

# SAVING LIVES THROUGH SHAMING

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*The Occupational Safety and Health Administration (OSHA) routinely employs shaming tactics toward employers, using public denunciations disseminated through social media, press releases, and online databases. These tactics, termed by the agency “regulation by shaming,” aim to name and shame companies into compliance with worker-safety regulations. In the face of heavy criticism of this practice, as well as legislative initiatives that aim to scale back OSHA’s regulation by shaming, this Article argues not only that shaming employers is an important regulatory tool that can help save workers’ lives, but also that OSHA’s “provocative” shaming tactics are in fact soft in comparison to other forms of regulatory shaming, and should be amplified.*

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## INTRODUCTION

“This employer is risking the safety of workers by failing to comply with fall protection requirements.”<sup>1</sup>

“This employer’s failure to protect employees resulted in a tragedy that could have been prevented if training was provided and machinery was appropriately guarded.”<sup>2</sup>

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<sup>1</sup> See News Release Region 4, U.S. Dep’t of Labor Occupational Safety and Health Admin., Roofing Company Faces Penalties After Exposing Employees to Numerous Fall and Other Safety Hazards (2018), <https://www.osha.gov/news/newsreleases/region4/06252018>.

<sup>2</sup> See News Release Region 1, U.S. Dep’t of Labor Occupational Safety and Health Admin., U.S. Department of Labor Cites New Jersey Renewable Energy Company

[The] company’s history of safety violations continues, putting employees . . . at risk of serious injuries; [the company’s] 10th inspection since 2011 yields \$1.9M in penalties . . . [the company’s] extensive list of violations reflects a workplace that does not prioritize worker safety and health.<sup>3</sup>

These statements are all examples of highly controversial press releases that were disseminated by the Occupational Safety and Health Administration (OSHA) through social media as well as the agency’s website, as part of its “naming and shaming” practice. In the U.S., there are about 5,000 worker fatality cases each year—on average, more than 99 a week, or more than 14 deaths every day.<sup>4</sup> It has been OSHA’s policy for the past 15 years to issue press releases about corporations that violate worker safety regulations.<sup>5</sup> While other regulatory agencies, such as the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), and the Securities and Exchange Commission (SEC) also favor adverse publications as a regulatory tool,<sup>6</sup> OSHA is the agency most closely associated with the tactic of “regulation by shaming.” Today, OSHA tweets almost daily, and sometimes several times a day,<sup>7</sup> about occupational safety violations that resulted in illness, injury, or death, or that pose significant hazards to employees. These announcements are also posted on OSHA’s homepage and circulated to its newsletter subscribers and to the media as press releases.<sup>8</sup> As seen in the examples above, the announcements

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Following Fatality and New Hampshire Power Plant (2018),  
<https://www.osha.gov/news/newsreleases/region1/06012018>.

<sup>3</sup> See OSHA News Release Region 1, U.S. Dep’t of Labor Occupational Safety and Health Admin., Aluminum Manufacturing Company’s History of Safety Violations Continues, Putting Employees at Camden County Facility at Risk of Serious Injuries (2017), <https://www.osha.gov/news/newsreleases/region2/07212017>.

<sup>4</sup> See *Commonly Used Statistics*, U.S. DEP’T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN. (2018), <https://www.osha.gov/oshstats/commonstats.html>; Economic News Release, U.S. Dep’t of Labor Bureau of Labor Statistics, Census of Fatal Occupational Injuries Summary, 2017 (2017), <https://www.bls.gov/news.release/choi.nr0.htm>.

<sup>5</sup> See *OSHA News Releases—Enforcement*, U.S. DEP’T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/news/newsreleases/enforcement> (last visited June 26, 2018).

<sup>6</sup> See Sharon Yadin, *Regulatory Shaming*, 49 ENVTL. L. (forthcoming 2019), <https://ssrn.com/abstract=3290017>.

<sup>7</sup> See (@OSHA\_DOL), TWITTER (last visited Nov. 21, 2018), [https://twitter.com/OSHA\\_DOL](https://twitter.com/OSHA_DOL).

