations not prohibited by FLSA:

Work in petroleum and gas extraction, commercial fishing, many jobs that require use of respirators, work in sewage treatment plants or sewers, work on industrial conveyors, many uses of compressed air or pneumatic tools such as nail guns, farm work using all-terrain vehicles, and work around many types of machines with power take-offs or similarly rotating drivelines.

NIOSH, *supra*.

4. The effects of labor on children are highly destructive. In a noble effort to address the rising problems associated with child labor violations, the United States Department of Labor (DOL), under the direction of Secretary of Labor, Robert B. Reich, has initiated a program entitled "Work Safe This Summer (And Beyond)." *Work Safe This Summer (And Beyond): Employer's Guide to Teen Worker Safety* (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/employer.htm>> [hereinafter *Employer's Guide to Teen Worker Safety*]. The Secretary of Labor indicated that over three million teens will work at summer jobs, but despite the safety efforts of their employers,

This Note addresses the unwitting conflict between federal child labor law and state workers' compensation laws.⁵ In 1938, the United States Congress enacted the Fair Labor Standards Act (FLSA).⁶ FLSA includes statutory

a large number of teens will risk injury or death on the job. *Id.*

The "Work Safe This Summer (And Beyond)" program consists of multiple parts: (1) *Employer's Guide to Teen Worker Safety*, *supra* (providing employers with simple methods for preventing injuries, such as (a) understanding and complying with child labor laws and OSHA regulations, (b) focusing on safety by supervisors and providing adequate training, (c) initiating work "redesign" efforts to eliminate unsafe conditions, (d) becoming aware of which tasks and tools are designated as dangerous for teens by FLSA, and (e) training young workers to recognize hazardous conditions. Additionally, the Guide provides "A Quick Look" at FLSA's prohibited jobs and hours limitations, a list of ideas from other employers, and a list of resources which employers can turn to for assistance); (2) *Protecting Working Teens* (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/facts.htm>> [hereinafter *Protecting Working Teens*] (documenting statistical information indicating the dangers associated with teens and employment, providing an overview of recent changes to the penalty provisions of FLSA increasing the amount of fines to \$10,000 and of OSHA from \$7000 up to \$70,000, and illustrating the number of violations discovered and the penalties assessed by the DOL from 1994 to 1995); (3) *Employer's Teen Safety Checklist* (visited Mar. 31, 1997) <<http://www.gov/opa/public/summer/chklist.htm>> (reiterating the main points brought out in the *Employer's Guide to Teen Worker Safety*); (4) *Hot Ideas To Help Teens Work Safe This Summer* (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/ideas.htm>> (addressing teens and their parents on what to know about summer jobs and how to handle safety issues); (5) *Beat the Heat!!!* (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/contest.htm>> (seeking participation in a poster contest to design a logo for the program); and (6) Four charts providing data on where teens work, where they are injured, how they are injured, and how they are killed (see *infra* APPENDIX for a reproduction of these charts).

California has also begun to address the problem of child labor violations by creating "a statewide task force charged with coordinating strategies to protect young people from work related illness and injury." *Commission Funds California's Task Force on Young Workers' Health and Safety* (visited Mar. 31, 1997) <http://165.235.90.100/dir/DIR_News_Release/1996/ir96-23.html> . See also Department of Industrial Relations Internet servers' Commission on Health and Safety and Workers' Compensation home page <www.dir.ca.gov> .

For a complete history of child labor and its detrimental effects on its victims, see generally RAYMOND G. FULLER, *CHILD LABOR AND THE CONSTITUTION* (1923); NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., *THE EMPLOYMENT OF YOUNG PERSONS IN THE UNITED STATES* (1925); SELECTED ARTICLES ON CHILD LABOR (Julia E. Johnson 1925); JEREMY P. FELT, *HOSTAGES OF FORTUNE: CHILD LABOR REFORM IN NEW YORK STATE*; LAWRENCE KOTIN & WILLIAM F. AIKMAN, *LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE* (1980); MARJORIE CRUICKSHANK, *CHILDREN AND INDUSTRY: CHILD HEALTH AND WELFARE IN NORTH-WEST TEXTILE TOWNS DURING THE NINETEENTH CENTURY* (1981).

5. This note does not attempt to address the laws of each individual state's workers' compensation statutes. Rather, the focus is on the general scheme of workers' compensation and suggests further research into the individual state laws as they apply to the discussion henceforth. In addition, no attempt is made to address individual state child labor regulations. States have the constitutional power to pass child labor provisions that are more strict than that of the federal Congress. JOSEPH E. KALET, *PRIMER ON FLSA & OTHER WAGE & HOUR LAWS* 2 (3d ed. 1994).

6. Fair Labor Standards Act of 1938 (FLSA). ch. 676, 52 stat. 1060 (codified as 29 §§ 201-19 (1938)).

provisions which directly prohibit the use of "oppressive child labor."⁷ These provisions of FLSA seek to protect children from dangerous occupations. In all fifty states, workers' compensation systems utilize what is commonly known as an "exclusive remedy" provision. The "exclusive remedy" provision grants employers immunity from tort actions by their injured employees in exchange for automatic payments of limited compensation for injuries that "arise out of and in the course of employment."⁸ Workers' compensation strikes a balance between two competing interests: limiting employer liability for workplace injuries and compensating employees for their injuries incurred while in the workplace.

A problem arises when a child is injured or killed while employed in a hazardous occupation in violation of FLSA. Despite federal prohibitions against the use of children in hazardous occupations, the compensation award to the child or the surviving heir under workers' compensation is the same as if the employer had not violated FLSA.⁹ Essentially, the "exclusive remedy" provision of workers' compensation shields employers from all civil liability, even when an employer utilizes unlawful "oppressive child labor" which results in the injury or death of a child. Without either civil liability or constant vigilance by the United States Department of Labor over the four million plus work sites across America, there cannot be effective enforcement of protective child labor laws.

7. 29 U.S.C. § 203(l). The Fair Labor Standard Act defines "oppressive child labor" as follows:

"Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent . . .) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

29 U.S.C. § 203(l) (1994). See also *infra* note 128 for further discussion of FLSA protection against child labor abuses and procedures employers must follow in order to comply with the Act.

8. See *infra* notes 96-107 and accompanying text.

9. See *infra* notes 96-107 and accompanying text.

The number of children being “exploited, injured, and maimed” in the workplace is growing.¹⁰ Statistics indicate that serious injuries and death associated with violations of federal child labor law are common.¹¹ Between 1992 and 1993, the United States Bureau of Labor Statistics identified approximately seventy adolescent work-related deaths per year, and over 200,000 injuries to working teens, of which 64,000 injuries to those teens were severe enough to require hospital emergency room treatment.¹² More importantly, forty-one percent of the workplace deaths occurred while the adolescent was doing work prohibited by federal child labor laws.¹³ Adding to the tragedy, most young workers do not incur these injuries and deaths out of economic necessity to support themselves.¹⁴

10. Tom Lantos, *The Silence of the Kids: Children at Risk in the Workplace*, 43 LAB. L.J. 67, 67 (1992). In fact, child labor conditions were revealed as the third ranked “under-reported” story of 1995, stating that “children in the U.S. are working in environments dangerous to their social and educational development, health, and even their lives.” 45 NEWSLETTER ON INTELLECTUAL FREEDOM 111 (July 1996). The Bureau of Labor Statistics reported that fewer workers died on the job in 1995, but that “deaths of women and teen-agers increased since 1994.” Laura Meckler, *Fewer Workers Die On Job in 1995* (last updated Aug. 9, 1996) <http://sddt.com/files/librarywire/96wireheadlines/08_96/DN96_08_09/DN96_08_09_fg.html>. One such example of a teen death on the job was reported by NIOSH in an Update which stated that “On October 29, 1994, a 13-year old male sustained severe fatal head trauma when the 1953-model tractor he was using overturned. . . .” NIOSH, *NIOSH Warns: Improper Hitching to Tractor Can Be Fatal* (last modified Feb. 11, 1997) <<http://ftp.cdc.gov/niosh/tractor1.html>>.

For a history of the Bureau of Labor Statistics, see *History of BLS Safety and Health Statistical Programs* (last modified Aug. 14, 1995) <<http://stats.bls.gov/oshhist.htm>>.

11. NIOSH, *supra* note 3. NIOSH issued an alert to request assistance in preventing deaths and injuries to adolescent workers. *Id.* The alert was issued because the risk of injury or death for young workers aged 16-17 was nearly the same as the risk for adult workers. *Id.* Because adolescent workers are less frequently employed in hazardous jobs, and are therefore exposed to dangerous conditions less than adults, the similarity of risk is alarming. *Id.*

12. *Id.* Unfortunately, statistical representations of child labor violations compiled by independent sources are not consistent with one another. For example, compare the Department of Labor’s report of 1475 serious injuries to children from 1983 to 1990 (a seven-year period) to an independent study that found 1333 workers’ compensation awards to children under age 18 in New York State for 1986 alone. Lantos, *supra* note 10, at 69. Of the workers’ compensation awards, 99 were to children under 15 years old, 541 were to children for permanent disability, and six were for work-related deaths. *Id.* The injuries included chemical burns, thermal burns, lacerations, fractures, head injuries, amputations, and injuries to multiple body parts. *Id.*

13. Dawn N. Castillo et al., *Occupational Injury Deaths of 16- and 17-Year-Olds in the United States*, 84 AM. J. PUB. HEALTH 646, 648 (1994). Note that the remaining 59% of the deaths occurred in occupations that have not been proscribed by law. Deaths to children in unrestricted occupations indicate the inability to create the perfect statute that covers all forms of hazardous employment that is likely to kill or severely injure young workers.

14. Lantos, *supra* note 10, at 67. In 1991, the General Accounting Office reported that a larger percentage of working children came from families with annual incomes of over \$60,000 than from families earning less than \$20,000 per year. *Id.*

Currently, FLSA's enforcement provisions have little deterrent effect.¹⁵ No direct remedy exists for a child and his or her family when an employer utilizes "oppressive child labor" in violation of FLSA.¹⁶ Rather, direct enforcement of FLSA is at the discretion of the Department of Labor. Any personal recovery is limited to the compensation available under the relevant state workers' compensation act.¹⁷

This Note explores the difficulty of enforcing child labor laws under the Fair Labor Standards Act when workers' compensation statutes protect employers from civil liability for workplace injuries or deaths. This Note proposes to solve this conflict by enacting a series of statutory amendments to the Fair Labor Standards Act that grant a federal civil remedy to the injured child or the surviving heir when that child is injured or killed during the course of "oppressive child labor."

Section II provides an expansive discussion exploring the labor conditions at the beginning of the twentieth century and demonstrates how the law reacted to meet the growing needs of an increasingly industrial society.¹⁸ Further, Section II discusses three of the legal approaches used to control both workplace injuries and child labor. Section III analyzes the conflict between enforcement of child labor protection and the restriction of liability for negligence under workers' compensation by discussing several vital issues that explain the need for a change in the law.¹⁹ Finally, Section IV proposes a series of statutory amendments to the Fair Labor Standards Act to grant a federal civil cause of action for negligence against employers when a child is injured or killed while performing a task defined as "oppressive child labor."²⁰

II. HISTORICAL BACKGROUND TO WORKPLACE INJURIES, REMEDIES, & CHILD LABOR PROTECTION

The industrial revolution and the incidentally sharp increase in industrial accidents created the need for new legal, social, and economic systems to replace the quickly outmoded societal structures of agrarian America.²¹ The common law tort system, as a means for addressing workplace injuries, was considered by many as one of the most important failures of the legal system.²²

15. See *infra* notes 217-33 and accompanying text.

16. See *infra* notes 131-41 and accompanying text.

17. See *infra* notes 98-107 and accompanying text.

18. See *infra* notes 21-141 and accompanying text.

19. See *infra* notes 142-247 and accompanying text.

20. See *infra* notes 248-57 and accompanying text.

21. 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION, at 2-1 (1996).

22. *Id.*; 1 WILLIAM R. SCHNEIDER, THE LAW OF WORKMEN'S COMPENSATION 2-3 (1932).

Historians indicate, however, that workers and employers had drastically opposing views in their solutions to workplace injuries.²³ This Section explores the economic and social conditions that affected the development of basic legal structures as they existed during the rapidly changing industrial America. This Section will illustrate the legislative responses to workplace injuries through the development of employer liability acts,²⁴ workers' compensation laws,²⁵ and child labor laws.²⁶

After the Civil War and with the growth of the industrial revolution, issues of social responsibility for the general welfare and oppressive working conditions created the need for social reconstruction.²⁷ The post-Civil War social order, which was comprised of small, rural political systems, was inadequately prepared to handle the political and economic changes that occurred during the industrial revolution.²⁸ Workers migrated from small rural communities to larger industrial cities.²⁹ From 1900 to 1920, the urban population in the United States grew by eighty percent while rural populations correspondingly declined.³⁰ The advent of large, impersonal factory systems and the payment of wages to once independent workers created a new dependence upon the economic elite.³¹ During this period of rapid growth, neither individuals nor the government had substantial control over the social welfare of the community at large.³² Rather, "laissez-faire" economics and "Social Darwinism" prevented any substantial objections to either oppressive working conditions of the general worker or child labor.³³ Accordingly,

23. DANIEL M. BERMAN, *DEATH OF THE JOB: OCCUPATIONAL HEALTH AND SAFETY STRUGGLES IN THE UNITED STATES* (1978).

24. See *infra* notes 66-85 and accompanying text.

25. See *infra* notes 86-107 and accompanying text.

26. See *infra* notes 108-41 and accompanying text.

27. STEPHEN B. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA* 1-2 (1968).

28. *Id.*

29. *Id.* at 2.

