

CORPORATE COMMERCE VS. GOVERNMENT REGULATION: THE STATE AND OCCUPATIONAL SAFETY AND HEALTH

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INTRODUCTION

In our days corporations are subject to extensive government regulation. The firms that produce, transport and market the goods and services we consume and use are regulated by a myriad of municipal, county, state and federal regulatory agencies. This essay will examine whether the philosophical and moral case for one of these regulatory agencies, the federal Occupational Safety and Health Administration (OSHA), is sound. As OSHA probably is one of the most widely supported regulatory agencies of the federal government, this inquiry should prove to be a fair test of the soundness of government regulation in general.

Among the innumerable regulatory bodies, OSHA has managed to attract special attention because it deals with the very physical well-being of the employee in the workplace.¹ It is often singled out for its bureaucratic zeal. OSHA inspectors are frequent targets of complaint, usually about their unannounced visits to factories or mines, eager to catch employers guilty of some infraction of one of the agency's thousands of rules. Major court battles have ensued, with OSHA charging business owners with the violation of standards and with reckless conduct, and with businesses responding by attempting to squelch the attacks.

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1. Examples of such special attention include, *THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION* (R. Crandell & L. Lave eds. 1981); Merry, *OSHA's Action Plan on Cancer*, *WALL ST. J.*, Oct. 11, 1978, at 6, col. 3; Huber, *Exorcists vs. Gatekeepers in Risk Regulation*, 7 *REGULATION* 23 (1983); Alter, *Reagan's Regulatory Report Card*, *WASH. MONTHLY* (Nov. 1982), and Love, *Indecent Exposure: Reagan Guts the Rules on Cancer Protection*, *ROLLING STONE*, June 7, 1984, at 8.

ters to most people, what motivates them, is what they get out of something, yet what counts for people as a gain is left entirely unclear by economists. People do things for a great variety of reasons. Some of these reasons have to do with what they believe about right and wrong, good and evil. Some of them deal with their feelings, some with their expected monetary gain, some with fame, some with pleasure, some with jealousy, some with ignorance, and so forth. Many of us are hard at work, even in mature years, trying to figure out what it is we want to get out of things.

Morality concerns precisely what we should pursue in life. In this article I will be concerned with the moral reasons one might have to support or resist certain public policies. This does not imply that other matters have no impact on such policies. We shall, however, focus on the moral dimension of public policy.

A LOOK AT SEVERAL CASES

According to the intuitionist line of analysis, the starting point of a framework for policy determination must be concrete moral situations.⁶ That is to say, some paradigmatic cases for moral evaluation must be found. Once it is clear what our intuitions are with respect to these examples, we can proceed to harmonize our intuitions and derive public policy from them.

private interest The great Saints of history have served their 'private interest' just as the most money grubbing miser has served his interest. The *private interest* is whatever it is that drives an individual." Friedman, *The Line We Dare Not Cross*, 11 ENCOUNTER 8, 11 (1976). Professor Gary Becker puts the point more elaborately: "The combined assumptions of maximizing behavior, market equilibrium, and stable preferences, used relentlessly and unflinchingly, form the heart of the economic approach as I see it." G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 8 (1976). The clearest statement of this viewpoint comes from George Stigler's Lecture II, Tanner Lectures, Harvard University, April 1980. ". . . Man is eternally a utility maximizer—in his home, in his office (be it public or private), in his church, in his scientific work—in short, everywhere." R. MCKENZIE, *THE LIMITS OF ECONOMIC SCIENCE* 6 (1983). Each of these statements is an elaboration of the self-interested motivation (of at least market agents) familiar from A. SMITH, *THE WEALTH OF NATIONS* (1776).

6. Intuitionist moral analysis proposes to begin with the first impressions people have in the face of various types of conduct and to build on these impressions by placing them in "reflective equilibrium"; that is, in a coherent pattern which then should serve as the basis for more complex moral evaluation. This view is detailed in J. RAWLS, *A THEORY OF JUSTICE* (1971).

At this point, one of the workers from "Oxy" came on camera and said: "Large corporations are in business to make money, you know, regardless of what happens to my life or Jack's life or anybody else's life, and their number-one priority will still be money until somebody puts their foot down."¹¹ Another worker, however, observed, "We *have* safety stuff. It's our *choice* whether to use it." When asked "Does anyone use it?" the reply was that yes, "Joe uses it. He goes by the book" and "Joe's a pain in the ass." The rest of the workers seemed to agree that working "by the book" is an impossible situation which would "slow things down." One added that "Hans, the plant's owner, would lose profits, and the men would lose some of their profit-sharing"¹² *Mother Jones'* comment follows the transcript:

After the furor broke out, the union forced the company to put a new ventilation system in the Ag-Chem department. Oxy agreed to pay for semi-annual physical exams, with results going to the union's doctor. The men who became sterile slapped Dow Chemical, Shell Chemical and the University of California with a civil suit, alleging negligence based on DBCP research done at the University and funded by both companies. They also filed workers' compensation suits against Occidental. But beyond that, making the plant really safe seems an awfully steep hill to climb.¹³

This account creates the kind of moral revulsion which the intuitionist calls upon to support public policies requiring OSHA-type intervention in the workplace. We shall examine whether serious moral reflection will have the same results. First, however, we will look at some other cases.

B. *Farmworker Safety*

Arguing in 1978 for a ban on the use of DBCP before the FDA, Ralph Lightstone, an attorney with California Rural Legal Assistance (CRLA), sought to broaden the discussion.¹⁴ He tried, for instance, to show that various county agricultural commissioners were unwilling and/or unable to protect the largely Spanish-speaking farmworkers who must work with DBCP in the fields. According to a report in the *Los Angeles Times*, Lightstone told a meeting "mobbed by

11. *Id.* at 53.

12. *Id.*

13. *Id.* at 57.

14. *Id.* at 62.

worker who died was provided with the line but did not use them. And in another case against a company for failing to provide properly functioning respirators for its employees, the president and vice-president pleaded no contest to the charges and received suspended sentences and were placed on probation for four years.¹⁸

D. The OSHA-Benzene Case

In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*,¹⁹ OSHA issued an emergency temporary standard which required that worker exposure to benzene amount to no more than 1 ppm (parts per million time weighted average), rather than the previous standard of 10 ppm. The ruling was precipitated by a report produced by the National Institute of Health (NIH) in 1977 which indicated noticeably large numbers of leukemia deaths related to benzene. OSHA responded to the findings of the NIH by requiring that exposure be kept to the lowest technologically feasible level; one that could be maintained only at a considerable cost estimated to be in the hundreds of millions of dollars.²⁰

No one disputed that benzene is a carcinogen, or cancer causing agent, especially in animals. (OSHA has followed the widespread policy of applying findings related to cancer in animals to human beings as well. Of course, there are extensive disputes within the scientific community about this kind of extrapolation but public policy has not taken much notice of these debates.)²¹ What interests OSHA and its supporters is that "workers can be seriously affected by" benzene, and they base this on the studies which extrapolate from animal reaction to benzene or any other substance tested.²² That "OSHA therefore has a legitimate interest in the regulation of industrial manufacture involving benzene"²³ rests, in part, on the animal-study based allegation of the *possibility* of such a causal relationship, and not on established causal links between benzene exposure and human leukemia.