<sup>8</sup> See U.S. DEP’T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov> (last visited Nov. 28, 2018); see also *Quicktakes*, U.S. DEP’T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/as/opa/quicktakes/qt111618.html>; see also *OSHA News*

often include condemnatory language about the poor ethics of specific employers and their low level of commitment to worker safety.<sup>9</sup> OSHA also maintains a public database of records of its enforcement inspections, searchable by the name of the establishment, as well as a work-related fatalities database.<sup>10</sup> In addition, in 2016 the agency expanded employers' reporting obligations to the agency in order to provide the public with a searchable online database of workplace safety incidents.<sup>11</sup>

OSHA's former administrator, Dr. David Michaels, stated that these "reporting requirements will 'nudge' employers to prevent worker injuries and illnesses to demonstrate to investors, job seekers, customers and the public that they operate safe and well-managed facilities."<sup>12</sup> Michaels strongly promoted this practice during his term, calling it "regulation by shaming:" "In some cases, 'regulation by shaming' may be the most effective means for OSHA to encourage elimination of life-threatening hazards and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger."<sup>13</sup>

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*Releases—Enforcement*, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/news/newsreleases> (last visited Nov. 21, 2018).

<sup>9</sup> See *supra* notes 1–3.

<sup>10</sup> See *Establishment Search*, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/pls/imis/establishment.html> (last visited June 26, 2018); see also *Fatality Inspection Data: Work-related Fatalities for Cases Inspected by Federal or State OSHA*, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., [https://www.osha.gov/dep/fatcat/dep\\_fatcat.html](https://www.osha.gov/dep/fatcat/dep_fatcat.html) (last visited Dec. 3, 2018); 29 C.F.R. § 1904 (2014) (requiring employers to report all work-related fatalities and severe injuries—in-patient hospitalizations, amputations, and losses of an eye—to OSHA).

<sup>11</sup> See 29 C.F.R. §§ 1902, 1904 (2016).

<sup>12</sup> See OSHA News Release, U.S. Dep't of Labor Occupational Safety and Health Admin., OSHA's Final Rule to Nudge Employers to Prevent Workplace Injuries (2016), [www.osha.gov/news/newsreleases/national/05112016](https://www.osha.gov/news/newsreleases/national/05112016); see also OSHA News Release, Occupational Safety and Health Admin. U.S. Dep't of Labor, Statement on Updates to OSHA's Recordkeeping Rule by Assistant Secretary for Occupational Safety and Health Dr. David Michaels (2014), <https://www.osha.gov/news/newsreleases/statement/09112014>. This goal is also mentioned in the preamble of the recordkeeping rule. See *supra* note 11 (stating that the agency believes that the benefits of the rule include "increased prevention of workplace injuries and illnesses as a result of expanded access to timely, establishment-specific injury/illness information by OSHA, employers, employees, employee representatives, potential employees, customers, potential customers, and researchers.").

<sup>13</sup> See David Michaels, Assistant Secretary, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., OSHA AT FORTY: NEW CHALLENGES AND NEW DIRECTIONS (2010); see also DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 257–58 (2008).

OSHA's adverse publications policy instigated a vigorous debate between those who advocate fierce governmental regulation of workplace safety and those who favor a much softer approach toward industry and employers.<sup>14</sup> In the Obama era, "regulation by shaming" initiatives proliferated in OSHA.<sup>15</sup> Research suggests that OSHA's adverse publications improved compliance with safety regulations by dozens of percent.<sup>16</sup> Data provided by the Bureau of Labor Statistics (BLS) has also been encouraging, reflecting a noticeable decrease in cases of nonfatal injuries and illnesses.<sup>17</sup> However, the Trump administration is much less enthusiastic about shaming employers for safety violations and worker fatalities in general,<sup>18</sup> giving preference to softer strategies for encouraging compliance,<sup>19</sup> such as OSHA's Cooperative Programs.<sup>20</sup> In this vein, a new OSHA rule was recently promulgated to rescind a previous regulation that mandates electronic

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<sup>14</sup> See, e.g., Jennifer Gollan, *How an Industry Group is Driving Trump's Workplace Safety Agenda*, REVEAL (Dec. 14, 2017), <https://www.revealnews.org/article/how-an-industry-group-is-driving-trumps-workplace-safety-agenda>.

<sup>15</sup> See, e.g., Eric J. Conn, *OSHA's Policies of Public Shaming: The Status Under the Trump Admin. and the Future* (Aug. 21, 2018), <https://oshadefensereport.com/2018/08/13/webinar-oshas-policy-of-public-shaming-the-status-under-the-trump-admin-and-the-future>.

<sup>16</sup> See generally Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws* (Working Paper, 2018), <https://econ.ucsb.edu/docs/default-source/default-document-library/regulation-by-shaming-deterrence-effects-of-publicizing-violations-of-workplace-safety-and-health-laws.pdf?sfvrsn=0>.

<sup>17</sup> See BUREAU OF LABOR STATISTICS, 2017 SURVEY OF OCCUPATIONAL INJURIES & ILLNESSES 1 (2018), <https://www.bls.gov/iif/osch0062.pdf> (last visited Dec. 12, 2018).