30. LAWRENCE WHITE, *HUMAN DEBRIS: THE INJURED WORKER IN AMERICA* 67 (1983).

31. WOOD, *supra* note 27, at 1-2. In a startling comparison, Adam Smith wrote that the price of wear and tear on an employer's workers was considerably less than the price of wear and tear on a slave owner's slave. CARL GERSUNY, *WORK HAZARDS AND INDUSTRIAL CONFLICT* 14 (1981). In a legal system that requires nothing of an employer when an employee is injured, the result is that employers "may have less regard for the personal welfare of his workers than would be the case under a slave system" because that employer has no investment to protect in the worker. *Id.*

32. WOOD, *supra* note 27, at 3-9.

33. *Id.* at 5. "Laissez-faire" economics is based upon a philosophy that nothing should interfere with an individual's freedom of choice or action. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 670 (1984). "Social Darwinism" is a sociological theory carried over from Darwin's theory of biological progression applied to human behavior. *Id.* at 1118. "Social Darwinism" states that sociocultural advance is the result of conflict and competition between the classes. *Id.* The socially elite classes with wealth and power are said to be superior in the struggle for existence because of biological traits that enable them to compete more effectively. *Id.* This "survival of the fittest"

widely accepted productive processes utilized child labor, demonstrating that the "profit motive took precedence over humane labor practices."³⁴ Additionally, workers were viewed by industry as "an extension of the machine he or she [was] working on."³⁵ If the worker could no longer function, he would be assessed as to whether he was "repairable."³⁶ If the worker was not worth fixing, because it would cost less to put another worker in his place, then the injured worker was discarded into the "caste of the unemployable."³⁷ The first years of the twentieth century have been described as "dark ages when the human machine was driven to the limit without lubrication or repair"³⁸

A. Common Law Tort Actions

Prior to the enactment of workers' compensation statutes, injured workers resolved their disputes and collected damages for workplace injuries through the common law tort system.³⁹ There were four primary obstacles that made the tort system a difficult and inequitable forum for resolving a large portion of workplace injuries. First, the tort system required the employee to prove that the employer was at fault for the injury.⁴⁰ Second, the tort system, as a process of litigation, was neither speedy nor sure to guarantee a recovery.⁴¹ Third, the tort system did not provide a system of compensation and therefore did not attempt to evenly distribute the costs of injuries.⁴² Finally, the common law created three affirmative defenses which favored the expansion of economic interests and allowed employers to avoid liability to their employees.⁴³

The tort system tied an employee's recovery of damages to the employee's ability to prove the fault of the employer.⁴⁴ While the tort system satisfied notions of fairness by only granting compensation when the employee was able to prove that the employer was liable, it proved to be inadequate to meet the

mentality forced workers to seek individual success. DAVID P. MCCAFFREY, *OHSА AND THE POLITICS OF HEALTH REGULATION* 3 (1982). At the same time, if workers failed or were injured, the "Social Darwinism" philosophy left them without anything but the comfort that they were not given the natural ability to succeed. *Id.*

34. WOOD, *supra* note 27, at 5.

35. WHITE, *supra* note 30, at 24.

36. *Id.*

37. *Id.*

38. GERSUNY, *supra* note 31, at 20.

39. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 568 (5th ed. 1984).

40. *See infra* notes 44-47 and accompanying text.

41. *See infra* notes 48-50 and accompanying text.

42. *See infra* notes 51-56 and accompanying text.

43. *See infra* notes 57-65 and accompanying text.

44. KEETON ET AL., *supra* note 39, at 568; SCHNEIDER, *supra* note 22, at 2.

needs of most injured employees in the industrial economy.⁴⁵ The tort system's adversarial approach to resolving civil disputes led to costly, time-consuming, and uncertain outcomes in litigation.⁴⁶ The tort system, with its inherent limitations coupled with common law affirmative defenses, proved to be inefficient, inequitable, and counterproductive to industrial safety.⁴⁷

The tort system was both inefficient and inequitable for resolving disputes over workplace injuries. The tort system was inefficient because it relied on the litigation process in order to determine if an employee would have a remedy for an injury that occurred as a result of the employer's negligence.⁴⁸ Such a process is slow in relation to the immediate medical and rehabilitative needs of an injured employee.⁴⁹ It is also an uncertain approach for determining who, if anyone other than the employee, will be responsible for the recovery expenses incurred by the employee.⁵⁰

The tort system is inequitable for determining what relief an employee has for injuries sustained in the workplace.⁵¹ First, tort law fundamentally relies on the concept of fault, i.e., that some person actually caused the injury, whether it be the employer, employee, or some third party.⁵² Fault-based liability is too narrow a concept that does not address all injuries sustained by employees in the workplace. Rather, many workplace injuries are incidental to the nature of the work and are not necessarily based on fault.⁵³ Some injuries just happen. Other injuries occur due to negligence, but not the negligence of

45. KEETON ET AL., *supra* note 39, at 568; SCHNEIDER, *supra* note 22, at 2.

46. KEETON ET AL., *supra* note 39, at 568; SCHNEIDER, *supra* note 22, at 2-3.

47. Arthur J. Amchan, "Callous Disregard" for Employee Safety: *The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 683 (1983). On the other hand, Amchan asserts that when suits for gross negligence and willful misconduct are barred by the exclusive remedy clause of workers' compensation, there is no incentive to the employer to make the workplace safe. *Id.*

48. JOHN G. FLEMING, *THE LAW OF TORTS* 495-96 (1987).

49. *Id.*; SCHNEIDER, *supra* note 22, at 4-5.

50. FLEMING, *supra* note 48, at 495-96; SCHNEIDER, *supra* note 22, at 1. Schneider explains that statistics proved that 40% of workplace accidents were the fault of no one, that 30% were the fault of the employee, and only 30% of accidents were the fault of the employer. *Id.* Because of the larger percentage of injuries that were non-compensable, it became necessary to find a new system for distributing the costs of industrial accidents. *Id.*

51. FLEMING, *supra* note 48, at 495-96.

52. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 85 (1977). Horwitz explains that the development of the law of negligence has been a relatively recent phenomenon in American history that sprouted from the early 19th century concepts of strict liability from nuisance. *Id.* Horwitz explains that the law shifted away from requiring some form of misfeasance to the notion of non-feasance, or the failure to act. *Id.*

53. FLEMING, *supra* note 48, at 495-96; SCHNEIDER, *supra* note 22, at 1.

the employer.⁵⁴ Under the tort system, employees injured by anything other than the negligence of the employer are left to bear all the costs of the injury.⁵⁵ The eventual consequence was that injured employees shouldered the burden of industrial injuries.⁵⁶ Forcing employees to bear the cost of industrial injuries was fundamentally unfair because this system failed to incorporate, and therefore disperse, the costs incurred from the injuries to employees as part of the costs and burdens of production.

Common law tort actions were also inequitable because the courts gave employers a significant advantage over employees through the development of certain affirmative defenses that favored economic expansion.⁵⁷ For example, the common law allowed three tort defenses for employers which greatly limited an employee's ability to gain recovery in a negligence action. Judges used the defenses even when there was no dispute as to the employer's negligence.⁵⁸ The defenses, assumption of risk,⁵⁹ contributory negligence,⁶⁰ and the fellow

54. FLEMING, *supra* note 48, at 495-96. Examples range from the negligence of the injured employee to the negligence of fellow workers.

55. *Id.*

56. *Id.*

57. HORWITZ, *supra* note 52, at 63-108. Horwitz discusses the courts' fluctuation back and forth between supporting old world notions of property versus new notions that sought to expand the rights of property owners to allow them to develop on their land even at the expense of the neighbors' quiet enjoyment rights. *Id.*

58. WHITE, *supra* note 30, at 64.

59. KEETON ET AL., *supra* note 39, at 486-92. Assumption of risk is a legal defense which requires an employer to demonstrate that the employee had knowledge and appreciation of the dangers normally and ordinarily incident to the work, and that the employee voluntarily agreed to assume the dangers related to the work. *Id.* For example, if an employee complained to the employer that a machine was unsafe and the employee continued to work with the machine and subsequently became injured, the employee was found to have knowledge and appreciation of this risk and voluntarily assumed it. WHITE, *supra* note 30, at 64-65. White characterizes this as "through-the-looking-glass reasoning" because it completely overlooks the employer's negligence for not fixing or, at a minimum, placing safety guards on the machine, that the replacement job would likely be just as dangerous, that there were other workers who would be placed in the same job and be put at the same risks, that the employee might be fired, and that the employee probably relied upon the job to survive. *Id.* For a complete discussion of the assumptions of risk doctrine, see (cite for Sugarman article).

60. KEETON ET AL., *supra* note 39, at 451-53. Contributory negligence is a legal concept based on the conduct of the plaintiff. *Id.* at 451. If the plaintiff failed to meet the standard of a reasonable person acting to protect himself, then the plaintiff was contributorily negligent for the injury. *Id.* at 451-52. This meant that the plaintiff's conduct involved undue risk of harm to himself. *Id.* at 453. This acted as a defense for employers because the conduct of the plaintiff intervened as the proximate cause of the injury and therefore removed the right of action against the defendant. *Id.* at 451-52. This defense acted as a complete bar to recovery for a plaintiff if the defendant could demonstrate that the plaintiff was responsible for as little as one percent of the injury. WHITE, *supra* note 30, at 66.

servant doctrine,⁶¹ have been characterized as the “Unholy Trinity” and the “terrible trio.”⁶² The “Unholy Trinity” ended most attempts by employees to gain recovery for injuries by providing reasons that removed direct responsibility away from the employer.⁶³ Further limitation of employer liability came through the common law’s limited requirements for an employer’s liability to employees.⁶⁴ These limited requirements reflected the dominant social theories of “Social Darwinism” and “laissez-faire” economics which favored industrial growth and its benefit to society over any impediments of economic expansion for the protection of individual rights.⁶⁵

B. The Employer Liability Movement

Near the turn of the twentieth century, several states began enacting “employer liability” laws which were based on the tort litigation process but modified common law defenses to allow both sides a fair chance to establish

61. KEETON ET AL., *supra* note 39, at 571-72. The fellow servant doctrine is based on the theory that when an employee enters into employment, the risk of negligence from fellow servants is an assumed risk for which the employee must be responsible. *Id.* at 571. This doctrine protected employers from workplace liability, even when the risk was created by employees within the control of the employer. *Id.* Courts reasoned that individual employees were more likely to know the deficiencies of other employees and, as a result, the promotion of public safety would come from employees watching each other’s conduct. *Id.* This notion is entirely contrary to the legal doctrine of respondeat superior which holds that an employer is held accountable when an employee is responsible for injuring a third party. WHITE, *supra* note 30, at 65. Respondeat superior does not apply to employees injured by other employees because the common law in 1830-40 carved out an exception for employers. *Id.* The exception allows an employer to be liable to the world, but not to his own employees. *Id.*

62. WHITE, *supra* note 30, at 66; *See also* SCHNEIDER, *supra* note 22, at 5; KEETON ET AL., *supra* note 39, at 569.

63. KEETON ET AL., *supra* note 39, at 569. In these cases, the realistic result of an employer avoiding liability was that employees were not likely to gain any recovery from any source because no other source had sufficient money to pay a damage award, even if granted by a court. *See id.* For example, employees were not likely to sue their fellow employees because they were in no better position to pay for the injuries than the plaintiff. *See id.*

64. 1 LARSON, *supra* note 21, at 2-6. The common law required employers to exercise reasonable care “to provide and maintain a reasonably safe place to work and safe appliances, tools, and equipment; to provide a sufficient number of suitable and competent fellow-servants to permit safe performance of the work; to warn employees of unusual hazards; and to make and enforce safety rules.” *Id.* It is important to stress that employer liability was only based on the failure to exercise reasonable care to protect against dangers of which the employer knew and to exercise reasonable care to discover conditions of which he did not know. KEETON ET AL., *supra* note 39, at 569 & n.3.

65. WOOD, *supra* note 27, at 5. *See also* KEETON ET AL., *supra* note 39, at 568-71. American courts held the view that there was complete mobility of the laborer, that the supply of workers was unlimited, and that each worker was his own agent under no compulsion to enter into employment. *Id.* at 568. This theory of worker independence completely overlooked the demands of subsistence on workers and their subsequent inability to support themselves if they decided not to work in dangerous conditions. *Id.*

liability.⁶⁶ By 1907, twenty-six states had enacted some form of “employer liability” law which affected the common law tort system.⁶⁷ “Employer liability” laws eliminated the use of the common law defenses of assumption of risk, the fellow servant doctrine, and contributory negligence by employers in court, thereby removing an employer’s ability to avoid liability to its employees.⁶⁸ By limiting employer defenses, both employers and employees had a fair chance of succeeding with their legal rights in the courts.⁶⁹ The eventual result was that employees began to succeed in the courtroom, able to present their cases to sympathetic juries who tended to be from the same social class as the injured worker.⁷⁰ Since employers could no longer assert affirmative defenses which previously blocked most liability, employees began to win larger settlements more frequently for injuries sustained in the workplace.⁷¹ For example, in 1905, the average award to an employee who lost an arm was \$10,138.⁷² Comparing this average award with the salary of railroad workers at \$500 per year and textile workers at \$300 per year, employees fared well.⁷³ In fact, the average damage award was twenty times

66. BERMAN, *supra* note 23, at 19. See also B. Nathaniel Richter & Lois G. Forer, *Federal Employers’ Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L.Q. 203, 232 (1951). FELA, an employer liability law, sought to equalize the positions of employers and employees in court by not allowing common law defenses which were developed during a period when the law was “unduly sensitive” to the economic pressures of the industrial order. *Id.* See also *infra* notes 76-80 and accompanying text for further discussion of the Federal Employer’s Liability Act.

67. WHITE, *supra* note 30, at 68.

68. BERMAN, *supra* note 23, at 19.

69. *Id.*

70. WHITE, *supra* note 30, at 69. White states that fellow jurors understood the economic binds that forced workers to put in long hours in dangerous jobs. *Id.* Gersuny agrees that juries were becoming more sympathetic to worker claims and that this trend was a serious threat to the liability of employers. GERSUNY, *supra* note 31, at 70.

71. BERMAN, *supra* note 23, at 20. It was important to workers that their employer could not escape all liability for workplace accidents, and this was facilitated by limiting the use of the common law defenses. It is reasonable to ask why the employer should be held liable when there were other possible causes for the injury. It is more appropriate, however, to ask why an employer should not be liable for injuries in the workplace when the primary beneficiary of the work is the employer. Through the use of the common law defenses, employers were gaining the benefits of production without supporting the costs to the workers when they were injured by the production. By analogy, the United States Tax Court would not let a taxpayer take a deduction from gross income if that taxpayer did not actually spend the money being claimed. Without bearing the burden of the payment, the taxpayer may not gain the benefit of the deduction. In the case of employers, they should not be able to reap the benefits of production from their employees if they do not also bear the burdens of the production. In this context, injuries to employees in the course of employment are burdens of employment.

72. WHITE, *supra* note 30, at 69.

73. *Id.*

the amount of a railroad worker's salary for one year.⁷⁴ The financial costs and embarrassing publicity to employers from these judgments created the impetus for a major political response by employers and industry to support a compensation system that restricted employer liability.⁷⁵

An example of an "employer liability" law created in 1908 that survived the wave of workers' compensation laws and still functions today is the Federal Employers' Liability Act (FELA).⁷⁶ FELA was enacted as a federal statutory tort that limited the impact of the traditional common law tort defenses but still relied on the essential elements of negligence.⁷⁷ FELA was enacted to protect railroad workers employed in interstate commerce because railroad work was considered "abnormally dangerous."⁷⁸ In fact, one commentator stated that "war is safe compared to railroading in this country."⁷⁹ Justice Douglas stated that "FELA was designed to put on the railroad industry some of the costs for the legs, eyes, arms and lives which it consumed in its operations."⁸⁰

Since railroad work was considered "abnormally dangerous," FELA instituted a negligence standard to provide greater protection for employee and workplace safety through full recovery of damages.⁸¹ FELA established a statutory standard of care which the employer must meet or be subject to

74. This amount was calculated by dividing the average court award of \$10,138 by the average yearly salary of a railroad worker of \$500, which equals approximately 20.3 times the amount earned in one year. Hypothetically, if an employee with an annual salary of \$25,000 were to receive an award at the same twenty-to-one ratio, the damage remedy would amount to \$500,000.