18. *Id.*

19. 448 U.S. 607 (1980).

20. Beauchamp, *The OSHA-Benzene Case*, CASE STUDIES IN BUSINESS, SOCIETY, AND ETHICS 184 (1983).

21. For a detailed discussion, accessible to lay readers, see E. EFRON, THE APOCALYPTICS (1984), especially *The Bridge to the Regulatory World* at 220.

22. Beauchamp, *supra* note 20, at 187.

23. *Id.* at 185-86.

E. The Lubricating Gun Case

The following example is provided in a business ethics text:

[A]t a Shell location not too long ago, a refinery employee nearly lost an arm while using a high-pressure lubricating gun. The incident began harmlessly enough when the worker inadvertently got his forearm in the way of the spray jetting from the gun's nozzle. He wiped the grease off, unmindful of the serious injury he had sustained. Later the arm swelled and became painful, and surgery was required. For a while, surgeons thought the arm would have to be amputated.

What had happened? Grease, usually a soft substance, when propelled to high velocity can become like needles that penetrate the skin. In this instance the grease penetrated the skin, depositing foreign material up to the worker's elbow. The material, insoluble in blood, could be removed only by surgery.

This was not a bizarre, remote occurrence. With the widespread use of a similar tool, the high-pressure airless paint gun, such incidents have become common enough for concern. Indeed, a recent survey by the Consumer Product Safety Commission's Bureau of Epidemiology indicated that an estimated 847 surgeons and hand specialists have treated at least one injury caused by injection from high-pressure grease guns or airless spray paint guns. Ninety-six percent of the patients were professional painters.²⁶

THE WELFARE STATE V. THE NATURAL RIGHTS DOCTRINE

In this section I will examine whether these cases support what advocates of the welfare state claim they support, namely, supervision of the labor market by government regulatory bodies. I will first sketch the historical context of the welfare state and the natural rights doctrine. Next, I will examine the case for the welfare state, and look specifically at several recent defenses of the welfare state. Finally, I will explore a theory of natural rights by drawing upon a version first espoused by John Locke. By juxtaposing these two theories, the moral case for and against OSHA will become more clear.

26. MORAL ISSUES IN BUSINESS 129-30 (V. Barry ed. 1983).

idea of the welfare state was reintroduced. Proponents of the welfare state view government regulation, such as OSHA, as a necessary means of ameliorating the hardships inherent in a capitalist system.

The Welfare State

The welfare state rests on the view that while individual liberty, including the freedom to earn and even amass wealth, needs to be respected in a legal system, so must the needs of those, to use Keynes' phrase, "whose necks are shorter." The result of this expression of moral concern for those who could not flourish under capitalism—or who did not do so, for whatever reason—was the modification of pure capitalist theory and the gradual emergence of the welfare state as a more humane alternative.

What is crucial here is that in addition to all the anti-capitalist systems of thought, there emerged one that did not entirely dismiss capitalism and its moral-political foundations which stress negative liberty as the supreme political value.²⁹ Rather, this system, unlike socialism, fascism, communism, or some of the religiously inspired benevolent dictatorial regimes, such as Islamic theocracy, combined some of the fundamental values of capitalism with certain other, and even alien, values, such as the notion of the right to welfare or well-being or happiness.

One of the major consequences of this combination has been the rejection of the doctrine of *caveat emptor*, or "let the buyer beware." This is a notion that wherever trade occurs, either party is legally obligated merely to act in a nonviolent and nonfraudulent manner—that is all.³⁰ No special assis-

29. Recent works on the philosophical underpinnings of the welfare state include N. RESCHER, *WELFARE* (1972); D. MARSH, *THE WELFARE STATE* (1970); *TALKING ABOUT WELFARE* (N. Timms & D. Watson eds. 1976).

30. One jurist observed recently that the rule of *caveat emptor* has recently "given way to *caveat venditor* under pressure of growing complexity of products and hence increasing costs of inspection to buyers relative to sellers." R. POSNER, *THE ECONOMICS OF JUSTICE* 184 (1981). Posner is too quick to assert that the cost of inspection to buyers is greater with the increasing complexity of products than it is to seller. Product advisory firms, such as Consumers' Union, the familiar "action reporter" (NBC's David Horowitz), and consumer advice columns in magazines and newspapers—indeed the entire market of consumer guides—testify to the fact that *caveat emptor* could be continued in an era of product complexity, provided the task is not preempted by government regulation! The welfare state undercuts the prospect of the development in a culture of private, voluntary "self-help" agencies. Consider that we do not expect guides to

Prima-facie Rights

Princeton University philosopher Gregory Vlastos has advanced a widely studied argument in support of the modification of the idea of natural rights. He holds that although it is true that we all possess certain basic rights as human beings, these rights are not absolute or do not deserve full or consistent protection in the legal system.³²

Here is what Vlastos' point comes to: as expressed in the Declaration of Independence and in John Locke's theory, each of us is said to have *inalienable* rights. This means that certain rights—to life, liberty, and the pursuit of happiness—may not be violated or abridged either by our neighbors or by the government. Governments were established for the purpose of protecting these rights by resisting any effort to try to prohibit these pursuits.

So understood, these rights are absolute.³³ They may not be alienated, not even by the individual who has them (for example, one may not "sell" oneself into slavery).

Vlastos argues against such an absolutist conception of human rights. He holds that "We would . . . improve the consistency of Locke's theory if we understood him to mean that natural rights are subject to justified exceptions."³⁴ He proposes to speak of human rights as 'prima facie' rights, meaning that "the claims of any of them may be overruled in special circumstances."³⁵ We must quickly note that Vlastos does not mean to deny the existence of rights—"prima facie" is not used in the sense of "on its face" or "apparent."

Vlastos claims that as real as these rights may be, "any of them may be overruled in special circumstances."³⁶ The reason is simple: clearly we can imagine circumstances when

32. Vlastos, *Justice and Equality*, in HUMAN RIGHTS 76 (A. Melden ed. 1970).

33. For a modern explanation, see T. R. MACHAN, HUMAN RIGHTS AND HUMAN LIBERTIES (1975); Machan, *Human Rights: Some Points of Clarification*, 5 JOURNAL OF CRITICAL ANALYSIS 30 (1973); Machan, *Towards a Theory of Natural Individual Human Rights*, 61 THE NEW SCHOLASTICISM 33 (1986). See also, T.R. MACHAN, INDIVIDUALS AND THEIR RIGHTS (forthcoming). For an overview of recent human rights theories, see Machan, *Some Recent Work in Human Rights Theory*, in RECENT WORK IN PHILOSOPHY 227 (K. Lucey & T. Machan eds. (1983).

34. Vlastos, *supra* note 32, at 82.

35. *Id.*

36. Vlastos, *supra* note 32, at 82. As another philosopher notes, those who "declare that [a] human right is only a *prima facie* right . . . certainly do not mean a right that is merely apparent or presumptive . . ." Melden, *Introduction to HUMAN RIGHTS supra* note 32, at 8-9.

as possible equal chances for developing and utilizing their own capabilities for successful agency.³⁹

How does Gewirth defend this view? He basically states that anyone with good sense acts because he believes that it is a good thing to do, otherwise he would not freely choose to do it. Gewirth proceeds to argue that the acting individual must view every other person in the same light. Whatever he demands for himself—for instance the freedom and the basic ability to do what he wants—he implicitly demands for others as well.⁴⁰ That, in turn, implies that none may rob us of our freedom and that we must be provided, at least when we lack it, with the materials required for action.