<sup>18</sup> See, e.g., Barry Meier & Danielle Ivory, *Worker Safety Rules Are Among Those Under Fire in Trump Era*, N.Y. TIMES, (Mar. 13, 2017).

<sup>19</sup> See, e.g., Sandy Smith, *Worker Deaths: Now You See Them, Now You Don't*, EHS TODAY (Aug. 29, 2017), <https://www.ehstoday.com/osha/worker-deaths-now-you-see-them-now-you-don-t>.

<sup>20</sup> See Gloria Gonzalez, *OSHA Focus Shifts Away from Name and Shame Policy*, BUSINESS INSURANCE (2017), <http://www.businessinsurance.com/article/20170830/NEWS08/912315495/OSHA-focus-shifts-away-from-name-and-shame-policy>; see also *OSHA's Cooperative Programs*, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., (2018), [https://www.osha.gov/dcsp/compliance\\_assistance/index\\_programs.html](https://www.osha.gov/dcsp/compliance_assistance/index_programs.html) (last visited Dec. 11, 2018).

submission of injuries data,<sup>21</sup> which were meant to be published online.<sup>22</sup> This rule is now being challenged in court.<sup>23</sup>

Some commentators also suggested that under the Trump administration, OSHA has softened the tone of its press releases and issued them less frequently, relative to previous administrations.<sup>24</sup> Additionally, a new bill, which was recently introduced into the House of Representatives, proposes to impose various restraints on OSHA's "shaming" practices.<sup>25</sup> Finally, the agency's practice of publicizing worker fatalities was recently reduced in terms of visibility and scope.<sup>26</sup>

In light of these changes and controversies and recent legislative proposals calling for a fundamental shift in regulatory policy, this Article aims to examine OSHA's policy of regulation by shaming, and to evaluate it from a normative perspective. In response to severe criticism of this policy as being futile and overly aggressive, this Article argues not only that OSHA's shaming tactics are legitimate and essential to workers' health and occupational safety, but that they are relatively soft compared with the regulatory shaming tactics commonly used by other agencies today. The Article therefore argues that OSHA does not currently fulfill the potential of regulation by shaming as an effective enforcement tool, and suggests ways to further enhance regulatory shaming of employers. The discussion in this Article will concentrate on principles rather than on technical legal issues that the practice may raise. Once the importance and justification of regulatory shaming are firmly established in principle in the field of occupational safety, discussion of specific legal doctrines can take place in future research.

The Article proceeds as follows: Part I introduces the theory of regulation by shaming, which only recently emerged in legal scholarship. Part II discusses the theory's relevance to OSHA's shaming practices. This Part argues that regulation by shaming is an essential tool in promoting occupational safety. Part III discusses different types of regulatory shaming that OSHA and other regulatory

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<sup>21</sup> See 29 C.F.R. § 1904 (2019).

<sup>22</sup> See *supra* note 11.

<sup>23</sup> See *Critics Challenge OSHA's Reporting Rule Within Hours of Promulgation*, INSIDEOSHAONLINE (Jan. 25, 2019), <https://insideoshaonline.com/daily-news/critics-challenge-oshas-reporting-rule-within-hours-promulgation>.

<sup>24</sup> See *Obama Official Faults Trump OSHA's Softer Tone in Enforcement Releases*, INSIDE OSHA ONLINE, <https://insideoshaonline.com/daily-news/obama-official-faults-trump-oshas-softer-tone-enforcement-releases> (July 31, 2018). *But see, e.g.*, OSHA News Release Region 4, *supra* note 1.

<sup>25</sup> See OSHA Employer Notification Act, H.R. 5870, 115th Cong. (2018).

<sup>26</sup> See Smith, *supra* note 19.

agencies implement, and argues that, relative to other agencies, OSHA's shaming is carried out softly. This Part argues against rolling back OSHA's shaming initiatives, and instead proposes that OSHA's shaming policy be enhanced.

## I. REGULATORY SHAMING

Regulation by shaming is most associated with OSHA's policy of naming specific employers who the agency found to have infringed on workplace safety regulations, often following a health or safety incident. While other agencies also publish the names of corporations that violate regulations in various sectors relating to human life, health, and wellbeing, such as in the environmental, pharmaceutical, and healthcare fields, OSHA has become the center of the debate on the legitimacy of shaming as a regulatory tool due to its prominent use of condemnatory statements.<sup>27</sup> In its publications, disseminated through social media, newsletters, press releases, and the agency's website, OSHA denounces certain companies for not keeping their employees safe, not caring enough about workers' health, and not prioritizing occupational safety regulations.<sup>28</sup>

Prior to my own research, legal scholars had paid almost no attention to regulatory shaming.<sup>29</sup> In my work, I have begun to develop a theory of regulatory shaming that suggests viewing various administrative actions by different regulatory agencies as a form of shaming.<sup>30</sup> This Article examines the previously unexplored intersection of shaming literature and regulatory literature in the context of occupational safety.

