
Beyond OSHA: Improving Workplace Safety and Health

In the more than a decade since its establishment by Congress in 1971, the Occupational Safety and Health Administration (OSHA) has been embroiled in heated controversy. Critics have charged that OSHA has over-regulated, that its standards and enforcement have been nit-picking, intrusive, and too expensive for industry in a time of lagging productivity and economic decline.

Examination of available statistics prompts a different line of criticism: that OSHA has simply not succeeded very well in its mandate to protect worker health and safety. OSHA has promulgated only 23 health standards in the twelve years of its existence, and both the absolute number and the rate of workplace injuries and illnesses have remained unacceptably high. The Bureau of Labor Statistics estimates that, in 1981, 4,370 workers were killed on the job, 5,404,400 work-related injuries and illnesses occurred, and one out of every 13 workers was injured or made ill on the job. These estimates do not include long-term occupationally related illnesses such as cancer. The National Institute for Occupational Safety and Health (NIOSH) has estimated that these long-term cases may amount to as many as 100,000 per year.

The purely economic burden imposed by workplace injuries and illnesses is staggeringly large. The National Safety Council estimates that the annual cost of these injuries and illnesses is approximately 1 percent of the Gross National Product, or about \$30 billion in today's economy. But capital investment for safety and health equipment declined during the 1970s both absolutely and as a proportion of all new capital expenditures.

This suggests that as a nation we are doing too little to control workplace hazards and that current institutional arrangements must be reformed and supplemented if we are to do anything like an adequate job. In the face of OSHA's apparent regulatory failure, what can be done to increase worker protection?

The Court System

The current workers' compensation system, which limits workers' rights to sue firms for negligence in return for "no-fault" compensation for workplace injuries and illnesses, gives industry little incentive to improve workplace safety. Under the present system

workers receive a maximum of two-thirds of their lost income plus medical expenses. These awards are not large enough to affect industry conduct. Greater reliance upon the court system may create greater incentives to protect workers' safety and health. When workers are still able to sue for damages, as they are, for example, in the asbestos case, the awards they receive can be substantial. More than 12,000 asbestos compensation cases, involving over 20,000 persons, have been filed against asbestos manufacturers. Some have estimated the potential liability for U.S. industry at \$40 to \$80 billion. The prospect of enormous future court awards may be sufficient to deter current industry misbehavior.

However, the courts are clearly not the proper forum for public health crises of such magnitudes. The court system with its inevitable burden of proof on the victim is too costly, too uncertain, too lengthy, and too unfair to be relied upon as the sole avenue of recourse for victims. Moreover, the asbestos epidemic is so vast that the survival of large manufacturers and insurance companies could very well be threatened. This has provided one asbestos manufacturer, the Manville Corporation, a justification for attempting to avoid its tort liabilities by declaring bankruptcy. If this strategy succeeds, workers suffering from asbestos-related diseases may never be compensated.

Industry may not take action to control future hazards, however, if costly court suits are preempted by the adoption of a national compensation system. It is often good business to pay compensation costs rather than to pay the costs of making the workplace safe. Resolution of this impasse requires the development of a toxic exposure prevention system that ensures compensation for victims and also contains an incentive to prevent future exposures. What seems clear, though, is that sole reliance on court suits is not an acceptable system.

Industrial Policy

Regulatory objectives of achieving greater workplace safety could be incorporated within the framework of a coherent industrial policy. Such a policy could, for instance, involve the creation of coordinating mechanisms, such as national or regional development

banks, which could assist private financial institutions in raising capital and allocating it efficiently and equitably to all economic and regional sectors. This focus on capital investment is promising because achieving regulatory objectives requires a significant investment of capital, either development capital to devise new ways in which pollution or workplace hazards can be controlled, diffusion capital to spread techniques proven useful in one industry to other industries, or direct investment in the control technology itself. OSHA's authority to mandate expenditures for safety and health is limited by the requirement that the technology involved be "looming on the horizon" and by the financial health of the affected industry. If the industry could obtain public funds to develop and install control technology needed for worker safety and health, this would greatly weaken the budgetary cap currently placed on OSHA's authority.