But Professor Gewirth is wrong. He has not demonstrated that each of us has a *right* to both freedom and well-being, but only that both freedom and well-being (the ability to act) are necessary for the pursuit of our goals. He has not shown that well-being is something others must provide for us, but only that it is vital for our lives. Freedom is different, since if others do not provide it for us we cannot have it. Without others refraining from assaulting, killing, or stealing from us, we cannot be free. But well-being, although necessary to pursue our goals, is something we can secure for ourselves. The only exception to this may be in the case of some drastic emergency for children, who depend on adults and should be cared for by those who brought them into this world.

Gewirth's argument for a welfare or supportive state fails because he does not fully appreciate the importance of the distinction between values *only* others can produce for us, such as freedom, and values which almost all adult persons could produce for themselves—even if sometimes with very great difficulty and on rare occasions only with the help of others. Contrary to Gewirth's insistence, it makes sense that there should only be the basic (negative) human right to freedom from others' invasion of our lives or our property. A right is the sort of moral condition which must be secured through the cooperation of other people, and it is the only moral condition which may be secured by force if other people do not respect it. In other words, we have a right to freedom because it is something that one would always possess were it not for others taking it away. Freedom cannot be given; it can only be taken and then regained. The point of

39. A. GEWIRTH, *REASON AND MORALITY* 209 (1979).

40. *Id.* at 210.

sive reliance on any doctrine of rights. He argues that unless we are going to contribute to the needy in some exceptional way, we should not be permitted to enjoy greater welfare than others. Inequalities are morally and legally justified if they raise the people who are the worst off to a better station in life. As Rawls himself makes the point:

Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. . . .⁴¹

But why should this be so? Rawls is very clear about this as well:

The assertion that a man deserves [i.e., it is *just* for one exclusively to possess and to benefit from] the superior character that enables him to make the effort to cultivate his abilities is . . . problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit.⁴²

Therefore, as Rawls points out, "[n]o one deserves his greater natural capacity nor merits a more favorable starting place in society."⁴³ This is why we must have a system that guarantees equality of resources for everyone in life, unless inequality can be expected to yield welfare improvements for those "who have lost out."

The gist of Rawls's view, then, is that we are all products of forces over which we have no individual control. When some of us are better off than others, it cannot be *just*, or, as Rawls understands that concept, it cannot be *fair*.⁴⁴ When we view human life in this light, it indeed seems unfair that some are better off than others.

In Rawls's view we are really back to what Keynes told us: it is unjust or unfair to leave a society to be governed on the basis of winners and losers. The welfare state is the remedy for this. It does not fully destroy liberty, as people are justified in acting autonomously, independently with regard to some matters. But they have a right to anything of great value only if by so doing they also improve the lot of the needy.

41. RAWLS, *supra* note 6, at 101-02.

42. *Id.* at 104.

43. *Id.*

44. This is the central political thesis of Rawls' theory of justice, namely, that justice is fairness. *Id.* at 3-53.

moral responsibility to excel as such. A good society requires standards for guiding the conduct of human beings toward one another, making explicit where the proper jurisdiction of one begins and another ends. This is so because living in human dignity requires, at least for adults, that persons govern *themselves* and guide their *own lives*. It is this requirement of freedom from the willful invasion by others, what is called "negative" freedom, that exists within a framework of basic human rights within relatively large human communities.

John Locke, it appears, was right that we all have the basic natural rights to life, liberty, and property. This means, roughly, that we need ask no one's permission to live, to take action, and to acquire, hold, or use as we see fit the results of our productivity or creativity. These rights are absolute, inalienable and universal. In the realm of social relations they may not legitimately be violated or infringed. No one can lose these rights, although a person may act in such a manner as to place himself or herself into circumstances resulting in a restricted exercise (e.g., imprisonment) of the rights. Every human being has these rights, even when they are not respected by others. And finally, having these rights entitle us to resist, with reasonable force if necessary, attempts by others to violate or infringe upon them.

Many people want to protect another kind of human "freedom" different from that which is at the heart of the above viewpoint. They wish to have government protect so called positive freedom; meaning the *ability* (rather than the freedom from others) to flourish in one's life as a human being. In plain terms, many people want government to protect not just our right to freedom from the violence of others but also some alleged right to have help provided by others as we face hardships in life—sometimes as innocent casualties of acts of nature; sometimes because of our own misdeeds or negligence.

Such positive rights can only be secured, however, via the full protection of negative rights. This is because only when such negative rights are fully secured that human beings are going to be most willing and able to provide the values which we all seek in life, both for themselves and for others, including the specially needy. The so-called positive freedoms, namely, abilities to overcome hardship and make headway toward a reasonably successful life, can only be secured when each person is secure in his or her rights to act productively, helpfully, creatively, and so forth.

The condition of freedom that characterizes a society

Workers' rights in this sense are a bad idea. Failure to be treated with care and respect can be open to moral criticism. When values such as safety and health provisions are neglected by employers, critically important features of the work situation could be missing. Nevertheless, this is categorically different from holding that workers have legally enforceable positive rights to these features. Adults have no rights to have benefits provided for them by unwilling others, including their employers. These others are free agents whose conduct should be guided by their own judgments until they encroach upon someone's natural rights.⁴⁸

Many workers' rights advocates claim that a free labor market can lead to horrid experiences such as child labor and health-impairing work conditions. However, it is far from true that a free labor market implies child labor and rampant neglect of safety and health at the workplace. Children are, after all, dependents. Parents, therefore, owe enforceable duties to their children. To subject children to hazardous or exploitative work, or to deprive them of normal education and health care, could be construed as a violation of their individual rights as young dependent human beings. Similarly, knowingly or negligently subjecting workers to hazards at the workplace constitutes a form of fraud and assault and comes under the prohibition of the violation of the right to liberty, and at times even the right to life. Such conduct is actionable in a just court of law. Workers, individually or organized into unions, would be morally justified, indeed advised, to challenge such conduct.

Attempts to socially engineer human goodness is a futile task. There is no political solution to the problem of human folly and evil. Making others good by force is impossible and to try to do so is wasteful and insulting. Such efforts will be resisted with black markets, mobs, tax evasion, draft dodging, and the like.

Practical versus Moral Issues in Focus

Moral considerations override pragmatic ones, and this is the first point to be made in connection with any discussion of OSHA's record and the methodology employed in imple-

after. For a discussion of some of these views see Machan, *Should Business Be Regulated?*, *supra* note 7.

48. Machan, *Human Rights, Workers' Rights, and the 'Right' to Occupational Safety*, in *MORAL RIGHTS IN THE WORKPLACE* 45 (G. Ezorsky and J. Nickel eds. 1987).

cost-benefit approach seriously, who find the numbers impressive if not decisive, who regard it as imperative that we calculate and estimate how best we can help those at the workplace who may suffer unnecessary harms. In short, these individuals are not against OSHA *in principle* but due to their belief that OSHA isn't doing the work it was created to do.