It is important to note that the use of the term "shaming" is not pejorative—implying that the agency is doing something wrong; on the contrary, shaming—causing companies to suffer reputational losses—can be harnessed for worthy regulatory goals, such as enhancing human health, safety, and general wellbeing.<sup>31</sup> Specifically, the definition of regulatory shaming rests on John Braithwaite's idea of shaming as expressing disapproval with the intent of invoking condemnation by others.<sup>32</sup> Accordingly, regulatory shaming does not intend to cause real

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<sup>27</sup> See *supra* Introduction.

<sup>28</sup> See, e.g., *supra* notes 1–3.

<sup>29</sup> See Yadin, *supra* note 6; Sharon Yadin, *Shaming Big Pharma*, 36 YALE J. ON REG. BULL. 131 (2019) [hereinafter Yadin, *Shaming Big Pharma*].

<sup>30</sup> See Yadin, *supra* note 6.

<sup>31</sup> See *id.*

<sup>32</sup> See JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 100 (1989) ("Shaming means all social processes of expressing disapproval which have the

shame, as civilian shaming often does, but rather to motivate companies to comply with regulatory standards in response to condemnation by third parties.<sup>33</sup> Thus, regulatory shaming refers to when regulatory agencies publicize corporate misbehavior to convey a normatively negative message to the public and induce compliance with regulatory norms.<sup>34</sup>

Regulatory shaming is largely based on private enforcement. It invites relevant communities, mostly outside the government, to apply pressure, to change the discourse, to alter behavioral patterns or ways of thinking about the shamed entity, and, when appropriate, denounce, condemn, or boycott the entity.<sup>35</sup> Regulatory shaming can inflict multi-layered costs on the firm in question well beyond damages suffered as a result of traditional penalties or monetary fines, and thus, shaming might better incentivize companies to prevent occupational health hazards.

As described in detail in my first work on regulatory shaming, this practice encompasses various types of publication.<sup>36</sup> The information made public may be detailed or summarized, basic or processed, technical or substantive; and it can take many forms, including star ratings, color ratings, league tables, score ratings, public statements, online databases, publication of enforcement actions, and publication of inspection results.<sup>37</sup> It can be disseminated through newspaper advertisements, media campaigns (online, televised, or other), online publications including social media, news conferences, and press releases.<sup>38</sup>

Regulatory shaming initiatives are becoming more and more common. For instance, the SEC shames companies for high internal pay gaps by requiring that public companies provide pay-ratio data in their annual reports.<sup>39</sup> The FDA shames entities for blocking competition in the pharmaceutical industry using a table that details the names of companies that refuse to provide samples to generic drugs companies, hindering efforts to develop affordable drugs.<sup>40</sup> The Health Department

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intention or effect of invoking remorse in the person being shamed and/or *condemnation by others who become aware of the shaming*") [emphasis added] [hereinafter BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION]; *see also* Yadin, *supra* note 6.

<sup>33</sup> Including companies that were not directly shamed. *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> *See* 15 U.S.C. § 78n[i] (2012); 17 C.F.R §§ 229, 240, 249 (2015).

<sup>40</sup> *See* Yadin, *Shaming Big Pharma*, *supra* note 29.

rates nursing homes on a one-to-five-star scale,<sup>41</sup> and the EPA assigns color ratings to factories according to their level of compliance with environmental regulation.<sup>42</sup>

In my previous work, I argued that shaming is a desired regulatory strategy from both normative and practical perspectives.<sup>43</sup> First, regulatory shaming is inherently efficient, as it can achieve regulatory goals in a quicker, simpler, and less expensive fashion than other enforcement tools.<sup>44</sup> Second, it encourages citizens to play an active role in regulatory processes, advancing cooperation, democratic values, and trust between the government and its citizens.<sup>45</sup> Third, regulatory shaming does not psychologically and emotionally affect regulated corporations in the same manner that shaming affects individuals.<sup>46</sup> Thus, it can be considered a soft and proportional tool in comparison with other enforcement strategies, such as criminal or administrative proceedings.<sup>47</sup>

## II. SHAMING EMPLOYERS INTO BOOSTING SAFETY

OSHA's shaming policy fits well with regulatory shaming theory. Despite heavy criticism from industry and the current administration's legislative initiatives that aim to curb OSHA's regulation by shaming,<sup>48</sup> I suggest that shaming is not only a suitable but also essential tool in occupational health regulation strategy.