75. BERMAN, *supra* note 23, at 20. To understand a social or political movement, it is important to know who supports it. WHITE, *supra* note 30, at 70. The primary "friends and champions" of workers' compensation were the National Association of Manufacturers (NAM) and U.S. Steel. *Id.* In opposition to the large judgments that employees were beginning to receive, NAM and U.S. Steel initiated, in the form of an "altruistic gift," a volunteer movement in favor of a no fault workers' compensation system, which had the self interested effect of cutting off all liability to their employees. *Id.* at 71-73. The desire to avoid liability by employers was a common theme. GERSUNY, *supra* note 31, at 70.

76. Employers' Liability Act (Federal Employers' Liability Act) (FELA), ch. 149, 35 Stat. 65 (codified as 45 U.S.C. §§ 51-60 (1994)).

77. Chauncey Eugene Brummer, *Occupational Disease Litigation Under the Federal Employers' Liability Act*, 19 FORUM 205, 205 (1984).

78. 45 U.S.C. § 51 (1994). FELA only applies to railroad workers. *Id.*

79. GERSUNY, *supra* note 31, at 20.

80. *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949). Notice in the forthcoming discussion of workers' compensation that the title and campaign slogan used to push for workers' compensation is essentially the same as what Justice Douglas used to describe employer liability laws.

81. See Brummer, *supra* note 77, at 214. The negligence standard adopted by FELA provided railroad employees protection that employees of other industries did not receive because of the abnormally dangerous nature of railroad employment. *Id.* at 216. The protection was the ability to gain a full recovery upon proof of employer negligence. On the other hand, employees received less protection for general injuries if the employee could not prove that the employer was negligent. *Id.* at 205.

liability to injured employees.⁸² If the employer failed to meet the statutory standard of care and an injury or death ensued from this breach, the employer would be liable without additional proof of negligence.⁸³ This essentially amounted to negligence per se for employers subject to the act if they violated the established standard of care.⁸⁴ Forcing employers to pay for their own negligence has resulted in the adoption of safety devices which have led to a substantial reduction in the number of railroad injuries.⁸⁵ This Note models a solution for child labor protection upon the Federal Employers' Liability Act. Section IV proposes amendments to the Fair Labor Standards Act which create a statutory standard of care by utilizing the same "employer liability" framework of FELA.

C. *Workers' Compensation*—"The cost of the product should bear the blood of the workman."⁸⁶

Despite the rising success of "employer liability" legislation, state legislatures began enacting workers' compensation statutes for the governance of workplace injuries.⁸⁷ The enactment of workers' compensation laws

82. *Id.* at 214. The standard of care under FELA has two basic components: the duty to provide a reasonably safe workplace and the duty to warn employees of dangers that are present in the workplace. *Id.* at 213.

83. *Id.* at 214. The Supreme Court found employer liability under FELA without any additional proof of negligence when an employer was at fault for violating a safety statute. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1957). The Court held that violating a safety statute amounted to negligence per se without requiring a special class of plaintiffs or a specific harm prohibited by the statute. *Id.* at 438. The proposal of this note creates a federal civil right for a special class of plaintiffs specifically for the purpose of limiting the scope of the right to injured children.

84. *See Brummer, supra* note 77, at 214. "Negligence per se" is defined as:

Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a specific statute or . . . because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it.

BLACK'S LAW DICTIONARY 1035 (6th ed. 1990).

85. *See Richter & Forer, supra* note 66, at 234. FELA has been so successful in reducing the number of injuries that many authors have advocated abolishing FELA liability in favor of compensation systems because the railroad is no longer such an abnormally dangerous occupation which would warrant the use of liability against employers for their own negligence. *Brummer, supra* note 77, at 215.

86. KEETON ET AL., *supra* note 39, at 573 n.48. This phrase was a campaign slogan that was possibly coined by Lloyd George. *Id.* As Phelps Brown puts it, "It was still the worker whose bones were broken; the employers and shareholders had only to pay a premium." GERSUNY, *supra* note 31, at xi.

87. *See Amchan, supra* note 47, at 685. Amchan states that workers' compensation laws were the result of an intense effort by business to stop the trend of "employers' liability" legislation because employees were beginning to collect substantial judgments. *Id.*

required a dramatic shift away from common law principles in order to create a system of compensation.⁸⁸ Proponents of workers' compensation claimed that this new paradigm for compensation included human accidents as part of the attendant costs of production.⁸⁹

The enactment of workers' compensation laws first began in New York in 1910.⁹⁰ This change in the law creating a scheme for compensation was a fundamental departure away from tort liability because workers' compensation adopted the philosophical goal of social protection to preserve dignity and self-respect of workers by treating them as "veterans of industry."⁹¹ To the contrary, workers' compensation has also been characterized much more negatively as a "compensation—safety apparatus" which has deliberately diverted public attention away from workplace safety by focusing on the voluntary assumption of compensation by employers.⁹² Regardless of who was correct, it is important to recall that workers' compensation laws were being enacted at the same time employer liability laws were beginning to yield larger and more frequent damage awards to employees who were injured due to the negligence of their employers.⁹³ So while workers' compensation laws did adopt the goal of social protection for employees, another primary reason workers' compensation achieved wide acceptance in such a short period of time was the protection it afforded to employers from the liability stemming from their own negligence.⁹⁴ Additionally, insurance companies benefited enormously from

88. See WHITE, *supra* note 30, at 64. In fact, workers' compensation had the effect of completely disregarding the common law. *Id.*

89. See KEETON ET AL., *supra* note 39, at 573.

90. 1 LARSON, *supra* note 21, at 1-6.

91. *Id.* at 1-7.

92. BERMAN, *supra* note 23, at 4. Berman contends that workers' compensation is an "apparatus" that has executed the policy interest of businesses and their insurance companies. *Id.* at 15. In addition, Berman states that the "compensation-safety apparatus" stresses compensation over prevention and safety over health. *Id.*

93. Amchan, *supra* note 47, at 685.

94. BERMAN, *supra* note 23, at 1-5. Berman also argues that very few labor unions had the strength or support to overcome the wave of business interests in favor of compensation. *Id.* at 5. It has also been suggested that there were not necessarily overwhelming business interests that pervasively took over the American political institutions, but rather, that there was a growing plurality of viewpoints that all melded together and manifested in the legal responses to the economic changes of the industrial revolution. MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933*, at 1-6 (1990). Keller agrees, however, that the power of labor unions was not strong enough to overcome major disputes. *Id.* at 116. Keller points to the flood of immigration, the explosive growth of the economy, and the non-political stances of unions to explain the diversity among the American workforce. *Id.* at 116-17. In addition, most unions were organized by trade and industry which tended to separate out the interests of the individual trades and industries, rather than the needs of workers in general. *Id.* at 117. Because of these diversifying factors, no one single set of conditions or pattern could accurately characterize the American labor scene. *Id.* at 118.

the development of workers' compensation as the exclusive remedy for workplace injuries.⁹⁵ As a result, state legislatures developed workers' compensation systems.⁹⁶ By 1920, all but eight states had some form of a workers' compensation system, demonstrating the widespread political acceptance of this new scheme.⁹⁷

Workers' compensation systems provide victims of work-related injuries the benefits of partial wages and medical care by placing these costs on the consumer.⁹⁸ Workers' compensation systems also provide stabilized costs to employers and their insurers for worker injuries by shielding them from liability in exchange for their payment of partial wages and medical care.⁹⁹ It is

95. WHITE, *supra* note 30, at 113-34. White describes the insurance industry as a "cartel" that is immune from antitrust laws. *Id.* at 113. One benefit to insurance companies through workers' compensation is the maximum limits on compensation. *Id.* at 117. By limiting compensation payments to 66% of the lost wages of the injured worker, there was no risk of overcompensation being paid to the highest paid workers. *Id.* The glaring problem with this policy is that the administrative convenience gained by treating all workers the same overlooked the realistic ability of a low paid worker to sustain himself on only two-thirds of his salary. By administratively treating all workers the same by giving them the same percentage of their salaries, workers' compensation placed a different economic value on different peoples' injuries. For example, if two employees suffer the same injury, but one employee is paid more than the other, the higher paid employee would receive more compensation than the other employee, even though they sustained the same injury. The original purpose of the limitation was to avoid overcompensation. Instead, the result is to undercompensate employees who do not earn high salaries.

96. Gustav H. Shubert, *Foreword* to LINDA DARLING-HAMMOND & THOMAS J. KNIESNER, *THE LAW AND ECONOMICS OF WORKERS' COMPENSATION* at vi (1980). The enactment of workers' compensation statutes brought on immediate constitutional challenges under the theory that employers were being denied the right to due process for having to pay for injuries without a showing of fault. *Id.* at v-vi. It is argued that these constitutional issues were overcome by "public" consensus (or more likely political power) which supported state constitutional amendments to remedy the overwhelming number of industrial injuries in a quick, efficient, and predictable method. *Id.* at vi.

97. 1 LARSON, *supra* note 21, at 2-25. By 1963, every state had enacted a workers' compensation statute. *Id.*

98. *Id.* at 1-1. Benefits are generally either one-half or two-thirds of the employee's average weekly income plus hospital, medical, and rehabilitation costs. *Id.* at 1-2. These costs of production are not born by the party that reaps the direct benefits of production, but rather, are passed on to the public at large through higher prices. *Id.*

99. BERMAN, *supra* note 23, at 4-5. Taking a more critical view of insurance companies in relation to workers' compensation, White suggests that insurers deliberately attempt to avoid paying out compensation for injuries because doing so allows for further investment of premiums. WHITE, *supra* note 30, at 122. In some cases, if an insurance company can delay payment long enough, the employee will die from the injuries, and the insurer will no longer be responsible for making payments. *Id.* This occurs because workers' compensation benefits do not survive the death of the employee in most states. *Id.* at 123. White compares the difference between the development of the law of negligence, allowing suits for "wrongful death," to the severe restrictions placed upon injured employees in workers' compensation and characterizes the situation as the "ghettoization of the American worker." *Id.*

estimated that the total cost to employers for compensation insurance is around one percent of their total payroll.¹⁰⁰

Workers' compensation schemes typically have similar features. Generally, employees are automatically entitled to certain "benefits"¹⁰¹ whenever a personal injury is suffered "arising out of and in the course of employment."¹⁰² An employee's recovery is based on a no-fault scheme that focuses on the connection between the injury and employment, not whether anyone was at fault for the injury.¹⁰³ Negligence by the employer, employee, or fellow servant is immaterial to the amount or ability of an employee to recover.¹⁰⁴ Workers' compensation coverage is limited to employees.¹⁰⁵ Importantly, employees forfeit their right to sue their employers at common

100. BERMAN, *supra* note 23, at 4-5. Berman states that employers only pay 1% of their total payroll to insurance for the compensation payments to employees. *Id.* He suggests that employers are able to pay such a small percentage because compensation payments totally ignore the problems of long-term disability, occupational disease, and worker rehabilitation. *Id.*

101. 1 LARSON, *supra* note 21, at 1-1. Benefits, which are defined by each individual state, are generally either one-half or two-thirds of the employee's average weekly income plus hospital, medical, and rehabilitation costs. *Id.* at 1-2.

102. *Id.* at 1-1; KENNETH M. WOLFF, UNDERSTANDING WORKERS' COMPENSATION: A GUIDE FOR SAFETY AND HEALTH PROFESSIONALS 6 (1995).

103. SCHNEIDER, *supra* note 22, at 3-5; 1 LARSON, *supra* note 21, at 1-1.

104. 1 LARSON, *supra* note 21, at 1-1. Larson suggests that most errors in compensation law are made when notions of fault are infused into the scheme as the basis for recovery rather than relying on the connection to employment. *Id.* at 1-4. Larson illustrates the work connection scheme through the following example.

Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.

Id. at 1-5.

The above example is troubling for two reasons. First, an employee is responsible for himself while the employer is responsible for his employees. An employee may injure himself and have no one to blame for the injury. An employer, however, has a greater responsibility to his employees because his actions have the consequence of injuring the employees for whom he or she is responsible. Second, workers' compensation merely makes an attempt to insure that injured workers receive minimum income and medical care to keep the victim from destitution. *Id.* at 1-7. This goal is far short of returning the victim to his condition prior to the accident. *Id.* at 1-11. The result is to continue to have the injured worker bear the costs of injury because the compensation scheme does not return him to pre-injury condition or the money equivalent. *Id.*

105. SCHNEIDER, *supra* note 22, at 159-61, 178-81; 1B LARSON, *supra* note 21, at 8-1. Larson makes a distinction between employees and independent contractors. *Id.* at 8-5.

law.¹⁰⁶ These elements make up what is popularly called the “exclusive remedy” provision and is the cornerstone of workers’ compensation.¹⁰⁷

Under the exclusive remedy provision, employees receive fixed levels of compensation and employers receive immunity from tort liability. In most circumstances, this compromise is a relatively fair and equitable system for remedying workplace injuries. As stated in the introduction, however, problems occur when the exclusive remedy provision of workers’ compensation acts as a shield for employers, guarding them from liability when they fail to follow laws that would prevent injuries and deaths to minors.