What if we considered these individuals' approach shortsighted, even callous? What if we turned to the points raised by Steven Kelman, namely the "more abstract conceptions of justice, fairness, and human dignity"?⁵¹ In the following section we will do exactly that. We will reexamine the previously described OSHA case studies, this time from the point of view of common sense morality.

A CLOSER LOOK AT THE CASES

At a superficial level, one could find all of the cases discussed earlier giving some good reasons for why we do indeed need OSHA. But in morality, as in law, due process should be employed. The consequences of public policy are every bit as serious and severe as those of law, and since the moral judgments involved in the cases we have recounted often help determine whether someone is going to support or oppose certain public policies and institutions, we should not rely on gut reactions or intuitions, but engage in a closer analysis.

Comment on Threat of Sterility

This case, as we saw, concerns the treatment of workers by Occidental Chemical Company. Specifically, workers experienced sterility at the time they worked for the company, and eventually sued the company by alleging that the company was responsible for causing the ailment that led to the sterility.

As we noted earlier, critics of the company made reference to the 1961 Dow Chemical Company study which showed sterility in rats. Dr. Torkelson's study showed that "with very high doses of DBCP you could get *testicular atrophy*, if you will, the shriveling up of the testicles." Officials of Occidental "talked to two scientists who are familiar with the work [who said] 'we just didn't draw the conclusion that

51. Kelman, *Regulation that Works*, THE NEW REPUBLIC, Nov. 24, 1980 at 19.

more strict and just than the OSHA-type approach precisely because it would not focus on the violation of rules, which bring relatively minimal punishment in response. As one commentator has observed, "[t]he imposition of the full costs of accidents on dangerous industries would no doubt be unpopular, but the consequences of not doing so are serious."⁵⁸ Furthermore,

A study . . . compar[ing] accident rates in the construction industry between Ohio and Michigan, the former highly regulated and the latter not, showed . . . no significant difference. [It] did, however, find a more positive attitude toward safety on the part of management as the parties themselves assumed more of the responsibility for safety.⁵⁹

Furthermore, truly careful attention to white-collar crime in health and safety would not counsel government regulation but the prosecution of perpetrators of actually unjust harmful acts toward workers.⁶⁰ Such an approach would also avoid the harassment of people in the business world who are not reasonably suspected of having unjustly harmed anyone. Instead of focusing on safety rule violations—and charges brought against firms on grounds of allegedly neglecting them—the focus would center on actual, consequential rights violations. This would preserve one of the most crucial and deservedly prized elements of recent Western legal traditions, namely, the refusal to impose burdens on individuals unless they have been proven to have committed wrongs against others.

In the cases at hand, however, some of the companies had to prove themselves innocent, e.g., by showing that "the safety lines had been provided and that the employee who fell to his death did not use them." In a just system there would be no prosecution in the first case without some reasonable ground for assuming that the company had been negligent or fraudulent in its relationship with the employee. The burden of proof would have been on the prosecution, consonant with the doctrine of individual rights.

58. Sands, *How Effective is Safety Legislation*, 11 J.L. AND ECON. 165 (1968).

59. *Id.*

60. Smith, *supra* note 50. Adjudication, rather than regulation, is the only way to secure due process! For a discussion, see Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulation*, 30 CHI. L. REV. 423 (1963); Ball & Friedman, *The Uses of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965).

Comment on the Lubricating Gun Case

In the Shell case we can raise other questions: Should workers be responsible for ensuring that their exercise of a skill be carried out safely? When someone professionally uses a high-pressure lubricating gun, that individual is surely responsible for learning about its hazards. Certainly there should be no "inadvertent" placing of one's own or another's forearm in its path. It is out of place here to even bring in the firm involved. If anything is clearly a case of worker responsibility, it is to know how to make the best and safest use of tools vital to one's profession. Were a plumber, who comes to fix one's sink, to be injured by misusing a tool, the homeowner may not be justly blamed.

The information concerning the hazards associated with the use of the lubricating gun were available. Workers involved could and should have taken precautions. Why is there any need to bring OSHA into the picture? The case shows what irresponsible conduct by workers and/or employers can do to people. To imagine that this general state of affairs could be avoided by introducing OSHA is to suppose something plainly wrong.

It appears, then, that even if we take seriously the idea of basing some of our decisions as to what public policy should be on the examination of key cases, such an approach still does not support OSHA and the kind of legislation which gives rise to it and numerous similar government agencies.

When we add that powerful moral objections exist to attempts at remedying socio-economic problems by way of such preemptive governmental methods as OSHA represents, the moral case for OSHA has to be regarded as extremely weak.

CONCLUSION: THE WELFARE STATE DOES NOT MEASURE UP

The welfare state and OSHA violate individual rights. Establishing a bureaucracy such as OSHA is not morally permissible, as it intrudes in the moral spheres of authority of individuals. Rather, individuals should make one of two choices regarding safety in the workplace: they can either work to make sure they are as well off and safe as is reasonable for them to be, or they can take safety risks but demand better pay for this from their employers. Adult individuals should not look to a government bureaucracy, such as OSHA, to provide them with safety, as this can only be accomplished through an impermissible, deprivation of individual rights.

ministry's work both advanced and hindered poetry, yet no clear quantitative advantage for its existence or nonexistence could be identified.

What should be done? Censorship undermines a basic value of a good human community. The work of the ministry must, therefore, be abolished. Despite what Irving Kristol says, that "no reasonable person is *in principle* opposed to all government regulation,"⁶³ there is no difference between opposing OSHA and opposing a Ministry of Poetry. The significance of creative and productive liberty when applied to poets is the same when it is applied to engineers, miners, chemists, pharmacists, and others regulated by OSHA. OSHA's people are not inherently more virtuous than those they regulate, thus making Herbert Spencer's comment most apt:

The ultimate result of shielding men from the effects of folly, is to fill the world with fools.⁶⁴

63. Kristol, *A Regulated Society?*, 1 REGULATION 12 (1977).

64. H. SPENCER, *State-Tamperings with Money Banks*, in ESSAYS 354 (1891).

In this article I will examine the moral dimensions of government regulation with special attention to OSHA, which should help us to decide whether the corporation in a free society is in need of the severe restrictions that some critics advocate.² My task, in short, is to ask whether OSHA actually is necessary. I will conclude that OSHA is not merely a nuisance from which corporate commerce ought to be rescued, but morally wrong and unjust as well.

SKEPTICISM AND MORALITY

Skeptical views on morality challenge whether we can assess the moral dimensions of political institutions. While these arguments have been presented in most persuasive ways, we won't be able to contend with them here in detail.³ But there is one difficulty with them all. Human beings have an obvious need to make good choices on important issues in their personal, social and political lives. Each of us is constantly faced with the need to choose well, and to suggest that this basic need cannot be met expresses a fundamental pessimism. Unless the case against morality is conclusively proven, there is no reason to accept such pessimism. In fact, much progress has been made in moral philosophy and ordinary moral understanding.⁴ Skepticism has, I think, been successfully challenged, so we need not dwell on it a great deal.