Worker safety and health is a major issue for Americans today. According to the Bureau of Labor's annual report on fatal injuries, "there were a total of 5,190 fatal work injuries recorded in the United States in 2016," a 7 percent increase from 2015. The report states "this is the third consecutive increase in annual workplace fatalities," and it is the first time that there were more than 5,000 fatalities recorded since

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<sup>41</sup> See *Nursing Home Compare*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicare.gov/nursinghomecompare/search.html> (last visited Aug. 27, 2018); see also ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 160–61 (2007).

<sup>42</sup> See *Toxics Release Inventory (TRI) Program*, ENVTL. PROT. AGENCY, <http://www.epa.gov/toxics-release-inventory-tri-program> (last visited Aug. 27, 2018); see also Mary Graham, *Regulation by Shaming*, THE ATLANTIC (Apr. 2000), <https://www.theatlantic.com/magazine/archive/2000/04/regulation-by-shaming/378126>.

<sup>43</sup> See Yadin, *supra* note 6.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *supra* Introduction.



2008.<sup>49</sup> Additionally, “the fatal injury rate increased to 3.6 per 100,000 full-time equivalent workers from 3.4 in 2015, the highest rate since 2010.”<sup>50</sup> Private industry reported approximately 2.9 million nonfatal workplace injuries and illnesses in 2016.<sup>51</sup>

Regulatory shaming success depends upon choosing a topic that third parties, shaming communities, will be interested in or passionate about.<sup>52</sup> Occupational safety is one of the most troubling issues and complex challenges that the regulatory state faces today. It concerns millions of workers and their families, and can generate a fierce and passionate response from the public toward companies that violate safety regulations.

In general, regulatory shaming is highly dependent on third parties from civil society who understand the harm and will hold the firm accountable. Employers’ failure to prevent workplace injuries and fatalities is a highly suitable subject for regulation by shaming. Both the public and various stakeholders can easily understand the importance of safety compliance, and thus, taking a stance against an employers’ occupational safety infringements is a non-controversial moral stance that the community can readily agree with.<sup>53</sup> Possible stakeholders who can partake in the shaming process include employees and their families, unions, investors, local, state and other politicians, the media, competitors, suppliers, customers, and creditors, local residents, the employer’s professional community, and the general public. Occupational safety can motivate any individual to participate in the regulatory shaming process and take a stand against such employers because occupational safety pertains to the universal value of preservation of human life and well-being.

Despite the importance of the subject matter, resources for “hard” enforcement of occupational safety regulations are scarce. OSHA primarily enforces its regulations and standards by conducting priority-based inspections, responding to imminent danger, fatalities, or worker complaints.<sup>54</sup> It is a small agency, located in the U.S.

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<sup>49</sup> BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2016, (2017), <https://www.bls.gov/news.release/cfoi.nr0.htm>.

<sup>50</sup> *See id.*

<sup>51</sup> BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYER-REPORTED WORKPLACE INJURY AND ILLNESSES 2016 (2017), [https://www.bls.gov/news.release/archives/osh\\_11092017.pdf](https://www.bls.gov/news.release/archives/osh_11092017.pdf).

<sup>52</sup> *See* Yadin, Shaming Big Pharma, *supra* note 29.

<sup>53</sup> *See id.*

<sup>54</sup> *See* OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP’T OF LABOR, LAW AND REGULATIONS, <https://www.osha.gov/law-regs.html> (last visited Dec. 13,

Department of Labor and employs (together with its state partners) about 2,100 inspectors. These inspectors are “responsible for the health and safety of 130 million workers employed at more than 8 million worksites around the nation”—approximately one compliance officer for every 59,000 workers.<sup>55</sup> OSHA’s annual budget for 2017 was only around \$550 million.<sup>56</sup> In comparison, the 2017 EPA budget was over \$8 billion.<sup>57</sup>

Regulation by shaming, however, is a cheap, fast, wide-reaching, and effective form of soft regulation that can supplement OSHA’s “hard” regulatory tools.<sup>58</sup> Recent research has also shown how regulatory shaming can help to save lives. According to economist Matthew S. Johnson, an OSHA press release that shames one facility “leads neighboring facilities in the same sector to improve compliance by twice as much as if OSHA inspected each of these facilities instead.”<sup>59</sup> In other words, OSHA would need to conduct 110 additional inspections to achieve the same improvement in compliance provided by a single press release.<sup>60</sup>

Due to the agency’s lack of enforcement resources, soft regulatory tools could function as one of the agency’s main regulatory building blocks. This is especially true when considering Ayres and Braithwaite’s enforcement pyramid, which explains how regulators with few enforcement tools, including “command and control” tools, are much less effective than regulators that have a rich and varied “enforcement pyramid.”<sup>61</sup> According to this model, the ideal foundation of any successful regulatory regime is supplemental soft regulation that is based not on punishment, but on encouraging compliance and

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2018); Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 108 (2000).