D. Child Labor Protection

Prior to the Civil War, “[c]hild labor . . . was practically unregulated in America.”¹⁰⁸ The controlling issue in the debate over child labor regulations was the scope of congressional authority to regulate interstate commerce.¹⁰⁹

106. 1 LARSON, *supra* note 21, at 1-2. Employees are barred from suing their employer, the employer’s insurer, and fellow-servants, but are not barred from suing third parties. *Id.* If the employee is successful at common law when suing a third party found responsible for the employee’s injuries, the award must first reimburse the employer or insurer for the compensation outlay, and then the remaining award goes to the injured party who litigated the cause of action. *Id.*

107. *Id.* In recent years, the exclusive remedy clause has come under attack by injured workers because of dissatisfaction with the limited amounts of recovery available under workers’ compensation. Joseph H. King, Jr., *The Exclusiveness of an Employee’s Workers’ Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 408 (1988). First, workers have attempted to expand the definitions of intentional torts which remove an employer’s protection from the exclusive remedy provision. Mark Rust, *New Tactics for Injured Workers*, A.B.A. J., Oct. 1, 1987, at 72. Some courts in West Virginia (*Mandolis v. Elkin Indus.*, 246 S.E.2d 907, 914 (W. Va. 1978)) and Ohio (*Blankenship v. Cincinnati Milacron Chem.*, 433 N.E.2d 572, 477 (Ohio 1982)) have included willful, wanton, or reckless misconduct, which has substantially lowered the threshold for gaining recovery outside the provisions of workers’ compensation. *Id.* In immediate reaction to these court decisions, the West Virginia and Ohio state legislatures passed legislation which significantly limited the holdings of those courts by adding difficult substantive requirements. Amchan, *supra* note 47, at 688, 690-91. The legislatures redefined intentional torts and required that the plaintiff prove “deliberate intention.” *Id.* at 688. “Deliberate intention” was further defined as “consciously, subjectively, and deliberately formed intention to produce the specific result of injury or death to an employee.” *Id.*

In addition, an employee may also breach the exclusive remedy clause and sue his employer under the “dual capacity doctrine.” *Id.* at 687. Under the “dual capacity doctrine,” the employee can sue using a products liability theory. *Id.* If the employee was injured by a product that was manufactured by the employer, then the employee may sue in tort. *Id.*

108. WOOD, *supra* note 27, at 5.

109. U.S. CONST. art. I, § 8, cl. 3. For a general discussion of the development of Commerce Clause jurisprudence, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 4.1-.10, at 129-87 (4th ed. 1991). Prior to the election of Franklin D. Roosevelt in 1932 and his “court packing plan” in 1937, the Supreme Court consistently restricted the scope of Congress’ authority under the Commerce Clause through the Tenth Amendment. *Id.* § 4.7, at 150-53. While

The competing arguments centered on which authority, state or federal, would have the power to regulate local activities like child labor.¹¹⁰ Many industrial representatives and southern delegates argued that the states, rather than the federal government, had the proper authority to regulate local commercial activities.¹¹¹ This debate turned upon the interpretation of the Commerce Clause of the United States Constitution.¹¹² Prior to the enactment of the Fair Labor Standards Act and its affirmation by the Supreme Court decision in *United States v. Darby*,¹¹³ each state had the individual authority to regulate or not regulate working conditions for minors since the federal powers under the Commerce Clause had been limited by the Tenth Amendment.¹¹⁴ Generally, states were able to curb the worst physical abuses, but did not put an end to all

it is unclear exactly why the Court began to defer to the other branches of government on issues of economics and social welfare, it is clear that the changes enabled the federal government to enact laws that affected many types of activities. *Id.* § 4.7, at 154.

110. *Id.* § 4.7, at 154. The Court's Commerce Clause decisions had defined Congress' power under the Commerce Clause in relation to the restriction of the Tenth Amendment which reserves power to the states. *Id.*

111. *Id.* See also WOOD, *supra* note 27, at 83. In response to the first federal law passed to regulate child labor, a test case was initiated to challenge the Keating-Owen law. *Id.* at 81-110. In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the plaintiffs, a poor working family from North Carolina, being represented by a distinguished group of nationally known corporate attorneys, charged that federal control as promulgated in the Keating-Owen law was unconstitutional because the law went beyond the constitutionally-granted scope of authority given to Congress, and by doing so, usurped the authority of the states. WOOD, *supra* note 27, at 97.

112. NOWAK & ROTUNDA, *supra* note 109, § 4.8, at 154.

113. 312 U.S. 100 (1941). The Court held that the prohibition and direct regulation of wages and hours was within the plenary power of Congress to set terms for the regulation of interstate commerce. *Id.* at 116-17. The Court also stated that Congress could regulate intrastate activities that "so affect interstate commerce or the exercise of the power of Congress over it." *Id.* at 118. The scope of the Court's decision greatly enhanced Congress' power to regulate economic activities within the United States by explicitly overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918). *Darby*, 312 U.S. at 116-17.

The recent Supreme Court decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), provides a comprehensive review of the Court's Commerce Clause rulings. The Court's holding, that Congress does not have the authority to regulate the possession of guns in school zones, demonstrates a new trend by the Court that will likely restrict Congress' authority under the Commerce Clause. Even in light of this recent decision, the constitutional foundation of the Fair Labor Standards Act is not in jeopardy. The Court held that Congress may regulate activity so long as it falls within the following three categories: 1) channels of interstate commerce, 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even if the persons or activities are substantially intrastate, and 3) activities which substantially affect interstate commerce. *Id.* at 1630. The basis of congressional regulation of child labor is first through the regulation of "hot goods" in interstate commerce made by children, and second, through regulation of "oppressive child labor" itself. KALET, *supra* note 5, at 59. See *infra* note 128 and accompanying text.

114. NOWAK & ROTUNDA, *supra* note 109, § 4.9, at 157.

exploitation.¹¹⁵ The lack of uniformity in child labor laws from state to state negatively affected the progress of new legislation because states without regulations had an economic advantage over states with regulations.¹¹⁶

An important figure in the fight for child labor reform was Senator Albert Beveridge from Indiana.¹¹⁷ Senator Beveridge strongly supported the use of federal law to stop child labor abuses around the nation.¹¹⁸ In 1907, Beveridge made a historical three day speech on the floor of the United States Senate.¹¹⁹ His attempts at passing substantive laws were ultimately ineffective in the short term, but his efforts laid the ground work for later efforts.¹²⁰

Also among the first to declare the need to use federal authority to combat industrial child labor was Samuel Lindsay, vice-chairman of the National Child Labor Committee (NCLC).¹²¹ At the tenth annual meeting of the NCLC in 1913, Lindsay called for a "Cooperative Federalism"¹²² when he stated:

To combat child labor successfully we need to unite all the forces of the national authority to those of the state and local authorities, each acting within their respective and proper jurisdiction but so united, cooperative, and comprehensive that there is no "twilight zone" in which no authorities . . . may nullify each other's activities.¹²³

As early as 1913, Lindsay seemed to foresee the eventual problem with effective enforcement of child labor by stating that there should not be a

115. WOOD, *supra* note 27, at 24. For a complete survey of child labor laws and a debate over what types of work were considered appropriate for young workers, see VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* 73-112 (1994). See also *supra* note 4.

116. WOOD, *supra* note 27, at 25. See also *infra* notes 237-44 and accompanying text.

117. See generally JOHN BRAEMAN, ALBERT J. BEVERIDGE: AMERICAN NATIONALIST (1971).

118. *Id.* at 116.

119. *Id.* In his speech, Beveridge presented evidence to the Senate "of the slow murder of these children, not by tens or hundreds, but by the thousands. But let us not 'hasten' to their relief 'too fast.' Let us 'investigate.'" 41 CONG. REC. 1807 (1907). Throughout the speech, Beveridge gave graphic descriptions of children working in "the breakers," in mines, cotton mills, and in agriculture. *Id.* at 1552-57. For the entire transcript of Beveridge's speech, see *id.* at 1552-57, 1792-1826, 1867-83.

120. BRAEMAN, *supra* note 117, at 121. Even though Beveridge's personal attempt failed to produce legislation, he had raised the public awareness of the issues of child labor abuses. *Id.* at 119. Only a few years later, Congress passed the Keating-Owen law, whose drafters hailed Beveridge as the "pioneer" of federal regulation of child labor. *Id.* at 121.

121. WOOD, *supra* note 27, at 28. For additional information regarding Lindsay's work towards reforming child labor, see Samuel McCune Lindsay, *Unequal Laws an Impediment to Child Labor Legislation*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Mar. 1910, at 16, 16-22.

122. WOOD, *supra* note 27, at 35.

123. *Id.* at 28.

“twilight zone” between laws that nullify the activities of one another.¹²⁴ Lindsay recognized the need for a coordinated effort to attack poor labor conditions such as the conflict between an employer’s immunity from liability under the “exclusive remedy” provision of workers’ compensation by state and local government and the effective enforcement of child labor law by the federal government.

In 1938, Congress passed the Fair Labor Standards Act (FLSA) which included provisions covering the employment of children.¹²⁵ Congress’ goal was to eliminate as quickly as possible poor working conditions and oppressive hours without substantially burdening employment or earning power.¹²⁶ The purpose was to protect low paid, unorganized employees without sufficient bargaining power to protect themselves.¹²⁷ Enforcement of FLSA fulfills a dual purpose by protecting workers from oppressive conditions, while at the same time protecting employers who comply with the Act.¹²⁸ Enforcement of the Act is designed to come from the Secretary of Labor.¹²⁹ The Secretary of Labor may seek criminal penalties against employers in violation of FLSA.¹³⁰

124. *Id.*

125. *See supra* note 6. *See also* 29 U.S.C. §§ 212(a), (c), 215-17 (1994).

126. *Id.* § 202(b).

127. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945).

128. 29 U.S.C. § 203(f) (1994). FLSA protects children directly by prohibiting the use of “oppressive child labor” through two statutory provisions. First, FLSA places a ban on any goods placed in commerce coming from any establishment that utilizes “oppressive child labor.” *Id.* § 212(a). Second, through the 1949 and 1961 amendments, FLSA prohibits “oppressive child labor” directly by prohibiting the actual “oppressive child labor,” as distinguished from the goods produced through the use of oppressive child labor. *Id.* § 212(c). FLSA defines “oppressive child labor” in 29 U.S.C. § 203(f) (1994). *See supra* note 7.

FLSA protects employers who comply with the Act through the use of age certificates which verify that the employee, based on the best available documentary evidence of age, is not employed in violation of oppressive child labor prohibitions. 29 C.F.R. § 570.121 (1996). FLSA insures the employer’s ability to protect itself by stating that:

oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age.

29 U.S.C. § 203(f); 29 C.F.R. § 570.121 (1996).

129. 29 U.S.C. § 204(a) (1994).

130. *Id.* § 216(a). The Secretary of Labor may seek fines up to \$10,000 per violation and criminal prosecution for willful violation of child labor laws with penalties up to six months in prison. *Id.*

One critical aspect of FLSA is that it does not explicitly create a private right in the individual for violations of the child labor provisions.¹³¹ The enforcement “remedies” available to the Secretary of Labor primarily protect the public by deterring future violations, but provide no private cause of action.¹³² This limitation in the enforcement scheme of FLSA was first declared by the Fifth Circuit Court of Appeals in *Breitwieser v. KMS Industries, Inc.*¹³³

In *Breitwieser*, a sixteen year-old boy was crushed to death when the forklift he was operating fell on top of him.¹³⁴ Operation of forklifts had been declared a “particularly hazardous” occupation by the Secretary of Labor.¹³⁵ The trial court refused to imply a private remedy even though the total amount of recovery under Georgia’s workers’ compensation statute given to the beneficiaries of deceased workers with no dependents was \$750.¹³⁶ In affirming the trial court decision, the Fifth Circuit decided that a civil remedy was not necessary to enforce the intent of Congress because the Act already contained a “comprehensive enforcement scheme.”¹³⁷ The court reasoned that the criminal sanctions available to the Secretary of Labor were substantial enough to deter future abuses of child labor.¹³⁸

131. *See id.* §§ 215-217. The statute explicitly provides criminal penalties and fines intended to reduce future abuse, but is silent in regard to creating a private cause of action for personal recovery for violations of the Act which caused past injury. *Id.* The child labor provisions are part of a larger statute that also regulates the wages and hours of employees. KALET, *supra* note 5, at vi. Under several of the wage and hour provisions, employees are granted the right to bring a private cause of action against their employers. *Id.* In these cases, Congress has determined that the most efficient enforcement of these regulations is through the action of individual employees acting as “private attorneys-general.” *Id.*

132. 29 U.S.C. § 216(a) (1994). Use of the word “remedy” in the context of criminal sanctions is misleading because it connotes that the victim of a legal wrong has received compensation. More accurately, society at-large receives the benefit of deterrence as a remedy. *See Breitwieser v. KMS Indus., Inc.*, 467 F.2d 1391, 1392 (5th Cir. 1972). The court in *Breitwieser* used the term “remedy” when it described the comprehensive enforcement scheme as if the primary beneficiary of that scheme was the victim. *Id.*

133. 467 F.2d 1391, 1394 (5th Cir. 1972).

134. *Id.* at 1392.

135. *Id.* The declaration from the Secretary of Labor came through “Order No. 7, 29 C.F.R. § 422.7.” *See also* 29 C.F.R. §§ 570.1(c), 570.2(a) (1996) (defining “oppressive child labor age” at 16 with respect to any occupation and between 16 and 18 with respect to employment found to be particularly hazardous to minors at such an age or which is detrimental to their health or well-being).

136. *Breitwieser*, 467 F.2d at 1394. The court stated that the size of the state award does not justify creating a new federal remedy when the FLSA does not provide even “a hint of such a remedy.” *Id.* The court also suggested that employment-related injuries should be dealt with at the state level. *Id.*

137. *Id.* at 1392.

138. *Id.* at 1393.

The tragic reality of this case was that neither before nor after the Breitwieser boy's death did the Department of Labor bring suit against the defendants for employing child laborers.¹³⁹ While this fact may be an indictment of the Department of Labor, it is also an indication that the enforcement scheme that the Fifth Circuit chose to rely on was not, and is not, an adequate deterrent for violations of federal child labor laws.¹⁴⁰ Despite the inadequacy of the remedy, the court was not free to imply a cause of action in order to fill in the gaps of the legislation.¹⁴¹

The development of labor relations has produced several conflicting approaches which have attempted to solve the problem of worker injuries that occur in an industrial economy. It may be concluded that no single legal framework has proven capable of handling all issues in a manner acceptable to both employers and employees. Since no legal framework has been able to adequately address each party's needs, it is necessary to explore different possible solutions to the remaining problems not solved under the current mechanisms, specifically focused on child labor enforcement.

III. ANALYSIS OF THE CONFLICT BETWEEN CHILD LABOR ENFORCEMENT AND THE RESTRICTION OF LIABILITY FOR NEGLIGENCE UNDER WORKERS' COMPENSATION

The conflict addressed by this Note exists in the specific circumstance when workers' compensation creates a "twilight zone" of protection to employers when they violate other laws intended to create safe working conditions for child employees.¹⁴² For example, what happens when a young worker with no spouse or dependents is killed during the course of employment? In many instances the compensation award granted to the surviving legal guardian is

139. Note, *Private Remedy for Violation of the Oppressive Child Labor Provisions of the Fair Labor Standards Act Will Not Be Implied*, 51 TEX. L. REV. 804, 812 (1973). See also Michael Braunstein, *Implied Remedies—Fair Labor Standards Act—Violation of Federal Child Labor Laws Does Not Give Rise to Implied Cause of Action for Damages*, 47 TUL. L. REV. 1201 (1973); *Recent Case, Remedies—Fair Labor Standards Act—Private Damage Suit Unavailable to Redress Violations of Child Labor Provisions of the Fair Labor Standards Act*, 26 VAND. L. REV. 867 (1973).