A final preliminary word of caution about morality and its impact on human and political affairs. Economists are fond of telling us that what really matters in life is whether something serves our interest.⁵ They usually mean that what mat-

2. The most vehement of such advocates of severe restrictions is, of course, Ralph Nader. See, R. NADER, M. GREEN, & J. SELIGMAN, *CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS* (1976), and R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATIONS* (1976). Cf., R. HESSEN, *IN DEFENSE OF THE CORPORATION* (1979).

3. This challenge is implicit, of course, in all the classic skeptical views on the possibility of moral knowledge. The most famous of these is D. HUME, *TREATISE OF HUMAN NATURE* (1740). The view that we are unable to judge whether some conduct is morally right or wrong, whether one ought to do one thing or another, and whether some institutions are worthy of moral support or condemnation has, of course, been advanced more recently by all those who find the positivist approach to morality, law and politics sound. This recent tradition may be dated from the publication of A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* (1936).

4. See, e.g., R. BAMBROUGH, *MORAL SKEPTICISM AND MORAL KNOWLEDGE* (1979).

5. See, e.g., Milton Friedman: ". . . every individual serves his own

In assessing OSHA's moral legitimacy, then, what we need, according to an intuitionist approach, are some clear cases of moral problems which involve safety and health in the workplace. If it turns out that these cases present moral judgments which lead to a public policy of the type which OSHA exemplifies, then the case for OSHA will have a solid foundation. We can, of course, argue with the wisdom of this approach for laying the ground for public policy. Even a policy resting on perfectly accurate moral intuition can leave serious and reasonable doubt as to its wisdom, as the following examples will demonstrate.⁷ But perhaps it will be useful first to take a close look at a few cases which may elicit the moral intuitions that serve as the basis for OSHA-type public policy.

A. Threat of Sterility

A detailed interview conducted by CBS-TV News and reported in *Mother Jones*⁸ introduces us to our first OSHA case which apparently justifies the existence of OSHA. In this case, we learn that some workers at the Occidental Chemical Company were found to be sterile, and "Oxy" was assumed to be responsible. When one of its officials was asked about his feeling when he first found out that some workers were sterile, he answered: "Shock. We had no idea. I had no idea at all that we had any kind of process here in our plant operations that could do such a thing to a human being."⁹ The interviewer reminded the official of a study conducted by Dow Chemical in 1961 indicating that the chemical DBCP—the same chemical produced by Occidental—caused sterility in rats. Occidental's official replied that the study

showed . . . that with very high doses of DBCP you could get *testicular atrophy*, if you will, the shriveling up of the testicles. I've talked to two scientists who are familiar with the work, and they both say, 'Heck, we just didn't draw the conclusion that there'd be sterility from the fact that the testicles were shriveling up' (emphasis in original).¹⁰

7. I develop this point further in Machan, *The Petty Tyrannies of Government Regulation*, in RIGHTS AND REGULATION, IN ETHICAL, POLITICAL, AND ECONOMICS ISSUES 259 (T. Machan & N. Johnson eds. 1983); Machan, *Should Business Be Regulated?*, in JUST BUSINESS: NEW INTRODUCTORY ESSAYS IN BUSINESS ETHICS 202 (1983); Machan, *Ethics and the Regulation of Professional Ethics*, 13 PHILOSOPHIA 337 (1983).

8. Ben-Horin, *The Sterility Scandal*, MOTHER JONES, May 1979, at 51.

9. *Id.* at 52.

10. *Id.*

200 growers" that CRLA investigators had called on 17 agricultural commissioners, and, speaking only in Spanish, asked what to do if someone was poisoned by DBCP. But none of the officers spoke Spanish. At that point, someone in the hearing audience yelled, "This is America, not Mexico."¹⁵

Lighthouse's idea was that workers who are unable to speak English may morally expect the government to interfere in the employer/employee relationship, especially when health and safety considerations are at issue. Any morally sensitive individual would accept this conclusion—or so the intuitionist approach would have it.

The next cases are different in that OSHA had already become involved in them. The results are meant to demonstrate OSHA's current weak-kneed approach to health and safety issues.

C. Workplace Fatalities

In the late 1970s, OSHA began to crack down on violations leading to deaths in the workplace, enlisting the Justice Department in the effort. Here is how *Business Week* reported the handling of these cases:

Philip B. Heymann, Assistant Attorney General of the United States for the Criminal Division, makes clear that the new attention to criminal sanctions for OSHA violations is part of an overall Administration push against white collar crime in health and safety. 'My own view,' he says, 'is that if there are flagrant violations of safety regulations—in food and drugs, the environment, workers safety and health, and mine safety and health—we ought to take it seriously.' . . .¹⁶

This new concern over workplace deaths resulted in charges being brought against a number of companies for safety rules violations, including actions against an employer of 51 workers who died when scaffolding on a voting tower in Willow Island, West Virginia, collapsed, and the employer of six workers who were killed in a workplace explosion.¹⁷ However, in the case of a company that failed to provide safety nets for workers who operated more than 25 feet above ground, the company was found not guilty since the

15. *Id.*

16. *An OSHA Crackdown on Job-Related Deaths*, BUSINESS WEEK, August 20, 1979, at 25.

17. *Id.*

The United States Supreme Court eventually ruled that the benzene ruling was too strict, but it went on to confirm OSHA's statutory authority to regulate:

The Occupational Safety and Health Act of 1970 (Act) . . . was enacted for the purpose of ensuring safe and healthful working conditions for every working man and woman in the nation

The Act delegates broad authority to the Secretary [of Labor] to promulgate different kinds of standards. The basic definition of an "occupational safety and health standard" is found in §3(8), which provides:

"The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652 (8).

Where toxic materials or harmful physical agents are concerned, a standard must also comply with § 6(b)(5), which provides:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. . . . 29 U.S.C. § 655 (b)(5).²⁴

Despite OSHA's general authority, in this case the Court did not believe that grounds existed for setting this particular standard. It held that a mere possibility that certain deaths were related to benzene exposure did not justify OSHA in this particular action, as "[t]he Agency made no finding that the Dow study [which found such possible connection between benzene exposure and leukemia deaths], any other empirical evidence, or any opinion testimony demonstrated that exposure to benzene at or below that 10 ppm level had ever in fact caused leukemia."²⁵

24. *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 612 (1980).

25. *Id.* at 634.

The Constitution and the common law provided conflicting influences for the development of early American law. The Constitution stressed the individual rights doctrine of John Locke, although not with the consistency of the Declaration of Independence and its doctrine of equal rights to all persons,²⁷ while the common law kept within it much of the older, paternalistic legal idea of the supremacy of government. Many jurists and justices embraced elements of both of these viewpoints, which in part accounts for the conflicting tendencies within our legal institutions, and, indeed, for the ease with which a country of individualism could be turned, without revolution, into a country of substantial collectivism and statism.