<sup>55</sup> See *Commonly Used Statistics*, *supra* note 4.

<sup>56</sup> See *id.*

<sup>57</sup> See *EPA’s Budget and Spending*, EPA,

<https://www.epa.gov/planandbudget/budget> (last visited Dec. 13, 2018).

<sup>58</sup> See *id.* I consider regulatory shaming a soft enforcement tool because it aims not to punish but to invite relevant communities to apply pressure on the shamed entities, organizations, and corporations to enhance and encourage compliance and the voluntary development of internal safety initiatives. See Yadin, *supra* note 6.

<sup>59</sup> Johnson, *supra* note 16.

<sup>60</sup> See *id.*

<sup>61</sup> See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); see also Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 715–716 (1997) (a mix of cooperation approaches and punishment approaches can maximize employer compliance with agency regulations).

cooperation.<sup>62</sup> Given that OSHA’s enforcement pyramid is rather thin and short—as it mostly relies on civil penalties of no more than about \$13,000 for each violation detected,<sup>63</sup> often rendering non-compliance less costly for employers than compliance<sup>64</sup>—regulatory shaming can function as an essential tool in occupational safety regulation. While OSHA also operates several “cooperative programs,” which aim to encourage best practices and not mere compliance, literature suggests these programs only have a limited effect on workplace safety.<sup>65</sup> Regulatory shaming can therefore improve the agency’s enforcement pyramid and create direct and indirect reputational damages that can surpass the statutory penalty caps, thus achieving better deterrence.

Regulatory shaming also fits with the purposes of the Occupational Health and Safety Act, as stated by Congress in section 2:

The Congress declares it to be its purpose and policy . . . to assure . . . every working man and woman in the Nation safe and healthful working conditions . . . – (1) by *encouraging employers* and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to *stimulate employers* and employees to institute new and to perfect existing programs for providing safe and healthful working conditions [emphasis added].<sup>66</sup>

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<sup>62</sup> *See id.*

<sup>63</sup> *See OSHA Penalties*, U.S. DEP’T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/penalties/> (last visited Dec. 29, 2018) (willful or repeated violations have a maximum penalty just below \$130,000 per violation); 29 U.S.C. § 666 (2012). However, the average inspection between the years 2009–2012 resulted in about \$4,600 in penalties. *See Johnson, supra* note 16, at 11. In cases involving fatalities, OSHA can criminally fine organizations up to \$500,000. However, OSHA prosecutes no more than two cases each year on average. *See OSHA Criminal Referrals on the Rise*, EPSTEIN, BECKER & GREEN, P.C. (Dec. 18, 2012), <https://www.oshalawupdate.com/2012/12/18/osha-criminal-referrals-on-the-rise>; Shapiro & Rabinowitz, *supra* note 54, at 109; Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (2012) et seq.

<sup>64</sup> *See* Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? – A Panel Analysis of OSHA Enforcement*, 27 LAW & SOC’Y REV. 177, 179 (1993); *see also* John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 LAW & POL’Y 385, 388–89, 391–92 (1984); Shapiro & Rabinowitz, *supra* note 54, at 106–07.

<sup>65</sup> *See, e.g.,* Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005); *see also* John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115 (1991).

<sup>66</sup> 29 U.S.C. § 651 (2018).

Furthermore, shaming by OSHA can induce firms to comply not only with the letter of the law but “above and beyond” the law, thus possibly preventing workplace injuries that cannot be avoided by legally binding safety standards,<sup>67</sup> and also help in cultivating corporate “safety culture.”<sup>68</sup> Also, the active involvement of citizens in the regulatory process can help restore the public’s trust in OSHA, which has always suffered from a poor public image.<sup>69</sup> And finally, shaming tactics can also strengthen the agency’s legitimacy in the eyes of industry—which tends to be confrontational and highly resistant to OSHA’s policies<sup>70</sup>—as most of the enforcement in the regulatory shaming process comes from stakeholders outside of government.

### III. WHAT SHOULD OSHA DO?

While regulation by shaming is strongly associated with OSHA, the agency currently utilizes only a few aspects of regulatory shaming and does not fulfill this instrument’s full potential for improving occupational health in the U.S. OSHA’s actions in this area fall under a general mode of regulatory shaming in which it is used to address infringements of civil, administrative, or criminal regulations and to report on particular incidents, such as inspections, citations, orders, and so on. Whatever the form of publication issued, such shaming activities are essentially a part of the agency’s command and control regulation. While this type of shaming is certainly important, shaming can also function in a much broader regulatory setting.