140. Note, *supra* note 139, at 812. *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974) (creating a private civil remedy from a federal statute that does not explicitly state such a cause).

141. *Cort v. Ash*, 422 U.S. 66 (1975). The Supreme Court provided a list of factors that were to be given equal weight for the determination of whether a cause of action would be implied from a federal statute. *Id.* at 78. When reviewing a pre-1980 legislative enactment, the determination is based upon (1) whether there are rights created in favor of the plaintiff, (2) whether there is legislative intent to either create or deny a cause of action, (3) whether creation of a cause of action is consistent with the congressional goal, and (4) whether the issue is one that is traditionally relegated to state law. *Id.*

142. See *supra* text accompanying note 123. Both FLSA and the Occupational Safety and Health Act are examples of other laws intended to promote workplace safety.

barely enough to cover the burial expenses.¹⁴³ Because workers' compensation bars any suit at common law in exchange for as little as burial expenses, employers are able to "callous[ly] disregard" employee safety because the employer is required to pay virtually nothing for the death of an employee that occurred as a result of the employer's negligence.¹⁴⁴ Similar results occur when any employee is injured or killed, but the inequity is more pronounced with the illegal employment of minors because the compensation awards for minors are so limited, and because laws designed to prevent such injuries are being disregarded.¹⁴⁵ Child labor violations are on the increase and deserve nothing less than a uniform approach for stopping further violations.¹⁴⁶

A. Semantic Gymnastics and the Inconsistent Status of the Law

The exclusive remedy provision of workers' compensation bars all suits at common law by employees against their employers.¹⁴⁷ For violations of child labor law, however, some courts have broken through the exclusive remedy provision and have allowed children to sue their employers when injured or killed while performing jobs that were restricted by child labor laws.¹⁴⁸ When courts have broken through the exclusive remedy provision, they have determined that the injuries or deaths occurred outside the scope of workers' compensation coverage.¹⁴⁹ These cases are the result of inconsistent treatment between individual states in regard to their statutory definition of "employee" for the purpose of coverage under workers' compensation.¹⁵⁰ The issue turns on whether illegally employed minors satisfy the definition of "employee," thus warranting coverage under the state workers' compensation act.¹⁵¹ Courts that

143. See Amchan, *supra* note 47, at 683-84.

144. *Id.* at 683. Amchan illustrates this point through a workplace accident that occurred when an improperly sloped trench collapsed on two workers. *Id.* The employer had received several warnings that the trench was inadequately sloped, both from inspectors and from a prior cave-in. *Id.* The employer failed to heed the warnings of the inspectors and instructed the workers to head for sewage pipes in case of another collapse. *Id.* Neither employee made it to safety and both were killed. *Id.*

145. See *supra* notes 10-14 and accompanying text.

146. See *supra* notes 10-14 and accompanying text for a discussion of child labor violations. For a discussion of the need for a uniform approach, see *infra* notes 234-47 and accompanying text.

147. Annotation, *Workers' Compensation Statute As Barring Illegally Employed Minor's Tort Action*, 77 A.L.R. 4TH 844, 848-49 (1994) [hereinafter *Illegally Employed Minors*].

148. *Id.* at 849.

149. *Id.*

150. *Id.* See also *infra* notes 152-53.

151. *Illegally Employed Minors*, *supra* note 147, at 849. There is substantial confusion relating to what is considered illegal employment. *Id.* Some courts have decided that there is a distinction between a minor who was hired illegally and a minor hired legally but doing illegal tasks. Generally, a minor is hired illegally when the employer fails to obtain the proper working permits for the minor, or when the minor misrepresents his or her actual age. See *supra* note 128 and accompanying text. Also, a minor can be hired legally, but assigned to tasks considered statutorily

bar liability do so by interpreting the language of the statutes broadly to encompass all employees, focusing on their de facto relationship to their employers.¹⁵² On the other hand, courts that allow liability do so through a highly technical analysis of the legality of the employment contract between the employer and employee.¹⁵³ By going through semantic gymnastics, courts around the country have treated the issue of child labor violations quite inconsistently.¹⁵⁴

1. No Tort Liability—*Fanion v. McNeal*

In several states, courts have restricted tort liability in favor of the exclusive remedies recoverable under workers' compensation. In *Fanion v. McNeal*,¹⁵⁵ a minor was killed while employed in violation of the state child

illegal because of their ultra-hazardous nature. See *supra* note 3. For the purpose of this note, the major concern is actual employment in hazardous activities that leads to injuries and deaths.

152. *Kimmell v. Seven Up Bottling Co.*, 993 F.2d 410, 413 (4th Cir. 1993) (holding that a 15 year-old killed when crushed by a forklift, in violation of child labor laws and safety requirements, was limited to recovery under workers' compensation because the "accident" occurred during the course of employment which was covered under the act); *Hutton v. Cape Foods, Inc.*, 738 F. Supp. 38, 40 (D. Mass. 1990) (ruling that a minor is included in the definition "every person under the employment of another" barring any action in tort; and that the occupation in which the child was engaged was not ultra-hazardous); *Noble v. Blume Tree Servs., Inc.*, 646 So. 2d 441, 444 (La. Ct. App. 1994) (explaining that a minor who is hired in violation of child labor laws, but who is injured while performing a task permitted by those laws may not recover in tort but is limited to workers' compensation as his exclusive remedy); *Boyd v. Permian Servicing Co.*, 825 P.2d 611, 614 (N.M. 1992) (holding that the exclusive remedy provision of workers' compensation precludes bringing a wrongful death suit against an employer when a 16 year-old was crushed by the hoisting device which was illegal under FLSA); *Bruley v. Fonda Group, Inc.*, 595 A.2d 269, 271 (Vt. 1991) (stating that the exclusive remedy provision of workers' compensation law bars all personal injury claims even when the claim arises from an injury during an activity that is prohibited by federal law).

153. *Whitney-Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250, 254 (Alaska 1976) (stating that a child had a right to choose whether to receive workers' compensation benefits or to proceed against the employer in tort. The fact that the child had received workers' compensation benefits was not determinative of whether the child had in fact exercised conscious intent to choose compensation as opposed to seeking common law remedies); *Ewert v. Georgia Cas. & Sur. Co.*, 548 So. 2d 358, 362 (La. Ct. App. 1989) (holding that a minor hired for illegal employment may choose between workers' compensation and tort remedy; the court proceeded on the notion of a voidable contract); *Ginsberg v. Coca-Cola Bottling Co.*, 285 F.2d 77 (7th Cir. 1961) (discussing a lower court's holding that employers have an absolute duty not to employ minors without the requisite certificate of age and that non-performance of this duty could be considered negligence as a matter of law); *Baker v. Hunn Roofing, Inc.*, 399 F. Supp. 628, 630 (W.D. Okla. 1975) (ruling that a 13 year-old boy injured while carrying a bucket of hot tar was entitled to pursue a remedy in tort because illegally hazardous employment is not covered by Oklahoma's workers' compensation act).

154. *Illegally Employed Minors*, *supra* note 147, at 846.

155. 577 A.2d 2 (Me. 1990).

labor laws.¹⁵⁶ The *Fanion* court found that the plaintiff was both hired illegally and employed in a restricted occupation.¹⁵⁷ The surviving family was limited to the exclusive remedies available through workers' compensation for the death of their son despite the fact that he was illegally employed by the employer.¹⁵⁸ The victim, a fifteen year-old boy, was killed when he fell off the back of a garbage truck and was struck by another vehicle.¹⁵⁹ He was killed less than four hours after being hired, both without a work permit and in an occupation connected with a "mechanical establishment" which violated child labor laws.¹⁶⁰

In *Fanion*, the court relied on the Workers' Compensation Act's "almost unlimited" definition of employee to include illegally employed minors.¹⁶¹ The court held that the legislature had clearly stated its intention to limit employer liability though the Workers' Compensation Act.¹⁶² The opinion stated that any attempt to puncture the exclusive remedy scheme through child labor statutes was an impermissible attempt to circumvent the clear intention of the legislature.¹⁶³ The court explained that there was no legislative suggestion to give illegally employed minors any special treatment or to penalize employers beyond the already-proscribed sanctions of the child labor laws.¹⁶⁴

This decision by the Supreme Judicial Court of Maine to uphold the exclusive remedy shield for employers is widely supported.¹⁶⁵ Other courts

156. *Id.* at 3. The language and spirit of the Maine child labor laws are substantially similar to the federal law governing child labor which fit the basic framework of the conflict between child labor protection and the exclusive remedy clause of workers' compensation.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* The Maine statute states that "[n]o minor under 16 years of age shall be employed, permitted or suffered to work in, about or in connection with any manufacturing or mechanical establishment" ME. REV. STAT. ANN. tit. 26, § 773 (West 1988).

161. *Fanion v. McNeal*, 577 A.2d 2, 4 (Me. 1990). The Maine workers' compensation act defines employee as "every person in the service of another under any contract of hire, express or implied, oral or written" ME. REV. STAT. ANN. tit. 39, § 2(5) (West 1989).

162. *Fanion*, 577 A.2d at 4.

163. *Id.*

164. *Id.*

165. King, *supra* note 107, at 405. King discusses several arguments in favor of maintaining the exclusive remedy provision and views any attempt to abrogate it with the concern that such attempts will make limited liability an illusory concept. *Id.* at 411-12. King states that workers' compensation has performed well when objectively compared to the tort system since transaction costs of workers' compensation are much less than tort costs and more money actually gets to injured employees. *Id.* King also states that subjecting employers to both workers' compensation and tort liability claims would be "oppressive," and that any erosion of the exclusive remedy provision will undermine the predictability of employer liability. *Id.* at 412-13. Finally, King believes that tort claims will not only increase substantive litigation, but will largely increase

around the country have followed this line of reasoning and have ruled to sustain the liability shield for employers.¹⁶⁶ Still, other courts have taken the view that barring liability in cases where the employer takes advantage of child labor to the detriment of such children is an inequitable result that cannot be tolerated.

2. Tort Liability Granted—*Blancato v. Feldspar Corp.*

When legislatures do not explicitly include minors in the definition of an employee under the workers' compensation statute, courts have construed this omission to indicate deference to child labor laws. In *Blancato v. Feldspar Corp.*,¹⁶⁷ the Supreme Court of Connecticut found that illegally employed minors may treat their employment contract as voidable, giving the minor the choice between receiving a remedy through workers' compensation or foregoing workers' compensation and instead pursuing a common law action in tort.¹⁶⁸ The court reasoned that employers can only take advantage of the exclusive remedy clause if there is a valid employment contract.¹⁶⁹ In its determination, the court followed the theme of child labor laws which recognize a minor's inability to competently evaluate the risks of personal injury associated with hazardous activities.¹⁷⁰ The court relied on the notion of a voidable contract.¹⁷¹ Voidable contracts give minors the choice whether or not to enforce contracts entered into because minors are not legally capable of making

procedural litigation. *Id.* at 413.

166. *See supra* note 152.

167. 522 A.2d 1235 (Conn. 1987).

168. *Id.* at 1238. It is clear that receiving the right to sue in tort is the preferred approach by plaintiffs' attorneys. Rust, *supra* note 107, at 76. One of the first questions an attorney representing an injured worker will ask is whether they can file a claim outside of workers' compensation because the scope of recovery in tort is so much greater than the scheduled benefits under workers' compensation. *Id.* Recovery in tort may include nominal, pecuniary, or punitive damages for death cases and time losses affecting earning capacity, expenses, and pain and suffering for injury cases. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 540, 562-68 (1973). *See also supra* notes 72-75 and accompanying text.

169. *Blancato*, 522 A.2d at 1238.

170. *Id.*

171. *Id.* A "voidable contract" is defined as:

A contract that is valid, but which may be legally voided at the option of one of the parties. One which is void as to wrongdoer but not void as to wronged party, unless he elects to so treat it. *Depner v. Joseph Zukin Blouses*, 13 Cal. App. 2d 124, 56 P.2d 574, 575. One which can be avoided (cancelled) by one party because right of rescission exists as a result of some defect or illegality (e.g., fraud or incompetence)

.....

A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.

BLACK'S LAW DICTIONARY 1574 (6th ed. 1990).

a valid contract until they have reached the age of majority.¹⁷² The age of majority will vary for the purposes of child labor depending on the nature and degree of the ultra-hazardous occupation.¹⁷³ The court stated that to allow an employer to effectively bar all common law tort claims when that employer takes advantage of the minor's "legal disability" would contravene public policy.¹⁷⁴ In response, the court would allow a minor to have the option to either accept the employment contract and recover under workers' compensation, or to reject the employment contract in order to pursue a remedy through tort.¹⁷⁵

The voidable contract principle is particularly relevant to child labor law because the possible harm to the child through severe injury or death is generally irreversible.¹⁷⁶ In contrast to other types of contracts involving trade or services, once the injury or death has occurred, there is not much that can be done other than to grant money damages.¹⁷⁷ Although the result reached by the *Blancato* court is a step in the right direction, the method the court used to grant money damages creates future problems that make a state cause of action inadequate. For example, using the voidable contract theory to allow a minor to sue in tort changes the nature of the relationship between an employer and an employee. Their relationship no longer rests upon the association with work as under workers' compensation, but rather, it depends upon the status of their employment contract. This change is a rather drastic decision to be made by a court which may have the effect of denying minors compensation under workers' compensation statutes even when they do not seek to recover outside of the workers' compensation scheme. In addition, such a judicially created remedy is limited in scope. The remedy extends no further than the creating court's jurisdiction. A federal legislative enactment, on the other hand, that secures a minor's right to sue when employers break child labor laws, overcomes both of these issues.¹⁷⁸

172. 1 RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

173. For example, see *supra* note 128 and accompanying text illustrating FLSA requirements.

174. *Blancato v. Feldspar Corp.*, 522 A.2d 1235, 1238 (Conn. 1987) (citing *Whitney-Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250, 253 (Alaska 1976)).

175. *Id.* See also *supra* note 153.

176. See *supra* notes 4, 10-14 and accompanying text.

177. FLSA contemplates that the appropriate remedy to an injured child is through prosecution by the Department of Labor to pursue fines or potential imprisonment. 29 U.S.C. § 216(a)-(b) (1994). The available "remedies" under FLSA are woefully inadequate for placing the victim of "oppressive child labor" back in his or her rightful position prior to the violation that led to the injury or death because the remedies do not provide money damages to the injured child.