The natural rights individualism of Locke had certain features which many found difficult to reconcile with conventional morality. Perhaps the most telling criticism of the natural rights thesis, which stressed private property rights and therefore free market capitalism, is that it lacks compassion. As John Maynard Keynes noted, capitalism

implies that there must be no mercy or protection for those who embark their capital or their labor in the wrong direction. It is a method of bringing the most successful profit-makers to the top by a ruthless struggle for survival, which selects the most efficient by the bankruptcy of the less efficient. It does not count the cost of the struggle, but looks only to the benefits of the final result which are assumed to be lasting and permanent, once it has been attained. The object of life being to crop the leaves off the branches up to the greatest possible height, the likeliest way of achieving this end is to leave the giraffes with the longest necks to starve out those whose necks are shorter.²⁸

It is to tame corporate capitalism so regarded that the

27. The classic work by Locke, from which current natural rights theories emerge, is the *SECOND TREATISE ON GOVERNMENT* (1690). There is controversy as to just how philosophically well founded this theory is for purposes of actually establishing the existence of individual natural human rights. In my view some fundamental work is necessary to secure the basis to this theory in various areas of philosophy. See, e.g., Machan, *Metaphysics, Epistemology and Natural Law Theory*, 31 *AM. J. OF JURISPRUDENCE* 65 (1986).

For a detailed discussion of the relationship between the Declaration of Independence and the Constitution, see H.V. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION* (1978). See, also, the exchange between Jeffrey Rogers Hummel and William Marina, *Did the Constitution Betray the Revolution?*, 18 *REASON* 21, 23-25 (1987).

28. J. KEYNES, *THE END OF LAISSEZ-FAIRE* 28-29 (1927).

tance or help is due, in law, to those with whom one is trading. One may not perpetrate outright fraud or misrepresentation of one's wares or services, but, in trade, all parties are concerned mainly with what seems to benefit them most. No one is expected to offer help to a partner in trade.

The implication of this principle for the labor market should not be difficult to imagine. Capitalism implies that when workers take jobs, it is their responsibility to choose whether they work with the risk of hazards, health and safety threats, work elsewhere, or perhaps not work at all. In pure capitalist economic theory this idea is still well embedded.³¹ If the worker does not wish to work without knowing what he or she confronts in the way of safety or health hazards, he or she can go elsewhere to sell his or her labor.

Arguments for Political Welfarism

Let us now look at certain recent efforts to make the moral case in favor of government regulation and OSHA. We will examine three central contemporary ideas; namely, the doctrine of *prima-facie rights*, the doctrine of *equal rights to freedom and well-being*, and the doctrine of *justice as equal resources*. These doctrines all support the general notion of the welfare state, while using different assumptions and theories to support broad government intervention. The first of these doctrines states that there are no absolute (natural) human rights to liberty, and that there are competing rights, the right to happiness, which may sometimes override the *prima-facie* right to liberty. The second doctrine states that individuals actually have a basic human right to both freedom and well-being, and the last states that a society must implement a policy of equality concerning the acquisition of resources (income or material goods), provided certain conditions obtain in society. The three positions are advanced by philosophers Gregory Vlastos, Alan Gewirth, and John Rawls, respectively.

reading, the arts, etc., from the government but leave this difficult task to reviewers, critics, teachers.

31. See, e.g., M.N. ROTHBARD, *MAN, ECONOMY AND STATE* (1962); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) and A. RAND, *CAPITALISM: THE UNKNOWN IDEAL* (1967). The thrust of this view is that (adult) market agents are sovereigns, with their own responsibilities to pursue their own happiness—consistent with the rights of everyone to do the same.

rights must be overridden as a matter of moral decency. Locke's claim that "government . . . can *never* have a power to take . . . the whole, or any part of the subjects' property, without their consent"³⁷ seems plainly wrong. Vlastos claims that Locke himself appears to have accepted this in his actual political conduct.

Vlastos outlines a position in favor of a doctrine of "equal welfare-rights and freedom rights" for all.³⁸ Welfare rights would entitle all persons to what is required for their well-being, while freedom rights would entitle all persons to be left alone to live and act as they choose. Thus, if either welfare rights or freedom rights are absolute, they would cancel each other out in virtually all circumstances. An absolute right is a condition that must be fully and invariably respected. If one has a right to be free, then no one may ever take one's freedom. But the welfare of someone is often secured only through another person's productive support; to gain shelter and food, those who do not have it can get it only if others provide it. If others have an absolute freedom right, it would not be morally justified to obtain such shelter and food without the consent of these others. However, if those without shelter and food have an absolute right to it, then others would have a moral and legal responsibility to provide it. In practice, this would be impossible. One person's absolute right to liberty trumps or cancels another's absolute right to welfare, and vice versa.

A doctrine of prima facie rights appears to solve the problem, but the appearance is deceptive. What it does is to leave things pretty much "deuces wild," meaning that it is entirely arbitrary whether the "prima facie" right to liberty or the "prima facie" right to welfare will be protected.

Human Right to Freedom and Well-being

Alan Gewirth has defended what he calls the "supportive state" on the basis that each of us possesses the human rights to freedom *and* to well-being. He contends that we are all equal in possessing *generic rights*, and that:

What is of central importance here is not that wealth or property itself is to be equalized but rather that, beyond the minimum required for basic goods, persons have as nearly

37. LOCKE, *supra* note 27, at 82.

38. Vlastos, *supra* note 32, at 101.

the concept of a basic human or natural right is to identify a value we rightly or justly possess but which could be taken from us *by the actions of others*.

Well-being is a different kind of value. We may lack well-being *quite apart from what others do or don't do to or for us*.

People *can* unjustly, wrongfully hurt us. If they do unjustly hurt us, then they are liable to us for the harm caused. Theft, assault and murder all wrongfully take values from us. We know this from knowing we have the right to life, liberty and property. This also means that others may be thwarted in their efforts to take these values from us. If we had no right to our lives—if it were not for us to decide whether to live or not to live—or if it were not up to us to decide what to do with the products of our labors and creative efforts, it would not be possible to tell whether these actions would be categorically wrong. If our lives did not belong to us; if we were not the authorized agents of our actions; if we did not own what we produce, then murder, assault, and theft would not be generally wrong and prohibitable actions. In contrast, if we lack some value which others are not responsible for taking from us, we would not have a right to this value.

If I have a right to something, and another takes it, I may take it back or send the police to recover it (via the court system). If someone kidnaps me, I may regain my freedom, even by force. But when nothing has been taken from me, no one has assaulted me, no one has kidnapped me or threatened to kill me, I am not morally entitled to *forcibly deprive* anyone of anything he hasn't taken from me. Plainly any laws which would authorize such conduct would substitute need for justice as the ground of legitimacy.

The value of well-being is undeniable. Sickness, insecurity, and worry can all undermine it. Obtaining relief against these, then, is immensely valuable. But to regard such relief as a right is a mistake. It imposes on innocent parties legally enforceable duties which they do not have.

Thus, we do not have a human right to well-being. If something is ours by right, it can be compelled from others. Freedom is something we have by right, so it may be compelled from others who would invade it. Any political system which authorizes the initiation of force for any other purpose is most probably wrong.

Justice as Equality of Resources

John Rawls has defended the welfare state without exten-

Rawl's position is problematical for several reasons. First, there is a paradox in the theory. It denies any merit to individual effort and accomplishment and thus denies the possibility of differential welfare status which might have been earned through differences in merit. Yet he *morally* exhorts the merits of a system and rests the task of implementing its tenets with all of us. So, on the one hand no one is free to choose and gain moral credit, while on the other hand we should freely choose (and thus might be credited with) being on the side of justice.