Consider, for example, the FDA. The agency recently published a list of pharmaceutical companies whose actions were depicted as “gaming” the system, though they were not illegal.<sup>71</sup> These were branded pharmaceutical companies that did not respond to requests from generic drug companies to obtain branded drug samples.<sup>72</sup> The

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<sup>67</sup> See *infra* Parts II, III.

<sup>68</sup> See generally David Michaels, *7 Ways to Improve Operations Without Sacrificing Worker Safety*, HARV. BUS. REV. (2018).

<sup>69</sup> See, e.g., Sheila Jasanoff, *Science and the Limits of Administrative Rule-Making: Lessons from the OSHA Cancer Policy*, 20 OSGOODE HALL L. J. 536, 547 (1982); see also Lobel, *supra* note 65, at 1078.

<sup>70</sup> See, e.g., *id.* at 1115, 1120–21, 1074, 1077; Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 11 (1989).

<sup>71</sup> See *Reference Listed Drug (RLD) Access Inquiries*, U.S. FOOD & DRUG ADMIN, <https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/AbbreviatedNewDrugApplicationANDAGenerics/ucm607738.html>.

<sup>72</sup> See *id.*

agency specifically noted on its website that it has not independently investigated or confirmed the limitations to access described in the complaints it received from generic drug companies; rather, it has published the fact that complaints were received.<sup>73</sup>

Another example concerns the SEC. SEC regulations require public companies as of 2018 to disclose the salary ratios of their employees and company executives in regulatory filings.<sup>74</sup> According to the first filings made to the SEC, CEO-to-median-employee pay ratios are the highest in the financial sector (429:1), in industrial companies (428:1), and in health care (388:1).<sup>75</sup> While this regulation aims to nudge companies towards reducing pay gaps, high pay ratios are not illegal.

I call the first type of shaming, which OSHA regularly exercises towards employers, “compliance shaming,” and the second type, as used by the FDA and the SEC in the examples above, “beyond-compliance shaming.” “Beyond-compliance” relates to ideas such as corporate “social license,” which govern the extent to which a corporation is constrained to meet societal expectations and avoid activities that society deems unacceptable, whether or not those expectations are embodied in the law.<sup>76</sup> The term also builds on the notion of “corporate social responsibility” (CSR), which now plays a prominent role in many investors’ considerations.<sup>77</sup> Under the terms of CSR, the corporate entity is understood through a communitarian prism, which focuses on social and moral aspects of the corporation’s activities, rather than merely on its own self-interest.<sup>78</sup> This approach has given rise to the “stakeholder model,” in which shareholders are considered only one of the interest groups to which the corporation is

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<sup>73</sup> *See id.*

<sup>74</sup> *See supra* note 39.

<sup>75</sup> *See* Kyoko Takahashi Lin et al., *The First Wave of Pay Ratio Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (2018).

<sup>76</sup> Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQ. 307, 308 (2006); Dorothy Thornton et al., *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL’Y 262, 264 (2005).

<sup>77</sup> *See, e.g.*, Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1219 (2002).

<sup>78</sup> *See id.* at 1217; *See also* Oren Perez, Reuven Cohen & Nir Schreiber, *Governance Through Global Networks and Corporate Signaling*, REG. & GOVERNANCE (forthcoming 2019), <https://ssrn.com/abstract=3265793> (discussing the reasons why companies adopt CSR schemes).

beholden.<sup>79</sup> Other stakeholders may include employees, consumers, and local communities.<sup>80</sup>

Regulatory shaming should be understood as encompassing both types of shaming practices. While both are based on the social expectations made of firms and on agency mediation of relevant information to the public, beyond-compliance shaming mainly occupies the ethical rather than the legal sphere, and it aims to encourage companies to achieve even better regulatory goals than those required by law. In many ways, beyond-compliance shaming is a more basic form of regulatory shaming, as it relies solely on eliciting adverse public responses, while compliance shaming also relies on an accompanying legal sanctioning procedure. Beyond-compliance shaming therefore incorporates a broader understanding of regulatory agencies' modern roles and capabilities.