178. See *infra* section IV.

B. Workers' Compensation as a Non-incentive to Workplace Safety

Workers' compensation schemes do not focus on advancing workplace safety, and in fact, "the workers' comp[ensation] system was never designed to have any impact on prevention."¹⁷⁹ Looking no further than the fundamental purpose of workers' compensation, to provide prompt, dignified, and certain financial relief for injuries suffered in the course of employment,¹⁸⁰ it can easily be inferred that safety was not its intended goal. Demonstrating that safety is not the focus of workers' compensation, an employer can fulfill his workers' compensation obligations by merely purchasing the requisite insurance.¹⁸¹

While it may seem that poor safety records would translate into increased insurance premiums for employers with high injury rates, no such direct relationship exists.¹⁸² Rather, the amount employers pay is determined by the size, experience, classification, and insurance arrangements made by the employer.¹⁸³ Since an employer's payment to the insurer is fixed, and the employer is not liable at common law to employees, there is a shield from almost all economic burdens that employers would otherwise face in a tort system of liability.¹⁸⁴ The result of this legislative avoidance of liability is that there is no economic incentive to initiate safety prevention in the workplace

179. ANNE R. GRANT, *INJURY PREVENTION IN AMERICA* 37 (1991) (quoting David Vladek, Public Citizen Litigation Group). David Vladek's comment came as part of a roundtable discussion on the merits of worker safety. *Id.* See also Amchan, *supra* note 47, at 683.

180. King, *supra* note 107, at 406.

181. Franklin G. Mixon, Jr., *Workers' Compensation and OSHA: Are Both Necessary?*, *GOV'T UNION REV.*, Winter 1992, at 37, 40. Employers may choose between private insurance or state-administered funds, depending on the individual state requirements. *Id.* Recall the earlier discussion of the bargain between workers and employers in a workers' compensation system. It seems that nothing was left unhaggled over because even the way that the insurance funds are run was a topic of debate within the state legislatures when workers' compensation statutes were enacted. Some states have allowed private insurance carriers to run workers' compensation. When comparing the percentage of the premiums paid out for injuries between state run funds and private funds, it is clear that state funds are making substantial profits. GRANT, *supra* note 179, at 26-27.

182. Mixon, *supra* note 181, at 38. White defines a premium as the money an employer pays to an insurer for workers' compensation insurance. WHITE, *supra* note 30, at 130. He suggests that the rate-making process for workers' compensation is a mysterious undertaking that likely yields huge profits for private insurance providers. *Id.* at 129. In addition, White states that common sense would lead one to believe that when benefits are high, premiums will be high as well. *Id.* at 130. However, White states that this assumption is untrue and illustrates the surprising fact that there is no direct relationship between rates and benefits. *Id.* White demonstrates this point through a table which compares the relatively high rates and low benefits of four states with the high benefits and low rates of four other states. *Id.* at 130-31. Even in light of these facts, insurance providers continue to use rising benefits as an excuse to raise rates. *Id.* at 131.

183. Mixon, *supra* note 181, at 40.

184. See *supra* notes 39-85 and accompanying text.

because the cost of doing so would merely add economic burdens to employers without a corresponding economic benefit through a reduction in workers' compensation premiums.¹⁸⁵

Industrial safety and health as a goal of workers' compensation is not apparent on the face of the worker's compensation scheme.¹⁸⁶ Workers' compensation law does not encourage employers to initiate preventative expenditures because the cost of doing so is often higher than the cost of insurance premiums for injuries and death.¹⁸⁷ Congress recognized the failure of workers' compensation to encourage prevention of workplace injuries and, in response, enacted the Occupational Safety and Health Act (OSHA) of 1970.¹⁸⁸ Congress found that lost production, wage loss, medical expenses, and disability compensation were all such a substantial burden on interstate commerce that a national standard of safety enforcement was necessary to "preserve our human resources."¹⁸⁹ Opponents of OSHA describe the federal safety regulations as a "plague" that unnecessarily weighs down economic growth in a capitalist economy.¹⁹⁰ In line with this anti-regulation position, the resources poured into an adversarial posture against OSHA by industrial advocates have created "imbalanced compromises" that weaken the effect of the Act.¹⁹¹ This is consistent with a capitalist perspective which holds that maintaining the health and structure of the capitalist economy will provide the greatest good for all.¹⁹²

Workers' compensation generally *does* serve an important function for workers by providing cash benefits, medical care, and rehabilitation services for

185. WHITE, *supra* note 30, at 143. This argument is based on a cost-benefit analysis. *Id.* Critical of the use of cost-benefit analyses, Joe Velasquez believes that "cost-benefit argument[s] are] all bullshit. . . . When you talk about cost-benefit what you're really talking about is counting bodies, which is just unacceptable." *Id.* Rather, it is more appropriate to discuss any benefits derived in terms of worker health and safety, not reductions in liability. *Id.* at 145.

186. Amchan, *supra* note 47, at 686.

187. *Id.* Employers will make the choice to not prevent injuries even when doing so will raise the amount of the insurance premiums because that cost is still lower than prevention. *Id.*

188. Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-595, 84 Stat. 1590 (codified as 5 U.S.C. §§ 5108, 5314, 5315, 7902; 15 U.S.C. §§ 663, 636; 18 U.S.C. § 1114; 29 U.S.C. §§ 553, 651 to 678; 42 U.S.C. § 3142-1; 49 U.S.C. app. § 1421 (1970)).

189. 29 U.S.C. § 651(a)-(b) (1994). Unfortunately, Congress did not provide enough resources to carry out OSHA regulations effectively. GERSUNY, *supra* note 31, at 15. For example, when OSHA was enacted in 1970, there were only about 500 inspectors for 4.1 million workplaces. *Id.* Inspectors investigated over 17,000 workplaces in the first 8 months, establishing a rate that would take them over 230 years for them to visit all the workplaces in America. *Id.* Even with the projected number of investigators for the future, it would still take 46 years to visit each workplace for the first time. *Id.*

190. MCCAFFREY, *supra* note 33, at 7.

191. *Id.* at 8.

192. *Id.* at 9.

injuries and illnesses that “arise out of and in the course of employment.”¹⁹³ In order to serve these functions, the general balance between providing compensation to workers for workplace injuries and employer protection from unlimited liability is necessary. It must be asked, however, whether such a balance adequately protects special classes of workers, such as children, who need protection and deserve more than mere compensation for their injuries when such injuries are the result of their employer’s negligence. This inquiry, therefore, shifts toward exploring the effect that a limited exception to the exclusive remedy clause, created for illegally employed minors, would have on the workers’ compensation “bargain.”

C. Economic Incentives to Workplace Safety—Hypothetically

Workplace safety from an economic perspective is not the primary focus of workers’ compensation.¹⁹⁴ As discussed above, employers are shielded from the economic effects of workplace injuries through the exclusive remedy clause.¹⁹⁵ In light of the existing economic shield for employers, the following discussion on economic incentives is premised on a hypothetical example which subjects employers to the economic burdens that would be associated with an employees’ claim for negligence. These economic concepts are only applicable when employers are subject to the consequences of failing to prevent injuries. For the purpose of this Note, the arguments are used for the limited purpose of stopping child labor violations, and are not intended to undermine the basic structure of the entire workers’ compensation system.

Injuries and diseases are undesirable and somewhat unavoidable by-products that stem from the creation of goods and services.¹⁹⁶ If an employer can successfully lower the rate of injuries to its employees, the employer will benefit from lower labor costs in two ways.¹⁹⁷ First, by lowering injury rates, an employer can reduce the costs of recruiting and training replacement workers associated with employee turnover.¹⁹⁸ An employer will also be able to pay lower salaries than firms with higher risks of injury.¹⁹⁹ Evidence indicates that

193. *Mixon, supra* note 181, at 40. See generally *King, supra* note 107.

194. *Amchan, supra* note 47, at 683. See also *supra* notes 179-93 and accompanying text.

195. See *supra* notes 179-93 and accompanying text.

196. NEIL CARTER, GUIDE TO WORKMEN’S COMPENSATION CLAIMS at x (1965). Carter explains that the history of compensation for injuries in all contexts traces back to biblical times as recorded in the book of Exodus. *Id.* From the beginning of human consciousness, society has responded to the needs of those unfortunate enough to suffer injury while at work. *Id.*

197. DARLING-HAMMOND & KNIESNER, *supra* note 96, at 53.

198. *Id.*

199. *Id.* Workers will generally take a job that they know is risky if the employer pays a high enough wage. *Mixon, supra* note 181, at 38. Wage differentials must be calculated under the notion that the employee knows the risks involved in the employment. *Id.* It is critical to note,

when an employee learns that employment conditions are more hazardous than he or she initially anticipated, the employee quits.²⁰⁰ This illustrates that employees, when aware of the danger, are not always going to continue to take on the risks of that particular job. The notion that employees leave jobs when they know the job is dangerous is essential to the application of child labor law. The common law generally recognizes the legal disability of a minor to properly assess risks.²⁰¹ Because of a minor's legal and developmental disability, it is crucial that minors receive protection from undue risks of injury in hazardous occupations before they are injured.²⁰² Minors have proven themselves to be developmentally incapable of assessing risks of danger and less likely to recognize when a job is too dangerous for them to handle.²⁰³ In addition, children often attempt to prove themselves beyond what they are physically capable of doing.²⁰⁴ Mixing the inability to assess risks and the need to prove oneself is a deadly combination which has led to approximately seventy workplace deaths per year and over 200,000 injuries per year.²⁰⁵

For an employer to have an economic incentive to decrease injuries, the employer's cost expenditure on safety prevention must be less than or equal to the marginal benefit of the safety derived from the money spent.²⁰⁶ This concept is a simple cost-benefit analysis measuring the economic "worth" to an employer of the total costs applied towards safety compared to the actual benefits received for doing so.²⁰⁷ Applying a cost-benefit analysis to child

however, that economic necessity to earn money may motivate an employee to overlook the attendant risks of a job, rather than reflect that employee's willingness to risk his or her life because the job pays more. In addition, employees have generally been found to underestimate the risks associated with hazardous employment. DARLING-HAMMOND & KNIESNER, *supra* note 96, at 59.

200. DARLING-HAMMOND & KNIESNER, *supra* note 96, at 59.

201. *See supra* notes 167-78 and accompanying text. The Department of Labor (DOL) has also recognized the inability of minors to assess risks of danger and has instituted a federal effort to inform employers and teen employees of the dangers associated with certain types of employment. *See supra* note 4. The DOL states that "workers with less than one-year's experience account for almost one-third of the occupational injuries every year." *Id.*

202. *See supra* notes 10-14 and accompanying text. *See infra* section IV for proposed amendments to FLSA to accomplish this goal.

203. *See supra* notes 170 and 172 and accompanying text.

204. *See supra* notes 152-53 for a listing of cases in which children have been injured or killed while employed in dangerous conditions. *See also supra* notes 10-14 and accompanying text for a discussion of the growing problem of child labor.

205. *See supra* text accompanying note 12.

206. DARLING-HAMMOND & KNIESNER, *supra* note 96, at 55. *See also* RICHARD B. VICTOR ET AL., WORKERS' COMPENSATION AND WORKPLACE SAFETY: SOME LESSONS FROM ECONOMIC THEORY 29 (1982).

207. *See supra* note 185. The use of the word "worth" in this discussion is meant to focus on economic worth measured in dollars, to the exclusion of any other concept of "worth," whether it be psychological, emotional, or morale effects associated with injuries to workers. It is crucial to note that this restricted notion of "worth" overlooks the special category of employees, namely

labor violations, it is clear that an employer's costs to minimize the likelihood that a minor will be injured or killed in a statutorily proscribed occupation are minimal.²⁰⁸ The costs to an employer for compliance with FLSA amount to the time taken to read the statute and relevant Code of Federal Regulations to check for hazardous jobs that the employer engages in and then to decide if those jobs are what the child is being hired to do.²⁰⁹ To minimize the process, employers are invited to call the Department of Labor or the National Institute of Occupational Safety and Health for consultation regarding relevant information needed to protect themselves from violating the law.²¹⁰ The only additional cost to the employer would be to keep on file an up-to-date record of the employee's age.²¹¹ Record of an employee's age can be furnished by the employee's school principal or birth certificate and may be made a prerequisite to commencing work.²¹² FLSA specifically allows employers to rely upon assertions of age so long as the assertion is made through the best documentary evidence available.²¹³ By relying upon the best documentary evidence available, employers can protect themselves even when an employee attempts to circumvent the law by falsely stating his or her age.²¹⁴

Hypothetically, if an employer requires proof of the employee's age and applies the guidance provided by FLSA, there should be no risk of liability to employers. The employer can eliminate all cost of injuries or death associated with the employment of minors in hazardous occupations by simply not

children, who are at the beginning of their productive lives. If injured or killed, these children will either be a great burden on or great loss to society.

208. See *infra* notes 209-14 and accompanying text.

209. 29 U.S.C. § 201 (1988); 29 C.F.R. § 570.1-.23 (1995). These steps are precisely what the Department of Labor suggested recently in its program for teen worker safety. See *supra* note 4.

210. The address and phone numbers are as follows: Office of the Administrator, Wage & Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue N.W., Washington D.C., 20210; (202) 219-8305; and Director, Division of Safety Research, National Institute for Occupational Safety and Health, 1095 Willowdale Road, Morgantown, West Virginia 26505-2888; (800) 356-4674. In addition, there are a number of resources available to employers on how to avoid liability. See also *supra* note 4 discussing the DOL's *Work Safe This Summer (And Beyond)* initiative which addresses issues relating to teen safety in the workplace; RONALD M. GREEN & RICHARD J. REIBSTEIN, *EMPLOYER'S GUIDE TO WORKPLACE TORTS* (1992); LAURIE E. LEADER, *WAGES AND HOURS: LAW & PRACTICE* (1996); LOUIS WEINER, *FEDERAL WAGE AND HOUR LAW* (1977); CHARLES H. LIVENGOOD, JR., *THE FEDERAL WAGE AND HOUR LAW* (1952).

211. See *supra* note 128 (citing 29 C.F.R. § 570.121 (1996)). In addition, 29 U.S.C. § 203(i)(2) (1994) allows employers to rely upon unexpired certificates of age that illustrate that to the knowledge of employer, the employee was legally old enough to perform the hazardous occupation.

212. WEINER, *supra* note 210, at 208. An age certificate may be issued by the state or federal government and may be relied upon as a defense only if it shows that the child was above the minimum age for the occupation in which he or she was employed. *Id.*

213. See *supra* note 128 (citing 29 C.F.R. § 570.121 (1996)).

214. See *supra* note 128 (citing 29 C.F.R. § 570.121 (1996)).

employing minors in hazardous occupations. If there are no underage employees employed in such occupations, there is no corresponding risk of liability.