The idea that the general public should finance projects that protect worker health faces the objection that industry should not be paid to do what it has a moral obligation to do. However, the overriding objective of occupational safety and health policy should be the greater protection of workers in a manner consistent with preserving their freedom and dignity. If simply assigning a moral obligation to industry to protect worker health does not work, public financial assistance may be appropriate.

Public funding for workplace safety *could* be accomplished without any comprehensive industrial strategy. For instance, funds could be assigned to industries directly through the OSHA administrative budget. OSHA could then pass a regulation and allocate financial support for compliance at the same time. Alternatively, tax subsidies, accelerated depreciation, loans, loan guarantees, or direct grants from other administrative agencies could be targeted to investments in worker safety and health, without an overall investment strategy or coordinating agency.

Providing public funding for investments in safety and health technology in the absence of an overall industrial policy would not require safety and health funds to compete on a case-by-case basis with funding for other regulatory and industrial policy purposes. The drawback, however, is that if industry knows that safety and health investments will be partially financed by the government, but that normal investment in plant and equipment will not, it will be tempted to disguise normal investment expenditures as safety and health expenditures. The price of public funding of workplace safety outside of an industrial policy is a tolerance for having a certain amount of it used for backdoor reindustrialization.

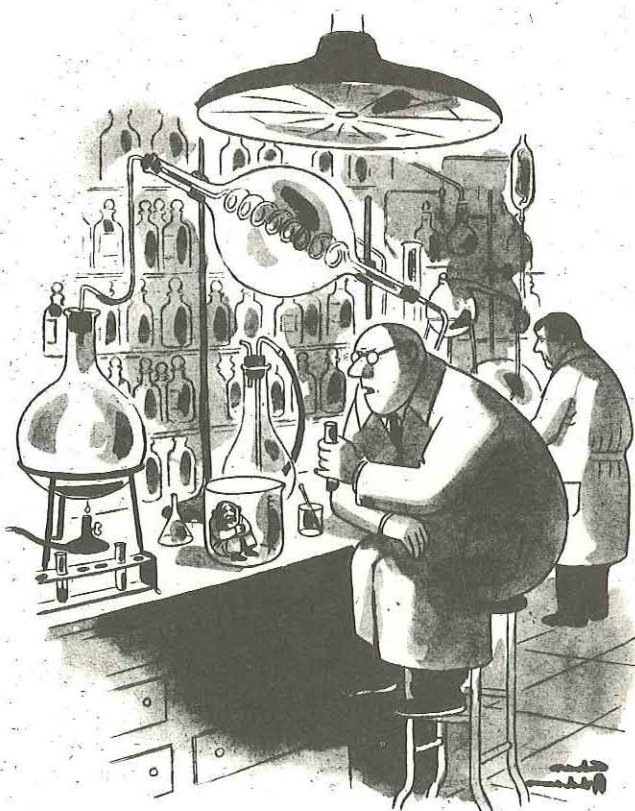
Consensus Standards

Another way to increase worker safety is to allow workers and industry representatives greater participation in drafting the regulations. Moving closer toward standard setting by consensus would incorporate bargaining directly into the rule-making process and would transform it from a trial-like process into a process of negotiation. In current practice, genuine negotiation seldom occurs. The trial-like atmosphere of rule-making proceedings encourages the adversaries to adopt the most extreme positions possible in hopes of forcing the regulatory agency to move in their direction. What each side can reasonably accept is not always brought out because there is no mechanism to encourage accommodation and compromise.

It might be profitable, then, to have all affected parties meet with agency officials, off the record, to express their views, learn what everyone can agree to, and make the necessary accommodations so that something can be done to meet a recognized need. Some recent regulatory reform bills moved in this direction by exempting certain agency contact with outside parties from the "sunshine" requirements of the various acts that govern rule-making proceedings. However, fairness and due process can often be satisfied only by imposing time-consuming, cumbersome, and costly safeguards. Balancing the need for new procedures for negotiation with the old procedures for fairness will be a thorny issue.