Using this typology, I argue that OSHA should expand its regulation from mere compliance shaming to beyond-compliance shaming to improve workplace safety. Here are some brief suggestions:

- OSHA produces and publishes an “incident rate,” which measures the safety level of some employers so that comparisons can be made between them.<sup>81</sup> The agency could publish a list that ranks the best and worst companies according to their incident rates, especially in industry sectors that are prone to high injury rates, such as construction. This would require electronic submission of all work-related injuries by all employers that fall in the categories specified in the Electronic Recordkeeping Rule.<sup>82</sup> The ranking would reflect all injuries, not only those that are a result of violations of safety regulations or that are subject to OSHA investigation, inspection, citation, or penalty.
- OSHA could publish the names of employers that hold the highest number of work-related deaths, and rank them. These also do not necessarily reflect a regulatory violation.
- OSHA could rank companies according to the quantity and severity of workers' complaints received by OSHA, using

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<sup>79</sup> See Branson, *supra* note 77.

<sup>80</sup> See *id.*

<sup>81</sup> See *Establishment Specific Injury & Illness Data (OSHA Data Initiative)*, OSHA, U.S. DEP'T OF LABOR, [https://www.osha.gov/pls/odi/establishment\\_search.html](https://www.osha.gov/pls/odi/establishment_search.html) (last visited Nov. 28, 2018). An incidence rate of injuries and illnesses is computed using the following formula: Incidence rate = (Number of injuries and illnesses X 200,000) / Employee hours worked. See *id.*

<sup>82</sup> See *supra* note 11.

a scheme based on a score, color code, star rating, or even emojis (smiley/frowning faces). This would be based solely on complaints received, rather than on active agency investigation of the companies in question, similar to the FDA’s list of pharma companies.<sup>83</sup>

- OSHA could publish a ranking of employers that are the slowest to report safety incidents, including failure to report fully or in a timely manner to the agency (this is a “grey area” infringement).
- OSHA could perform and publish official surveys of employees’ level of satisfaction with their employers’ safety programs and commitment to workers’ occupational health. These would also be translated to scores, rankings, or some form of infographic.
- In addition to agency publication of these rankings, OSHA should consider mandatory disclosure of the above-mentioned ranking scores by the ranked companies—in their physical facilities or branches, on their products, on their website’s homepage, on their mobile applications, and in their reports to the stock exchange (if relevant). While the standard itself is not mandatory (for instance, being the subject of a high number of employee complaints is not a violation in itself), disclosure of failure to meet “social responsibility” norms could be made mandatory (as is the case for the SEC’s pay-gap disclosure, for example).<sup>84</sup>
- OSHA could publish a list or a ranking of employers that have adopted one of its voluntary programs, or that have the lowest incident rate or number of employee complaints,<sup>85</sup> thus creating a reverse “shaming” effect for those who do not appear on these lists.<sup>86</sup>

## CONCLUSION

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<sup>83</sup> See Yadin, *Shaming Big Pharma*, *supra* note 29.

<sup>84</sup> See *supra* note 39.

<sup>85</sup> OSHA publicizes the names of some companies that have joined such voluntary programs. However, these publications are not systemically organized or displayed. See *OSHA News Releases – Alliances/Partnerships/Grants*, U.S. DEP’T OF LABOR OCCUPATIONAL AND SAFETY HEALTH ADMIN., <https://www.osha.gov/news/newsreleases/alliance>.

<sup>86</sup> This approach offers not only negative threats based on negative information, but also positive rewards based on positive information. See Shapiro & Rabinowitz, *supra* note 54, at 145.

The Occupational Safety and Health Administration has been depicted by some scholars as a “resource-starved agency” and “a picture of regulatory dysfunction.”<sup>87</sup> But contrary to common wisdom, effective enforcement does not have to rely on punishment nor on a grandiose government budget. Instead, as this Article has shown in a preliminary form, smart and soft regulation methods such as regulatory shaming can perform a crucial role in maintaining workplace safety. Indeed, this Article has argued that OSHA’s controversial “regulation by shaming” approach should not be revoked or lessened, but enhanced as an essential component in the agency’s important mission of protecting the life and health of workers in the U.S.

The Article also suggested ways in which OSHA might utilize regulatory shaming in a more efficient way than its current configuration, building on a new typology of regulatory shaming that differentiates between “compliance shaming” and “beyond-compliance shaming.” These categories, in addition to contributing to the development and understanding of regulatory shaming theory and practice, may also help OSHA, as well as other administrative agencies, develop regulatory shaming strategies for achieving public goals using responsive, sophisticated, information-based technologies.

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<sup>87</sup> See Thomas McGarity et al., *Workers at Risk: Regulatory Dysfunction at OSHA*, CENTER FOR PROGRESSIVE REFORM 1 (2010); see also Thomas J. Kneisner & John D. Leeth, *Abolishing OSHA*, 18 REGULATION 46 (1995); Lobel, *supra* note 65, at 1078.