This hypothetical transaction appears too obvious to be possible, but it is precisely what does not occur when employers are protected from tort liability under workers' compensation.²¹⁵ By opening up an employer to statutory liability to minors working in hazardous occupations, employers will find it in their economic interest to spend more resources on safety prevention.²¹⁶ The cost of prevention is very low and easily achievable. Choosing not to impose liability on employers is economically unsound and immoral.

D. Insufficient Penalties & Inadequate Enforcement of the Fair Labor Standards Act

Presumably, when FLSA was enacted, Congress knew that the effect of the exclusive remedy provision of workers' compensation acted not only as a bar to all suits by employees against their employers at common law, but also as a bar to any economic incentive to increase workplace safety for children.²¹⁷ Congress' scheme for enforcement of FLSA through the Secretary of Labor was intended to provide sufficient penalties to induce employers to comply with the Act.²¹⁸ Assuming arguendo that all violations of child labor law are penalized, it is not likely that the \$10,000 fine per violation is likely to serve as a "severe

215. The following cases are examples of when injuries or deaths have occurred because of an employer's insistence upon illegally employing a minor in some way: *Kimmell v. Seven Up Bottling Co.*, 993 F.2d 410 (4th Cir. 1993); *Scarpelli v. Travelers Indemnity Co. of Hartford*, 248 F.2d 791 (7th Cir. 1957); *Hutton v. Cape Foods, Inc.*, 738 F. Supp. 38 (D. Mass. 1990); *Mellon v. Hirsch*, 8 F.R.D. 250 (D. Md. 1948); *Noble v. Blume Tree Servs., Inc.*, 646 So. 2d 441 (La. Ct. App. 1994); *Fanion v. McNeal*, 577 A.2d 2 (Me. 1990). See also *Ginsberg v. Coca-Cola Bottling Co.*, 285 F.2d 77 (7th Cir. 1961); *Baker v. Hunn Roofing, Inc.*, 399 F. Supp. 628 (W.D. Okla. 1975); *Whitney-Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250 (Alaska 1976); *Blancato v. Feldspar Corp.*, 522 A.2d 1235 (Conn. 1987); *Ewert v. Georgia Cas. & Sur. Co.*, 548 So. 2d 358 (La. Ct. App. 1989).

216. See *infra* notes 248-57 and accompanying text.

217. See *supra* notes 194-216 and accompanying text.

218. 29 U.S.C. § 216(a) (1994). The Secretary of Labor may seek fines and criminal prosecution with penalties up to six months in prison. *Id.* The original Act allowed the Secretary of Labor to impose fines of \$1000 per violation. *Id.* In 1990, Congress recognized the inadequacy of a \$1000 penalty and increased the civil penalty to \$10,000 per violation. *Lantos, supra* note 10, at 68. At the same time, Congress also required that the collected fines be deposited into the general treasury fund, replacing the previous policy which deposited the collected fund with the Department of Labor to pay for further child labor investigations. *Id.*

financial deterrent” to larger companies, though such a penalty would certainly impact a smaller business.²¹⁹

Additionally, the “remedies” under FLSA, fines or imprisonment, are inappropriate substitutes for direct liability in damages which would be imposed on employers without the protection of workers’ compensation.²²⁰ Society made the political choice to grant employers immunity from liability to their employees through the enactment of workers’ compensation.²²¹ With the rise of child labor injuries and deaths, it is time to evaluate that choice in order to protect young workers by granting them a remedy at law, liability for damages.²²² Liability for damages can provide an economic incentive to abide by the law without requiring enforcement by a governmental agency.²²³

219. Lantos, *supra* note 10, at 69. Congressman Lantos spoke with the president of the fast food chain, Jack In The Box, who stated that the \$94,000 fines charged by the Department of Labor did not provide deterrent value to the \$700 million business. *Id.* The conclusion to be drawn is that \$10,000 fines are not substantial enough to affect larger corporations. This result may be different in relation to small businesses that are found in violation of child labor law because the amount of the fine will be more substantial in relation to the gross income of smaller businesses. This also assumes that all violations are caught and prosecuted.

220. 29 U.S.C. § 216(a) (1994). Recall that the Fifth Circuit Court of Appeals stated that the enforcement scheme under FLSA was adequate to deter violations of child labor. *See supra* notes 137-41 and accompanying text. Recall, as well, that the violations were not prosecuted by the Department of Labor. *See supra* notes 137-41 and accompanying text. The *Breitwieser* case has become a landmark decision for its declaration that the courts should not imply a private right because the statute does not provide “even a hint of such a remedy.” *Breitwieser v. KMS Indus., Inc.*, 467 F.2d 1391, 1394 (5th Cir. 1972). The *Breitwieser* court found it inappropriate to imply a private right, presumably because doing so should be the decision of the legislature to impose political choices. *Id.* This note concurs with that court’s decision to allow the legislature to make that political choice and, therefore, proposes that Congress amend FLSA to include a private right at law for damages. *See infra* section IV.

221. *See supra* notes 96-107 and accompanying text. This political choice may have been appropriate for the social and economic circumstances at the time; however, society, the nature of work, and the inability of one system to fairly administer compensation all require that this choice be re-evaluated. In addition, recall the statement by Samuel Lindsay in which he sought the co-existence of laws that did not invalidate each other’s substantive purpose. *See supra* text accompanying note 123. Lindsay sought to avoid a “twilight zone” of non-enforcement. *WOOD, supra* note 27, at 28. Currently, workers’ compensation immunity and the remedies under FLSA do not conflict with one another on a procedural level, but they are wholly incompatible for real enforcement of FLSA. There is no “twilight zone” procedurally, but the substantive weight behind the enforcement scheme of FLSA is inept without the power to hold employers liable for their failure to abide by the law. *See infra* notes 224-33 and accompanying text.

222. *See supra* notes 66-85 and accompanying text. This note does not seek to create employer liability for all workers. Rather, it seeks to evaluate the ability of workers’ compensation to competently effectuate the purpose of child labor laws when employers have complete immunity from liability to their employees, even when those employees are employed in violation of the laws enacted to protect them. *See infra* section IV.

223. *See supra* notes 76-85 and accompanying text.

Enforcement of child labor laws through economic incentives without the assistance of a governmental agency becomes particularly important when many violations of child labor laws have gone unaddressed and the violators are not prosecuted by the Department of Labor.²²⁴ Child labor violations are being overlooked for three reasons. First, there are too many violations occurring to keep accurate statistics.²²⁵ According to the Department of Labor, there has been a sharp increase in the number of child labor violations from 10,000 in 1983 up to 40,000 in 1990.²²⁶ Second, while the number of violations is increasing, the number of investigators is decreasing.²²⁷ Third, the responsibilities of the investigators are so great that they only spend five percent of their time working on child labor violations.²²⁸

In 1990, then Secretary of Labor, Elizabeth Dole, conducted four separate three-day intensive investigations for violations of child labor called "Operation Child Watch."²²⁹ During the twelve days of investigation, there were 9500

224. *Protecting Working Teens*, *supra* note 4. The DOL admitted as much when it stated that "enforcement efforts can only go so far." *Id.* From October 1, 1994 to September 30, 1995, the DOL investigators discovered a mere 6000 violations of child labor laws involving only 1242 establishments. *Id.* When compared to the number of violations which the DOL estimates occurs (40,000 per year), it appears that most violations go unaddressed by the DOL. *See infra* notes 229-33 accompanying text. In addition, recall from the discussion of child labor in section II.D that the Department of Labor did not prosecute the violations that led to the death of the Breitwieser boy. *See supra* text accompanying note 139.

225. Lantos, *supra* note 10, at 68. Refer to the discussion in the introduction section regarding the need for more information to accurately assess the extent of child labor violations. The Department of Labor's estimate for child labor violations was substantially lower than the conservative estimates given by the General Accounting Office (GAO). *Id.* The GAO data indicated that in 1988, there were approximately 166,000 15 year-old employees employed in violation of child labor law. *Id.* Comparing the GAO figure with the Department of Labor figure for the same year, there was a difference of 152,000 young workers employed in violation of child labor law. *Id.* McCaffrey calls the GAO an "institutionalized federal critic of lagging regulatory action" and endorses the GAO as an effective critic of regulatory action. MCCAFFREY, *supra* note 33, at 34-36. Regardless of which agency's numbers are more accurate, the problem of child labor violations is large, and it is being ignored.

226. Lantos, *supra* note 10, at 68.

227. *Id.* at 68-69. There was a 9% decrease in the number of investigators in the Wage and Hour Division of the Department of Labor from 1990 to 1991. *Id.* These investigators are responsible for investigation of child labor violations. *Id.* More importantly, in 1991, there were only 878 investigators. *Id.* This number indicates the gross inability of the Department of Labor to realistically go out into businesses to find violations before they turn into severe injuries or deaths to illegally employed minors.

228. *Id.* at 69. This estimate was from the GAO. *Id.* The investigators in the Wage and Hour Division of the Department of Labor are not only responsible for the enforcement of FLSA, which also includes minimum wages, overtime, and other provisions, but also, they are responsible for the Immigration Reform Act, provisions of the Immigration Nursing Relief Act, and the Employee Polygraph Protection Act. *Id.*

229. *Id.* at 68.

investigations which discovered over 29,000 violations of child labor law.²³⁰ Over forty-one percent of the businesses investigated were in violation of child labor law.²³¹ The number of violations detected in the twelve days of "Operation Child Watch" made up over seventy percent of the total number of violations detected by the Department of Labor for the entire year.²³² The success of the intensive investigations confirms that there are large numbers of violations that go undetected and unreported. These results are exemplified by the fact that less than ten complaints for child labor violations were reported in the entire state of California in 1991.²³³

E. The Need for Uniformity

Congress decided in 1938 when it passed the Fair Labor Standards Act that child labor violations were of such great importance and magnitude that the problem called for a uniform, national approach.²³⁴ One galvanizing feature of a national law was the consistent approach across the states that equalized the economic impact so as to not unfairly affect competition.²³⁵ When states may circumvent laws passed by Congress by either restricting child labor or not addressing the issue at all, it is clear that the intent and effect of Congress' law is minimized.²³⁶ In addition, the idea that each state should be able to institute its own regulations to govern the use of child labor trivializes the importance of the problem.²³⁷ Without a consistent approach that is applicable to all employers across the country, there will be an economic disadvantage to those employers who follow the law, while those employers violating the law would gain an unfair advantage because they have not assumed the same higher standard.²³⁸ Despite the uniformity of FLSA as a federal statute, the "exclusive remedy" provisions of states' workers' compensation acts serve as

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. See *supra* note 6. See also *supra* notes 108-41 and accompanying text.

235. BRAEMAN, *supra* note 117, at 115.

236. Lindsay, *supra* note 121, at 16. Lindsay explains that having different laws in different states for the protection of children in the workplace has a detrimental affect on the ability to control child labor. *Id.* Rather than providing combined experiences from different experimental laws, differing approaches make competition unfair to states with stricter standards and creates difficulty in enforcement because the legal standards for similar industries are different. *Id.* at 16-18. The real effect, Lindsay states, is to create unequal standards of civilization for different parts of the country and to admit the inability to provide equal protection under the laws of the Constitution. *Id.* at 16. The effect of the law is not minimized when states choose to regulate child labor more strictly than Congress, rather this occurs when states do not regulate it on their own or act to intercede in the effect of the federal law. *Id.*

237. *Id.* at 16.

238. WOOD, *supra* note 27, at 25. See also Lindsay, *supra* note 121, at 16.

a substitute for inconsistent state law treatment of child labor.²³⁹ Essentially, workers' compensation schemes nullify the consistent effect that Congress intended when it enacted FLSA. Not only is this economically unfair, but it is also morally unjustifiable because it would allow employers to violate FLSA without bearing the burden for doing so. Non-complying employers should not have a competitive advantage over employers that meet the standards the law provides.²⁴⁰

The "exclusive remedy" provision of workers' compensation served a very timely purpose when it was enacted; however, there have been significant social changes since its adoption which make a total limitation on liability extremely inequitable.²⁴¹ First, courts have been increasingly concerned with personal rights and recoveries.²⁴² In addition, there are other social programs such as social security and unemployment compensation that fulfill the lowest level of basic needs.²⁴³ The arena of labor and employment may not be ready for such a drastic change in employer liability for all employees; however, the possibility of opening up employer liability should be considered in specific circumstances where the employer can very easily avoid great harms at a minimal cost.²⁴⁴

Many employees in hazardous work conditions are young.²⁴⁵ The amount of compensation granted to them is "shockingly meager" and riddled with litigation which makes it similar to the difficult process of common law tort actions without the ability to recover fully for injuries.²⁴⁶ In addition, employee unions have traditionally been opposed to compensation schemes for hazardous occupations.²⁴⁷ In light of these circumstances, Section IV proposes to treat child labor as a form of ultra-hazardous employment that deserves the same protection granted to other employees also employed in ultra-hazardous employment.

239. See *supra* notes 106-16 and accompanying text.

240. Lindsay, *supra* note 121, at 17. Lindsay remarks that unequal laws "penalize the citizens of the more advanced states and give an unfair advantage to the thoughtless, ignorant and unscrupulous, who are always ready to avail themselves of that advantage." *Id.* By comparison, this problem is parallel to the inability of highly paid production workers to compete with countries that do not provide for a minimum wage to workers.

241. Amchan, *supra* note 47, at 685.

242. *Id.*

243. *Id.*

244. See *supra* notes 194-216 and accompanying text.

245. *Young Male Workers Show Most Risk of Injuries, NIOSH Survey Indicates*, 12 O.S.H. Rep (BNA) 817-18 (Mar. 3, 1983).

246. Richter & Forer, *supra* note 66, at 209.

247. Amchan, *supra* note 47, at 685.

IV. PROPOSAL: AMENDMENTS TO THE FAIR LABOR STANDARDS ACT

The use of "oppressive child labor" in the United States has taken many forms since the development of the industrial age.²⁴⁸ Since the enactment of FLSA in 1938, the nature of child labor has shifted away from massive glaring abuses in every factory or mine shaft.²⁴⁹ Now, the problems of child labor are diversified and much more subtle. As a result, the ability of the federal government's agencies to seek out and regulate such abuses is severely limited. In an effort to provide substantial recoveries beyond the scope of workers' compensation benefits and to begin to build a judicial sword to stop the use of "oppressive child labor," the following is a series of proposed amendments to FLSA.