Another problem will be appeal rights for those who feel that a standard unfairly discriminates against their interests. Much of the work and delay involved in preparing a regulation under the current system results from the need to defend the standard against lawsuits

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"Oh, for heaven's sake, Jackson, stop blubbering.
You knew this job was dangerous when you took it."



routinely filed by affected parties. This appeal right should not be removed, for it is a vital democratic protection against government abuse of its powers. But it seems clear that successful negotiations leading to a consensus standard will in fact produce fewer people who feel that their interests have been so neglected that they must sue.

Collective Bargaining

The most promising local supplement to national regulation of workplace safety and health conditions is the collective bargaining process. Bargaining could establish local mechanisms for enforcement of federal standards. These local mechanisms are important because there are simply too few OSHA inspectors to do the job. Manufacturing and construction establishments can expect an OSHA inspection once every ten years and an average penalty per violation of \$37.44. This does not give management a very strong economic incentive to comply with regulations they may consider unfair or foolish.

Local enforcement mechanisms could also allow for more flexibility, since no centrally imposed rule or regulation can hope to accommodate itself to the endless variety of conditions present in the workplace. Collective bargaining would permit unionized workers and management in particular industries or plants to develop their own compliance strategy for protection against safety and health hazards.

However, increased reliance on collective bargaining could expose workers to undue pressure to choose between their health and their jobs. When a compliance strategy is open to negotiation, and not simply imposed by fiat, management could present workers with a choice of going along with dangerous procedures or facing pay cuts, layoffs, or plant closings. Workers could be stampeded into giving back health protection in the same way that they have been stampeded into giving back wage gains and other benefits already won under collective bargaining.

Certain safeguards can minimize the evident risk here. Since workers lacking strong union representation would be especially susceptible to management pressure to surrender health and safety protection, union participation in these agreements would be essential. Moreover, OSHA would have to ensure that whatever arrangements workers and management propose do not violate the national standards, but rather are simply reasonable enforcement procedures designed to handle a particular hardship situation.

Another technique to involve unions in enforcement of federal standards is the use of health and safety committees to set safety procedures and conduct routine inspections at particular work-sites. To ensure committee access to relevant information, companies would be required to retain at their expense qualified union-approved industrial health consultants to conduct health surveys at the plant.

While these ideas have considerable appeal, there are several obstacles to their implementation from the

perspective of both management and labor. Management traditionally has had exclusive control over the workplace, based on the idea that property acquired in a fair way may be disposed of, within wide margins, at the sole discretion of the owner. The controversy surrounding OSHA in the last decade can be attributed in part to resentment over government and worker interference in an arena that had traditionally belonged exclusively to management.

Unions are reluctant to bargain for safety and health because it uses up scarce bargaining capital. If management makes safety and health concessions, they will be tougher on wage and benefit issues. Union officials often express their opposition to bargaining over workplace safety by saying that safety and health are rights, and workers should not have to pay for rights by giving up wages or other benefits. This argument that health and safety are rights for which no payment is necessary may technically be a fallacy: people have rights to protection against unreasonable health threats in other areas such as food and consumer products, but they are not exempt from paying for this protection through increased consumer prices. However, it is possible to argue that workers are entitled to the protection provided by federal standards and enforcement because power, mobility, information, and income are not fairly distributed between labor and management.

There is no doubt that greater reliance on collective bargaining will increase the cost of health and safety to unions and to workers. The best response to union worries about this approach is that it is the only practical local supplement to centralized regulation that will improve safety and health conditions in the nation's workplaces.

Moreover, many union officials with first-hand experience of labor-management safety committees view them at best as ineffective and at worst as cynical ways to co-opt people. Such committees simply make unions share management's responsibility for safety and health while having no real control over safety and health conditions. Many unions feel that only after management has been put on notice by vigorous OSHA enforcement efforts would there be an advantage for unions to bargain over safety and health.

