Poverty and the Politics of Occupational Safety and Health

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One of the most maligned bureaucracies in the United States is the Occupational Safety and Health Administration (OSHA), the institutional entity to which Congress has delegated the responsibility for implementing the Occupational Safety and Health Act of 1970. OSHA’s primary tasks are to implement and enforce occupational safety and health standards and to ensure that all employers adhere to their “general duty” to provide a safe workplace. Although many of OSHA’s problems are not of its own making, industry has often criticized (and occasionally ridiculed) the agency for writing overly burdensome health and safety regulations that threaten to place United States enterprises at a competitive disadvantage. This article accepts the pessimistic proposition that in a world in which most inhabitants live in poverty, any governmentally imposed health and safety protections can place companies at a competitive disadvantage. The answer, however, does not lie in retreating from the gains that industrialized countries have made in the rapidly expanding area of occupational safety and health regulation. Rather than seeking out the “lowest common denominator” of worker protections, the developed countries should explore the possibility of a tariff aimed at encouraging developing countries to protect their workers.

A Safety Fable and a Counter-Fable

Many economists refuse to recognize a legitimate role for government in regulating workplace safety and health beyond ensuring that workers are fully informed of the risks they face. One of OSHA’s earliest critics, Robert S. Smith, illustrates this view in a “safety fable” that can be paraphrased as follows:

Once upon a time, there was a kingdom in which there was no occupational safety and health program. In this kingdom, all of the businesses were owned and operated by selfish trolls. The other primary inhabitants of the kingdom, gnomes, worked for the trolls. Annoyed by the risks that they faced in their jobs, the gnomes petitioned the benevolent king to do something about these risks.

The king appointed a Royal Commission to study the matter. The commission reported that the trolls were greedy creatures who cared for the safety of the gnomes only when it helped to fill their own pockets. Gnome safety and health could be profitable for trolls, because a sick or injured gnome was wasting training costs and because gnomes in the more risky industries demanded higher wages.

In any event, the trolls had an incentive to improve safety for gnomes up to the point at which the additional training costs and wage premiums equalled the cost of additional safety measures. The gnomes seized upon the report of the Royal Commission as proof that trolls were greedy and did not mind providing unsafe workplaces. The king saw the gnomes’ point and issued an edict banning all occupational hazards.

The trolls were alarmed by the decree. They stopped putting capital into bridgebuilding and housing construction and invested in royal bonds. Gnomes soon found themselves out of work. Because there were not enough bridges, the gnomes began swimming across rivers and drowning in the process. They began to drop like flies as they attempted to build their own homes.

Learning of the higher rate of gnome deaths, the king became red with rage. He screamed at the gnomes, “I reduce the hazards in your factories to improve your lives, and now you choose to take more risks away from your jobs. I now ban all unsafe conditions both on and off the job. I demand the maximum safety technology available for every gnome endeavor.”

The gnomes fell to their knees and begged the king to rescind the decree requiring safe workplaces. A troll stepped forward and pointed out that the best workplace was the one that existed prior to the decree, where risk premiums determined safety conditions.

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The gnomes were stunned by the troll’s logic, and the king called out: “Royal decrees about safety are abolished, and I will take no further action except to ensure that you are aware of the risks you take and are mobile enough to avoid the risks that you do not accept.”

Mr. Smith’s fairy tale ends here. It is a captivating fable, and its moral has enlivened debates about occupational safety and health regulation for almost a decade. The moral is that the ideal workplace is one in which informed workers freely accept health and safety risks in return for higher wages. The prospect of paying higher wages for risky work will induce trolls to install the optimal amount of protective equipment. In the end, the gnomes concede this point. But most enlightened economists readily acknowledge that the fairy tale has several troubling aspects.

The trolls do not suggest how the gnomes become informed of workplace risks. Surely the trolls have no incentive to provide that information when the predictable response of the gnomes is to demand higher wages. Rather, the trolls have every incentive to provide inaccurate information to deceive the gnomes into believing that workplaces are safer than they really are. In the case of safety risks, this deception strategy may be of only limited utility. Over time, gnomes will see their fellow gnomes dying and becoming injured, and they will learn to distrust the trolls. This crude source of knowledge may not be readily available to gnomes seeking employment for the first time, but gnomes who are already employed can use it to bargain for increased wages. The trolls’ deception strategy is likely to be highly successful in the context of workplace diseases, because the ability to draw cause-effect relationships between workplace exposures and illnesses is extremely limited. Unless fairly sophisticated epidemiological studies or expensive animal experiments are undertaken, the gnomes may never know about the risk of contracting industrial diseases from exposure to particular substances. Therefore, knowledge of workplace exposure will play no role in wage negotiations.