The statutory amendments are deliberately modeled upon the language of the Federal Employers' Liability Act of 1908 (FELA).²⁵⁰ FELA provides a unique statutory model for child labor because of the similarities in the dangerous nature of railroad work and the chilling effect of hazardous occupations performed by children. FELA provided to railroad employees a level of protection from negligence that employees in other industries did not receive. Railroad work proved to be one of the most dangerous occupations in the history of the industrial revolution. Parallel to the dangers of railroad work to its workers, children in ultra-hazardous occupations are exposed to extreme danger and deserve the same level of protection. Children deserve heightened protection, not because the restricted occupations are so inherently dangerous to life and limb, but because they are so inherently dangerous to life and limb when performed by children.²⁵¹

Statistics indicate that employers utilize children in hazardous occupations, even when those occupations are specifically restricted by FLSA.²⁵² To their detriment, children are too young and inexperienced to know when to walk away from dangerous occupations. This combination of employer negligence and childhood inexperience begs the need to take action to protect the lives of our country's future workforce.

The "exclusive remedy" provision of workers' compensation is not focused on workplace safety.²⁵³ In addition, the "exclusive remedy" provision of

248. For discussion of the FLSA definition of "oppressive child labor," see *supra* notes 7 and 128.

249. See *supra* notes 21-38 and accompanying text.

250. See *supra* notes 76-85 and accompanying text.

251. See *supra* notes 10-14, 234-47 and accompanying text.

252. See *supra* note 3 and accompanying text.

253. See *supra* notes 142-247 and accompanying text.

workers' compensation guards employers from their own negligence when such negligence injures or kills their employees. It is a matter of public duty to protect our young workers through child labor laws, even at the expense of creating the extra liability insurance that will inevitably be charged to employers who insist upon employing children in hazardous occupations. To impose such liability, it is necessary to hold employers responsible for their failure to abide by the dictates of a fifty-eight year-old law.

The following amendments would institute a private federal civil cause of action for minor employees or their legal guardians when that employee is injured or killed while employed in "oppressive child labor" as defined by FLSA. This cause of action would be in addition to any remedy received through workers' compensation. It is for the express purpose of making the victim whole through damages and to provide an economic incentive for employers to immediately halt the use of "oppressive child labor." The amendments seek to ameliorate the common law defenses that once plagued an employee's ability to receive fair and full compensation from his or her employer when that employer was negligent.²⁵⁴ The amendments provide for a three year statute of limitations and also provide that the action survive the death of the employee. Additionally, the amendments establish a statutory standard of care requiring employers to follow the instructions of FLSA. Employers may use this standard as a guard against liability by following the requirements of FLSA for hiring minor employees, meaning that the use of child labor is only allowed in non-hazardous and unrestricted occupations.²⁵⁵ If the employer fails to do so, the employer has breached the duty of care and will be found liable per se for damages if the minor employee is injured or killed.

PROPOSED AMENDMENTS TO THE FAIR LABOR STANDARDS ACT

29 U.S.C. § 212²⁵⁶

(e) LIABILITY OF EMPLOYERS IN INTERSTATE COMMERCE FOR INJURIES OR DEATH TO EMPLOYEES FROM NEGLIGENCE; PAYMENT OF DAMAGES

Every employer engaging in the use of "oppressive child labor," as defined by § 203 (l) of this title, in interstate commerce shall be liable in damages to any child suffering injury while employed by such an employer in commerce,

254. See *supra* notes 57-65 and accompanying text.

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

256. The proposed amendments begin at letter (e) with the intention of adding to the existing text of the Fair Labor Standards Act.

or, in the case of death of such employee, to his or her legal guardian, for such injury or death resulting in whole or in part from the negligence of the employer.

COMMENTS: This amendment is intended to grant a private cause of action to victims of "oppressive child labor" against their employers when they are injured or killed as a result of such abuse. This is directed at the use of child labor in occupations that have been deemed too dangerous for minor children. This amendment limits the scope of an employer's liability to the use of "oppressive child labor" as specifically defined by FLSA. There is no intention to break down the entire workers' compensation system. Rather, the purpose of the amendments is to eradicate workplace deaths and injuries to children that result from dangerous labor practices. By creating this private cause of action, injured children do not have to rely upon enforcement through a governmental agency that would neither prevent their injury from occurring nor provide any direct compensation for the injury. Rather, by allowing children to sue when there is negligence by an employer, the child who was victimized will receive additional compensation and raise the likelihood that the employer will abide by the law in the future or face the risk of additional liability.

(f) CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES

In all actions brought against any employer by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in death, the fact that the employee may have been contributorily negligent shall not bar recovery, but the damages shall be diminished by the fact-finder in proportion to the comparative fault of the employee. No such employee who may be injured or killed shall be held to have been contributorily negligent in any case where the violation by such employer of any statute enacted for the safety of employees contributed to the injury or death of such employee.

COMMENTS: This section of the amendment is intended to prevent any use of the common law doctrine of contributory negligence. In its place, the amendment substitutes the doctrine of comparative negligence to insure that no party receives a windfall merely because the other party was at fault for even one percent of liability. It is also recommended that the fact-finder consider the age and ability of the minor to adequately assess risks of danger when assessing fault. This section modifies the extent of comparative fault liability, however,

if the employer breaches the statutory duty of care established by this Act. It does so in order to maintain a negligence per se standard when an employee is injured or killed as a result of "oppressive child labor."

(g) ASSUMPTION OF RISKS OF EMPLOYMENT AND THE FELLOW SERVANT DOCTRINE

In all actions brought against any employer by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in death, such employee shall not be held to have assumed the risks of employment in any case where such injury or death resulted in whole or in part from the negligence of any officers, agents, or employees of such employer; and no employee shall be held to have assumed the risks of employment in any case where the violation by such employer of any statute enacted for the safety of employees contributed to the injury or death of such employee.

COMMENTS: This section of the amendment seeks to abolish the use of the remaining common law defenses of assumption of risk and the fellow servant doctrine. The nature of child labor specifically warrants the restriction of the assumption of risk doctrine because children are less able to assess the risks and dangers associated with hazardous employment. The courts view minors in a special light that allows the minors to avoid the enforcement of contracts against them because they are "legally disabled," in comparison to adults above the age of majority.²⁵⁷ This section also stops the use of the fellow servant doctrine because its application to employees is contrary to consistent application of the law. For example, consider an employer's liability to third persons for the acts of its employees. There is no reasonable justification for limiting an employer's liability when the injured party is a child under the control of the employer.

(h) CONTRACT, RULE, REGULATION, OR DEVICE EXEMPTING FROM LIABILITY; SET-OFF

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt itself from any liability created by this Act shall to that extent be void. Provided, that in any action brought against any such employer under or by virtue of this Act, such employer may set off therein any sum it has contributed

257. See *supra* notes 167-78 and accompanying text.

or paid to the injured employee or the person entitled thereto on account of the injury or death for which the action was brought.

COMMENTS: This section seeks to prohibit any attempt by an employer, agency, or legislature to create a legal waiver of the rights created by this Act in order to circumvent liability to children for injuries or death sustained due to the employer's negligence. This is directly aimed at the "exclusive remedy" provision of state workers' compensation laws. It should be noted that this amendment seeks only a narrow exception to the "exclusive remedy" for the benefit of victims of "oppressive child labor." The second clause of this section allows for a set-off from any recovery in damages to reimburse the payer of any compensation paid for such injuries prior to the judgment. The purpose is to allow minors to accept workers' compensation payments through the regular channels of the state scheme without holding the child in a state of uncertainty as to immediate compensation. However, since it is the intention of these amendments to allow for negligence suits, any recovery must first be used to set-off the compensation received prior to the judgment. This course of action avoids forcing the child to choose between workers' compensation and taking a chance at a recovery for employer negligence. Rather, this gives immediate financial support and also allows the child to take action without having to wait through the potentially long litigation process before receiving any assistance for his injuries.

(i) **ACTIONS; LIMITATIONS; CONCURRENT JURISDICTION OF COURTS**

No action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued. Under this Act, an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States.

COMMENTS: This section creates a three year statute of limitations for actions against employers for negligence. This period is consistent with the statute of limitations applicable to employees under FELA. In addition, this section establishes concurrent jurisdiction between the United States federal courts and the courts of the several States.

(j) DUTY OR LIABILITY OF EMPLOYERS AND RIGHTS OF EMPLOYEES
UNDER OTHER ACTS NOT IMPAIRED

Nothing in this Act shall be held to limit the duty or liability of employers or to impair the rights of their employees under any other Act or Acts of Congress.

(k) SURVIVAL OF RIGHT OF ACTION OF PERSON INJURED

Any cause of action given by this Act to a person suffering injury shall survive to his or her personal representative for the benefit of the surviving legal guardians, or if none, to the next of kin, but there shall be only one recovery for the same injury.

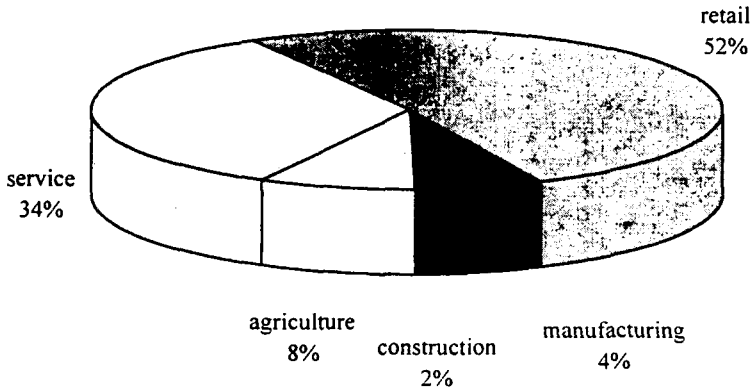
COMMENTS: Section (j) states that this Act shall not interfere with any other duty of employers or impair any other rights of employees under any other Act. Section (k) insures that the right of action will survive in any case where the victim of "oppressive child labor" dies. The purpose of section (k) is to extend the rights of child workers beyond their rights under workers' compensation, which terminate upon death. By extending the cause of action, this Act prevents employers from receiving the benefit of less liability simply because the worker died. Rather, the employer shall bear the burden of negligence for killing a child as equally as if the child had survived and received damages.

V. CONCLUSION

Child labor is a continuing problem in America that needs to be addressed on a federal level. The original child labor movement successfully stopped the massive, wide-spread abuses of children in American workplaces. However, child labor has not been completely eradicated. In fact, child labor violations are increasing due to the changing nature of child labor. Rather than finding large numbers of children bent over in dust-filled factories breaking up pieces of coal, now, children are being crushed by forklifts, they are drowning in silos, and they are falling off the backs of garbage trucks. When children are placed in occupations that they are not physically or mentally mature enough to handle, too often, they are severely injured or killed. These injuries and deaths do not have to occur. The Federal Department of Labor, at the charge of Congress, has compiled a list of occupations declared to be too dangerous for children to perform. This list is the law. The time is overdue to enforce the law. By enacting the series of amendments to FLSA presented in Section IV, children will gain the ability to personally recover for the negligence of their employers and provide real enforcement when employers violate child labor laws.

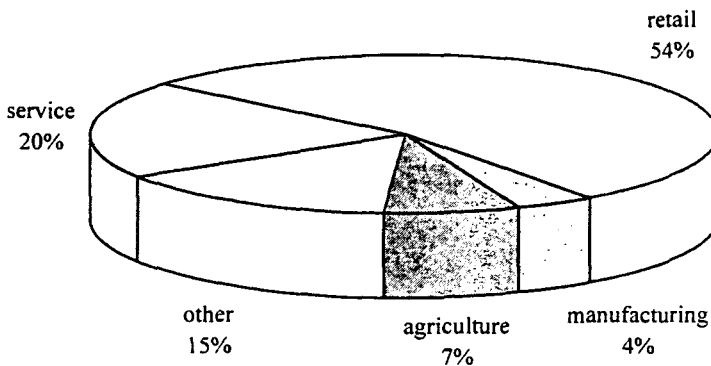
VI. APPENDIX

Where Teens Work During the Summer



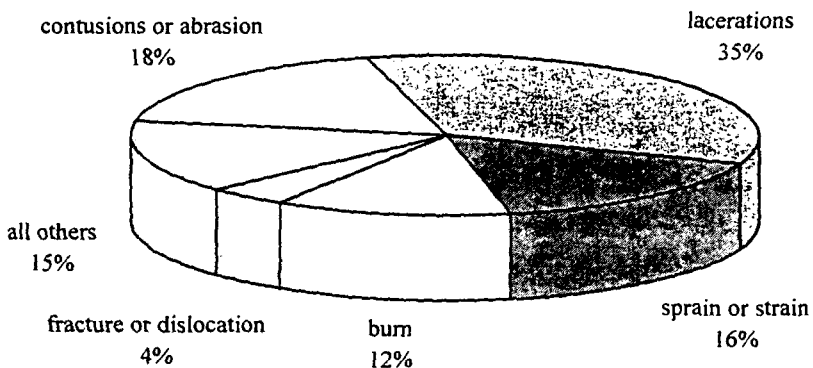
Source: *Work Safe This Summer (And Beyond)* - Chart 2 (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/chart2.htm>>.

Where Teens Are Injured at Work



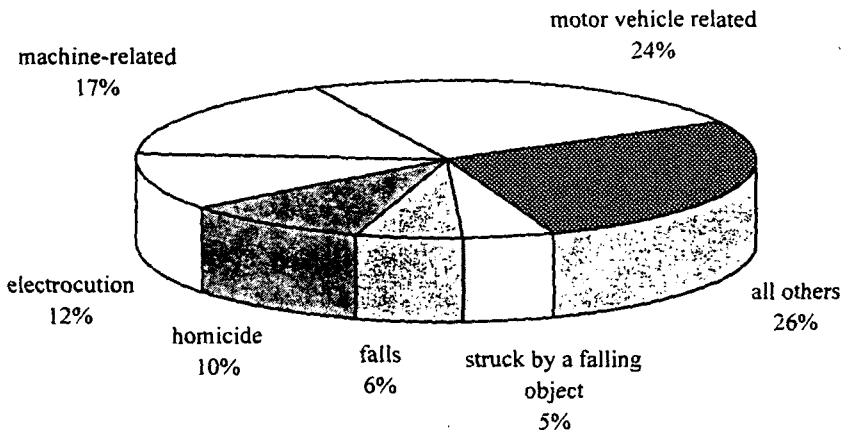
Source: *Work Safe This Summer (And Beyond)* - Chart 3 (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/chart3.htm>>.

How Teens Are Injured at Work



Source: *Work Safe This Summer (And Beyond)* - Chart 4 (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/chart4.htm>>.

How Teens Are Killed at Work



Source: *Work Safe This Summer (And Beyond)* - Chart 1 (visited Mar. 31, 1997) <<http://www.dol.gov/dol/opa/public/summer/chart1.htm>>.

Jeremy S. Sosin