
Panel Discussion of *The Excuse Factory*

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We are fortunate to have Henry Butler at the University of Kansas. Those of you who have participated in the programs sponsored by the Law and Economics Center know this better than others. When Henry was interviewing for a position at Kansas, I asked him for his definition of law and economics, and he had a very generous definition. He said, "Law and economics involves the recognition that governmental decisions create costs, and, as a result, analysis of public policy ought to take this fact into account and make judgments in light of it." Certainly, Mr. Olson's book brings that to our attention.

In thinking about my remarks on this panel, however, I harken back to my undergraduate training in economics classes, where I remember one of my professors always using the phrase: "compared to what?" My remarks start from that premise. A few years ago, Neil Komesar observed that the alternative solutions to most policy problems are highly imperfect alternatives.¹ In reading Walter Olson's book, I was therefore interested in the following question: Assuming that we wish to respond to problems in the workplace, what are the alternatives, potential responses, and what are the advantages and disadvantages of each?

Mr. Olson identifies four potential responses. At some points, he cites with approval the manner in which European countries address workplace difficulties, at least to the extent that they seem to operate without the kind of high transaction costs that are associated with work-related litigation in the United States.² At

another point, he notes that for some problems we rely on government agencies to protect workers, rather than private enforcement through employee lawsuits.³ The Occupational Safety and Health Administration (OSHA) is a good example of this approach. At still other points, Olson mentions workers compensation⁴ and unemployment compensation⁵ as examples of systems which he seems to admire, at least to some extent. Finally, he mentioned arbitration as yet another approach.⁶

As I move quickly through these ideas, I would like to suggest to you the type of comparative analysis that is necessary before we decide that the litigation system should be abandoned. Starting with the European systems, I agree with Professor Schwab about the difficulty of adopting a European system in the United States. I am reminded that some years ago I went to a talk by Bruce Valdeck, who was speaking about health care reform, about which he is an expert. Someone in the audience asked him whether it would be advisable for the United States to adopt the type of health care system that is used in Canada. Valdeck replied that the important fact to know about Canada was that it was full of Canadians. What he meant was that what people in other countries find acceptable in terms of government action is a function of their political culture and experience.⁷ As a result, it is difficult to adopt a for-

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esign system in the United States because Americans are not prepared to accept the same types of arrangements that prevail in other countries. Thus, although the European systems might appear to Mr. Olson to be better in some ways, they simply cannot be adopted here very readily.

In my prepared remarks, I will talk about the role of OSHA and workers' compensation in addressing occupational accidents and disease. For now, I would point out that an administrative agency, like OSHA, may not offer a sufficient level of protection for workers, when it is not accompanied by a private right of action to enforce workplace safety and health regulations. OSHA has about 1,000 inspectors, and is supposed to inspect seven million workplaces.⁸ So, needless to say, an employer could live a long life and never see an OSHA inspector. The fact of the matter is that agencies, like OSHA, will inevitably be underfunded in today's political climate.⁹ This means that unless there is a private right of action, there is likely to be underenforcement of regulations. Thus, if Mr. Olson expects that administrative agencies alone can do the necessary job, he is likely wrong.

What about workers' compensation? Does this system work better than litigation in the federal and state courts? Does it avoid the type of absurd results that occur in tort and contract litigation according to Walter Olson? The fact is that there is a heck of a lot of litigation going on in the workers' compensation system. It is true that employers have fewer issues that they can use to contest paying compensation, but that does not stop them from enthusiastically contesting many claims by employees.

In any case, if you are going to compare

workers' compensation and tort litigation, you must recognize that they deliver different levels of deterrence. In my prepared remarks, I will discuss how workers' compensation weakens the incentive for employers to take safety and health precautions. This occurs because the amount of compensation that employers pay under workers compensation is limited or capped. As I will discuss, this is contrary to economic theory. If we expect to reach an economically appropriate result concerning compensation for occupational injuries and disease, then we would expect employers to pay for the full costs of such injuries and diseases, either in the form of wages for undertaking risky work or compensation for accidents and illnesses. Because workers' compensation limits the damages that workers can recover, it is an economically inappropriate system.

The type of arbitration that Mr. Olson has in mind is apparently different. He mentions with approval the "old days" when the shop foreman of a labor union was responsible for handling various employee grievances.¹⁰ He likes this approach because when labor unions have this function they must take their broader institutional concerns into account in resolving individual employee grievances. With the greatly reduced role of labor unions in today's workplaces, the unions no longer function in this manner. One can argue about why labor unions are no longer an important force in the American workplace, but certainly one viable theory is they were done in by the National Labor Relations Board. Republican control of the Board during the Reagan and Bush administrations led to a series of rulings that have made it more difficult for unions to organize workers. I mention this theory because it is

related to another problem when you depend on agencies as the method to enforce rules and regulations. Agencies can get captured by those with superior resources. You have to look at who plays the game and what resources they bring to it. Recently, employers have gotten a lot better results from the NLRB than have employees and unions.

I see a connection here. I would suggest that the growth in employment litigation, which Mr. Olson bemoans, is related to the drastic reduction in unions. Capitalism has rough edges. Workers sometimes come up on the short end, and there are far more employees in this country than employers. Inevitably, people will seek relief for what they view as the unfairness of capitalism. If they don't find relief in labor unions, they'll go somewhere else, and it seems to be pretty clear where people have gone is to all these other solutions, particularly litigation. Thus, if Mr. Olson wishes to reduce employment related litigation, he should favor the reinvigoration of labor unions. It will be interesting to see if he will join me in supporting stronger unions.

governmental structure).

8. See THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* 47 (1993).

9. See Richard J. Pierce, *Judicial Review of Agency Actions In a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 87 (1997).

10. See OLSON, *supra* note 2, at 237.

Notes

1. See Neil Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 24 (1990).

2. See WALTER OLSON, *THE EXCUSE FACTORY* 234-35 (1997).

3. See *id.* at 50-51.

4. See *id.* at 7.

5. See *id.* at 34.

6. See *id.* at 298.

7. See *generally* STEVEN KELMAN, *REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY* 221-28 (1981) (discussing the connection between political culture and