Although the problem of inadequate safety and health information is an important one, this article focuses on the other questionable assumption underlying the trolls’ position—that freely mobile gnomes have equal bargaining power. It is not insignificant that the fairy tale takes place within a discrete kingdom. Suppose that the kingdom is surrounded by poorer kingdoms in which large numbers of gnomes go to bed hungry every night. Suppose further that these “foreignomes” are not lazy, but genuinely have no opportunities for employment in the kingdoms where fate has placed them. When presented with the choice between allowing their families to starve and working in a hazardous job, these foreignomes will accept the hazardous employment.

Unless the kingdom has erected high walls around it, these foreignomes may decide to immigrate to the fortunate kingdom in which trolls have jobs to offer. Recall the trolls’ assumption of the free mobility of gnomes. Does this include mobility from the poor kingdoms to the wealthier kingdoms? One suspects that the trolls would reply that it does, and the trolls would no doubt argue that the converse is also true. The ungrateful gnomes who want to receive higher pay for assuming hazardous employment should be free to migrate to the poorer kingdoms in search of safer employment. Is this what the benevolent King had in mind? Perhaps it is time to examine more carefully the tacit notion of “equality of bargaining power” that underlies the trolls’ weltanschaung.

Professor Frank Knight, founder of the Chicago School of Economics, observed that the difference between laborers and the owners of companies is that laborers have freely elected to risk their health and safety whereas owners have chosen to risk their capital. Modern-day economists share Knight’s belief that workers freely accept risky employment in return for additional compensation. Perhaps to emphasize the point, the prominent modern OSHA analyst, W. Kip Viscusi, titled his book Risk By Choice. Several studies attempting to correlate wages to risks have concluded that some workers in the United States who undertake hazardous jobs are able to extract wage premiums from employers, but this is not an uncontested point. The empirical studies, however, do not reveal the extent to which employees are shielded from labor competition by United States immigration restrictions.

The actual conditions in many labor markets in the United States suggest that workers do not freely accept the health and safety risks to which they are exposed. The outcome of any negotiation depends on the relative economic power of the employees and their employer. Since the Progressive era,
realistic observers of the sociology of the workplace have recognized that a worker who can be fired at the whim of an employer is unable to demand safer working conditions. This is especially true for jobs in which employees can easily be replaced or for which alternative jobs with fewer risks at lower wage rates are not readily available. Further, the costs associated with switching jobs, such as loss of health benefits, pension rights and seniority, the necessity of becoming familiar with a new employer, and the financial and personal costs of relocation, are very high for employees.8

The emergence of unions as a market force has assisted employees in confronting employer market power. Indeed, wage premiums apparently exist only in the unionized work sector.9 Even so, the capacity of unionized employees to obtain fully compensatory wage premiums is questionable. Due to increased automation of the workplace and the accompanying high costs of technology, union power has diminished in the last decade to the point where employers have forced workers in many industries to accept wage concessions.10 In other industries, prominent companies have been able to replace higher wage, unionized workers with lower wage, nonunion workers.11 At the same time, the percentage of the American workforce that is unionized has declined from 29.5 percent in 196412 to 21.9 percent in 1982.13

The economist's answer to the occupational safety and health problem (inform workers and allow them free mobility) presumes an a priori state of the law regarding the employment relationship. In particular, the economist's answer takes as a given the “employment at will” doctrine, under which an employer is free to fire an employee for any reason, including his refusal to perform an extremely hazardous task. The employment at will doctrine, however, is steeped in nineteenth century notions about the nature of the employment relationship that may have little relevance to the modern reality of worldwide product and capital markets. To see this, let us return to the fable.14

As Act II of the fable unfolds, the king has commanded his very best wizards to ascertain all of the risks in all of the workplaces in the kingdom and to communicate those risks to all of the working gnomes. The wage rates for gnomes in dangerous occupations begins to escalate, and gnomes from kingdoms all around begin to flock to the high paying jobs in the dangerous occupations. Wages slowly begin to fall, even in the dangerous jobs, and there is a good deal of grumbling throughout the kingdom about the high crime rates and low moral standards that seem to have accompanied the influx of the foreign gnomes.

The king must now decide the fate of a gnome who has been accused of assaulting a troll with a deadly weapon. The king asks the gnome, "Why, in this peaceful and benevolent kingdom, have you breached the peace in this awful manner?" The gnome replies: "A troll told me to clean out a vinyl chloride tank. Because the wizards had told me the risks, I said, 'No. I would rather not do that.' The troll replied, 'You heard the king. You have a choice. You can work in the vinyl chloride tank or you can be fired. You are completely free to do as you please. But don't talk to me about a wage premium, because there are fifty foreign gnomes out there who are willing to do the job for your wage, and it won't cost much to train them to do your unskilled job.'"

"I pondered this for a moment. I thought of my wife and my kids. I thought of the pension that I would lose if I were fired. And I thought of the seven percent unemployment rate and of the unlikelihood of finding another job. Finally, I asked, 'Do I really have a choice?'"

"You sure do," replied the troll.

"'In that case,' I said, 'I choose to be a troll.'"