Second, do we really lack the freedom to choose to make something of our lives? There are reasons to think that we are quite free. The very effort to seek answers to questions rests on our freedom to seek and find such answers. It presupposes that we are not prisoners of our prejudices, preconceptions, and simple opinions. The uncanny recurrence of the notion of good and evil despite the diversity of human life is most easily explained by accepting that individuals have substantial control over how they conduct themselves. There is scientific evidence as well for the view that human beings have the kind of brain that makes self-generated conduct something that is possible.⁴⁵ Finally, self-understanding or introspection gives evidence of personal freedom. There is no reason why such personal testimony should be inadmissible in this kind of inquiry.

So we are presented with yet another failed defense of the welfare state. We will see later how these basic moral considerations about capitalism versus the welfare state bear quite directly on the moral issues which come to mind in connection with OSHA.

Natural Human Rights

Now that we have considered the most prominent recent arguments for the welfare state, it will be useful to consider the basis for moral opposition to OSHA-type institutions. This basis may be found in an updated version of John Locke's doctrine of natural human rights.⁴⁶

Here, briefly, is the argument in support of the theory that each individual has the basic natural rights to life, liberty and property. Human beings are rational animals, with the

45. R.W. Sperry, SCIENCE AND MORAL PRIORITY (1983); *Changing Concepts of Consciousness and Free Will*, in PERSPECTIVES IN BIOLOGY AND MEDICINE 9 (1976).

46. See *supra* note 27.

that respects the principle that everyone ought to be respected as a self-created, self-developing, responsible human being is best secured by the identification and implementation of the standards spelled out in the above sketched human rights doctrine. It is the primary requirement of human social life that each person's moral nature be protected and everyone be left free by others, and thus morally responsible to govern his or her life.

Thus, the welfare state promotes a series of entitlements and government intervention based on the notion that individuals within a capitalist system need some equalizing forces to soften the hardships of that social system. On the other hand, a doctrine of natural rights, such as that sketched by Locke and developed by others, identifies a more limited set of rights: those of life, liberty and property. These rights are identified by an understanding of human nature as possessing a moral dimension; that is, each individual has moral responsibilities and others may not thwart the efforts (or lack of them) of persons to face up to them. Here the task of overcoming life's hardships are left to voluntarily cooperating individuals and groups, and not to the efforts of a coercive state. The expectation is that a society with such rights adequately protected will be just and prosperous.

Workers' Rights

What does all this imply concerning rights at the workplace? Essentially, workers are individuals who intend to hire out their skills for whatever they will fetch in the marketplace. Workers have the right to offer their skills in return for what others, usually called employers, will offer as compensation. In short, the framework of human rights sketched here implies free trade in the labor market.

Defenders of special workers' rights believe that employees possess special rights, as employees, to such values as occupational health and safety. In general, proponents of such special workers' rights hold that aside from negative rights, workers have a positive right to be treated with care and consideration on the job.⁴⁷

47. For a detailed elaboration of such a view, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). See also H. SHUE, *BASIC RIGHTS* (1980). Of course, the three philosophers we have discussed are the most widely known proponents of doctrines which give rise to special workers' rights positions, based on the fact that workers are regarded by most advocates of welfare rights as in the greatest need of having their welfare or well being looked

menting its policies. One cannot assess the value of an institution such as OSHA on the basis of quantitative analysis. The performance of OSHA can produce benefits to some. It is clear that these benefits will involve costs. But even if somehow it were possible to benefit society more than to harm it by establishing an agency such as OSHA, it could still be argued that we ought not to sacrifice certain basic societal principles for the sake of such benefits. For example, even if it could be shown that a regulated press were more productive—e.g., relevant, accurate, honest, frugal—than a free one, it can be argued that the principle of human autonomy demands forgoing the benefits obtained through censorship. We also know that without constitutional restraints we could probably apprehend some criminals who roam about freely because of those restraints, even though they are responsible for the criminal acts in question. We nonetheless insist that in the process of pursuing such commendable goals as crime prevention we adhere to moral principles and refuse to violate the rights of the accused.

OSHA's benefits to society, even if they could be calculated accurately, would not by themselves justify maintaining this institution in our political scene. Even if we momentarily dispense with the moral objections, OSHA's measurable value is questionable. Consider the conclusion offered by Peter Huber:

It is commonplace to observe that risk is ubiquitous and inescapable. Every insurance company knows that life is growing safer, but the public is firmly convinced that living is becoming ever more hazardous. Congress, understandably enough, has been more interested in the opinion polls than in the actuarial tables. A bountiful crop of federal health and safety regulation, most of it of recent harvest, reflects the popular concern.⁴⁹

We might add to this Robert S. Smith's observations: "Because safety and health are goods, it is natural that we value them—yet we do not and probably cannot seek them at all costs. At some point, a lower speed limit, lower dust levels, or reduced noise levels simply are not worth the cost to us."⁵⁰ These observations are made by individuals who take the

49. Huber, *supra* note 1, at 23.

50. Smith, *The Processes of Adjudication and Regulation, A Comparison*, in *INSTEAD OF REGULATION: ALTERNATIVES TO FEDERAL REGULATORY AGENCIES* 319 (R. Poole ed. 1982).

there'd be sterility from the fact that the testicles were shriveling up'"⁵²

This is supposed to condemn Occidental from the moral point of view, but does it really? And even if culpability for criminal negligence could be laid at Occidental's feet, does this give support to OSHA-type government action, as opposed to straightforward legal prosecution based on the laws of wrongful death or injury? If someone is given poison at a restaurant, or by a friend at home, the law is not helpless, and can supply the framework for forceful response.⁵³

Intuitions to the contrary notwithstanding, testicles can shrivel up for many reasons. Furthermore, animal studies which show that very high doses of DBCP cause testicular atrophy in rats may well have no bearing on what will happen to human beings, despite widespread assumptions to the contrary. Certainly this has been argued by enough scientists to leave one with reasonable doubt when charges are based on such studies.⁵⁴

But there is the far more important *moral* issue to be considered. Workers are not and should not be thought of as helpless creatures in these circumstances. Labor organizations could insist that their members work at safe and healthy workplaces. Once it is recognized that employers may not, and should not, be *primarily* concerned about their employees' well-being, it would be logical and morally sensible to consider the well-being of workers mainly with regard to the responsibility of workers themselves and their unions. Since corporate managers owe it to shareholders, both legally and morally, to do as well as possible for them economically, they cannot serve their employees equally well. This is no different from how we understand the relationship between client and attorney or patient and physician. If the latter had to serve first of all their secretaries or technical staff, they would

52. Ben-Horin, *supra* note 8, at 53.

53. But the degree of swiftness some desire will not be available in a system of justice which demands due process. It is interesting that very often the same individuals who advocate strong safeguards against "swift" justice in the criminal courts—e.g., by insisting on a "Miranda" protection and by considering the use of legal "technicalities" perfectly legitimate, even when known murderers are being protected by this use—will be very impatient when it comes to the lack of swiftness due process of law would precipitate in connection with dealing with the accused in the business community. For the development of the law that has led to this double standard, see Karlin, *Substantive Due Process, A Doctrine for Regulatory Control*, in *RIGHTS AND REGULATION: ETHICAL, POLITICAL AND ECONOMIC ISSUES*, *supra* note 7, at 43.

54. EFRON, *supra* note 21.

rifice anything of value in keeping a firm prosperous, for many people it seems unfair that it should include the workers. Surely, business corporations can afford a few million, can't they, to provide workers with the maximum amount of safety that is technologically feasible?