There is no doubt that greater reliance on collective bargaining will increase the cost of health and safety to unions and to workers. The best response to union worries about this approach is that it is the only practical local supplement to centralized regulation that will improve safety and health conditions in the nation's workplaces. It may require labor to make concessions on wages or benefits which in an ideal world they should not have to make. But if unions do not bargain

for more job safety, unionized workers will not get better safety conditions.

Greater worker involvement in safety and health, moreover, provides benefits that go beyond efficiency. Since health is such a fundamental interest, workers need more than the exit vote of leaving a job with intolerable risks. They need to be involved in the process by which these risks are controlled. Health and safety committees provide a way of structuring work life that would increase workers' ability to direct their lives and would reduce the feelings of anger, powerlessness, and resentment they often experience under the current system.

The opposition between this social ideal and management's emphasis on property rights is stark: some people's rights to pursue private economic goals

conflict with other people's rights to participate in decisions that affect their fundamental interests. Further development of a collective bargaining framework for handling health and safety, with its emphasis on accommodation of opposing interests, may produce a workable compromise despite this underlying opposition.

—Mark MacCarthy

This article is substantially condensed and adapted from "Reform of Occupational Safety and Health Policy," by Mark MacCarthy, Center for Philosophy and Public Policy Working Paper RC-4 (College Park, Md.: Center for Philosophy and Public Policy, 1983), written for a Center research project on risk and consent funded by the National Science Foundation.

Playing Hardball with Human Rights

The bizarre notion has been promulgated by the Reagan administration that each government should be allowed to pick and choose among established human rights its own favorites and attend exclusively to those favored rights. This attempt at selective enforcement of human rights is authorized by a formal policy memorandum adopted by the Department of State on October 27, 1981, which states: "'Human rights'—meaning political rights and civil liberties—conveys what is ultimately at issue in a contest with the Soviet bloc. The fundamental distinction is our respective attitudes toward freedom. . . . We should move away from 'human rights' as a term, and begin to speak of 'individual rights,' 'political rights,' and 'civil liberties.'"

Such a narrowing of human rights to political rights and civil liberties would omit rights to physical security like the rights against torture and "disappearance" that are explicitly listed in the laws controlling U.S. foreign assistance. It also dismisses the third general category of internationally recognized human rights, the right to fulfillment of vital needs such as food, shelter, health care, and education. The supposition seems to be that a nation can simply focus upon the rights that are "at issue in a contest" with its principal adversary and relegate all the other rights to the periphery.

Human rights, in the administration's view, seem primarily to be used as a means toward other ends of foreign policy, specifically, as a weapon against the USSR. This manipulative attitude reveals a deep incomprehension of human rights and of how human rights actually function.

Human rights are inconveniences—grit in the gears. Due process is a pain in the neck, torture gets quicker answers. Dissidents disrupt the war effort, the disappeared cause no further problems. Human rights are supposed to be nuisances and obstacles, especially for governments. They are not designed to allow the smooth execution of policy but to force policy to take twists and turns around individuals whose insistence upon their own claims is a most unwelcome complication for people with bigger fish to fry.

Rights have a different logic from almost all other considerations that go into policy. To fail to see this is to fail to understand how rights work. Most of the time reasoning about policy appropriately takes a means/ends form. We decide what consequences we want to produce—we choose our ends—and then we select our means accordingly. Or we look at the means at our command—we examine our resources—and then select our goals accordingly. Sometimes we let our means dictate our ends, sometimes we let our ends dictate our means, and, of course, we usually do quite a bit of both.

There is nothing wrong with the mutual adjustment of means and ends. But *rights do not fit*. Rights cannot be accommodated within this pattern, because *rights are neither means nor ends*. Instead, rights are constraints upon both.

Since rights are not means, it is unacceptable to pick and choose among them as best serves your ends. To notice that within the Soviet Union there are no free elections but relatively few people are "disappeared," while within allied states people are "disappeared" right and left but partly free elections are held, and