But the idea that workers have a basic right to being provided with this protection rests on views we have already shown to be flawed, as well as on the general belief that workers aren't *really* free to choose and thus need government protection against the adversities of the labor market. This is demeaning to workers. Surely workers—who are not permanent members of some inferior species—are able to plan for the eventuality that a company is not principally concerned with their separate interests. When we see that the *union* finally produced the desired changes in safety provisions, it becomes apparent that thinking of workers as if they were unimaginative when it comes to their well-being is quite insulting and unjustified.

Finally, it would be naive to entirely ignore the role of workers who participate in the creation of the myth of worker impotence, ones who resent that they are not running the corporation, or at least reaping its benefits. Envy is not an unknown sentiment in the marketplace, and some people would take any such "envy" as merely a desperate outcry about one's helpless circumstances. Yet this need not be the case. It could be the result of a culpable resentment at the awareness of other people's relatively better lot. Because of the generally favorable moral response to the workers' demands, this sentiment is often overlooked or misunderstood for righteous indignation.

Many people do, in fact, forgo opportunities in early life which leaves them in economic circumstances that are difficult if not impossible to escape from later, especially once they have started families, etc. These choices can hound one through an entire life; attempts at evading the responsibility for these choices and substituting some doctrine of how one is really the victim of exploitation is a handy measure for trying to escape the results.

To believe that workers are incapable of such moral culpability is again to demean workers at a fundamental level as something other than human moral agents. This view would have them all back in a position of serfdom, as the peasants and their offspring had found themselves several centuries ago. This attitude lay in back of Great Britain's famous notion of the white man's burden. There is nothing morally ob-

the workers of their use of DBCP, and if DBCP is actually hazardous to human health and safety, then this case can also be handled through the courts.⁵⁶ The criminal and civil law, not government regulation, are far more promising means for remedying such matters.⁵⁷ Unions, legal-aid societies, and similar organizations, supported by vigorous fundraising efforts, should be in a position to help workers sue those employers who are suspected of being negligent or fraudulent.

Furthermore, because the case already involved government supervision at the county and state levels, there is no conceivable support for further governmental intervention such as that which might be expected from OSHA. There is no reason to think that government is any more just at the federal than at the local level. Of course, it could turn out that some locality is far more corrupt than some other, or that the administration, indeed even the government's ideals, at the federal level are more just than those at the local level. But there is no justification for assuming as a general rule that government regulation, locally or federally, does more good than judicial resolution of conflicts which may arise at the workplace.

Raising the issue of linguistic handicap is also open to criticism. Mexican-Americans are no less able and responsible to learn English, than had been Jews, Japanese, Chinese, Polish, or Hungarian Americans, all of whom chose to immigrate to the United States of America, with its English-speaking tradition and culture. Here again we find a kind of condescension toward some people which under other circumstances could be described as racism.

Comment on Workplace Fatalities

In our next case, all of the injuries to workers were the result of safety rule violations. Note, however, that *deaths* were involved. It completely understates the issue to label these injuries as mere violations of safety rules. The main point is surely that the companies may have caused or contributed to the deaths of almost 100 people.

The judicial approach to these kinds of cases could be far

56. I have in mind here that tort law could be developed—and could have developed—instead of government regulation for purposes of dealing with these kinds of cases.

57. See M.S. BARAM, *ALTERNATIVES TO REGULATION* (1981) and Smith, *The Processes of Adjudication and Regulation, A Comparison*, in Machan and Johnson, *supra* note 7, at 71.

Comment on the OSHA-Benzene Case

In the instant case we found how well entrenched OSHA's legal powers are. Moreover, we see the fact that "workers can be seriously affected by" a compound such as benzene imposes the legal obligation on firms not to make use of benzene or expose workers to it. Indeed, here the idea is that even if workers are aware of their exposure to benzene and the hazards this entails, it might be something OSHA can prohibit above certain minimum levels. The U.S. Supreme Court's "finding" that "OSHA therefore has a legitimate interest in the regulation of industrial manufacture involving benzene,"⁶¹ does not establish that OSHA is a morally proper institution; "legitimacy" is a statutory warrant, not a moral one.

Furthermore, the terms "reasonable" and "feasible" play a significant role in describing what OSHA legally does and requires of others. Yet, what is reasonable or feasible is impossible to determine on a society-wide basis. This is because of all the pitfalls in cost-benefit analysis, planning, and determining values for people in a human community. The determination of values must often be left to individuals in their voluntary relations with each other. The idea of assessing what people should do, produce, or forgo on a collective, social basis is extremely problematic, and even meaningless.⁶² So, interference by OSHA cannot help determine what is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment".

Nor is the Occupational Safety and Health Act the most efficient, let alone ethical, way to achieve what Congress wants. Delegating to OSHA "the broad authority . . . to promulgate . . . [and to] . . . set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity" is not even efficient legislative policy.

61. Beauchamp, *supra* note 20, at 185-86.

62. F.A. Hayek argues that for this reason the concept of social justice is meaningless. See HAYEK, 3 *LAW, LEGISLATION AND LIBERTY* 8-13 (1979). This is probably an overstatement, based on the unavailability or lack of prominence of a conception of social justice which is individualistic and rejects the idea of collective purposes or goods which supersede the individual's moral responsibility for self-government.

Furthermore, OSHA and the welfare state amount merely to the pretense of providing protection. In fact they introduce a new source of mistakes committed by their officials, managers and whoever else is involved. As has become so clear in connection with the far more drastic cases of human slavery and serfdom, liberty is not only a requirement of human dignity, but it also turns out to be a better means, all things taken into account, for securing beneficial results to all concerned. No doubt, there are market failures which make the welfare state appealing. In the end, however, it proves to be a certain political failure.

Believing otherwise—namely, that OSHA type agencies can really solve problems of well being, health, and safety—reveals an unwarranted bias in favor of the inherent wisdom and efficiency of government coercion and bureaucracy. It shows the error of thinking that market failures, even if thought of in the broad sense of what the market should do but fails to do, can really be remedied by political means. That completely overlooks the far greater hazard of political failures based on the problems we have outlined earlier: rights violation, paternalism, and inefficiency.

Not only is the political process unsuited for handling the problems which arise in the marketplace, but there is every reason to think that political workers, managers, etc.—in short, bureaucrats—are every bit as capable of failure, corruption, haste, greed, and other vices which produce harm to people, as are those who own and work in the workplace, in executive suites, etc. The belief that capitalism is especially geared toward tempting people to evade responsibilities is, of course, crass prejudice. If there is something to it all, there is no doubt that the political process offers temptations toward vices of its own. That those who work for OSHA should escape these temptations is one of the tragic myths afflicting human beings, and deserves to be contested at every possible chance.

As a final *Gedankenexperiment*, let us imagine a society in which one has been asked to morally evaluate the Ministry of Poetry. Such a governmental body should not exist, but perhaps some excuse could be found for it. The ministry's failures and achievements are recorded, and it is found that some of the poets have improved, some have obtained grants to keep working, some have abandoned the nonsense they wrote before, and others have quit. These poets quit after their work had been withdrawn from circulation because they were found inappropriate for aesthetic consumption. The