[That choice, however, is not available to the gnome. Apparently, at some point in his life, perhaps high school, perhaps even junior high, he made the fateful decision to risk his health, rather than his capital. From that day forward he has been a gnome, and it is too late to elect trollhood. Some economists of Professor Knight's persuasion really do see the world as divided between gnomes and trolls, and believe that there is no unfairness in this bifurcation. It was all a matter of choice at some far-off time when trolls decided to risk their capital, and gnomes decided to risk their bodies. But back to the fairy tale where the gnome continues his story to the king.]

"When I discovered that I couldn't be a troll, I decided that I would show the troll what it was like to be a gnome. So I picked up a sword, pointed it at the troll, and said, 'Now why don't you get in that vinyl chloride tank and clean it out. I'll bet you can do an even better job than I.' The troll said, 'I'd really rather not.' I replied, 'Now you, too, have a choice. And it is not so different from the choice you gave me. What will it be?' The troll then got in the tank and cleaned it out."

"But I discovered that there was a difference between the two situations. In all of those times that the trolls made us clean out vinyl chloride tanks, you, King, never once saw fit to summon a single troll before you to explain why the trolls have the power to force gnomes to make such choices. Yet the day after I forced a choice on a troll, I am summoned before you to explain myself."

"Why, it is the law," replied the king. "None of my subjects can assault another. When you pointed the sword at the troll, you assaulted him."

"But I did not intend to stab him," said the gnome. "I only
meant to give him a choice. The choice that the troll gave me had consequences equally dire. Not only can I not choose to be a troll, but I see also that the trolls are favored by your laws.” “Now I am really confused,” complained the king. “I do not mean to show favoritism to gnomes or trolls, but my laws appear to do so. If I protect trolls from gnomes through the assault laws, does that mean that I must protect gnomes from trolls through occupational safety and health laws? Is more law the solution to unfair laws?”

At this point, the king’s Minister of Laws stepped forward, scroll in hand.

Recognizing the Worker’s Right-to-Act

In the context of a less-than-fully employed society in which immigration occurs freely, the wage premium solution to the occupational safety and health problem fails to recognize the power that the employment at will doctrine confers on employers. The choice not to accept hazardous work in that context is not a free one. Low-pay workers in hazardous industries may act more out of desperation than by choice.\(^{15}\) According to Dean Guido Calabresi of the Yale Law School, “the willingness of a poor man, confronting a tragic situation, to choose money rather than the tragically scarce resource [his health or safety] always represents an unquiet indictment of society’s distribution of wealth.”\(^{16}\) Any governmental solution to the occupational safety and health problem must, therefore, reject at the outset the employment at will doctrine.

The fable suggests one solution to the occupational safety and health problem that does not necessarily involve the promulgation of volumes of occupational standards. The legislature could simply repeal the employment at will doctrine and empower workers to refuse hazardous work without threat of retaliation by the employer. This solution would allow workers to decide initially whether the job they have been assigned is sufficiently safe. Additionally, it gives workers the right-to-act based on their own assessments. Although few would argue that empowering workers with the right-to-act is a complete solution to the occupational safety and health problem, worker representatives have increasingly favored it.

Employees in the United States currently have a limited right under the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA) to engage in reasonable, good faith “concerted” work refusals to protest unsafe workplaces or practices.\(^{17}\) Although the Occupational Safety and Health Act does not specifically provide for an employee’s right to refuse unsafe employment, section 11(c) of the Act prohibits an employer from taking any adverse action against an employee for exercising any rights provided by the statute. In 1973 OSHA promulgated a regulation allowing workers to refuse to work under unsafe conditions if they are forced to choose between not performing the assigned task or subjecting themselves to serious injury or death arising from a hazardous workplace condition.\(^{18}\) The Supreme Court upheld this regulation in Whirlpool Corp. v. Marshall.\(^{19}\) The Court held that employees could reasonably decline to climb out on a suspended wire-mesh screen after one man had already died from a fall through the screen, which was subject to tearing, and after OSHA had issued an order forbidding employees from stepping on the screen. The Court found that an employee could decline to perform dangerous work if the employee reasonably believed the working conditions posed an eminent danger of death or serious bodily injury, and the employee believed there was insufficient time or opportunity to seek redress from the employer or to inform OSHA.\(^{20}\)

If limited to Whirlpool-like situations, OSHA’s right-to-act provision could be very narrow. The safety risk at issue in that case was obvious and substantial: a fellow employee had recently died. OSHA had already visited the plant; therefore, the employer’s orders to the complaining employees constituted a blatant violation of OSHA’s direct order.\(^{21}\) The employees could easily have avoided that an after-the-fact OSHA complaint would not reduce the risk posed by the insubstantial wire screen. None of the surprisingly few post-Whirlpool cases expand the range of the right-to-act regulation beyond the fairly narrow confines of the Court’s holding.\(^{22}\) It is not clear, for example, whether employees may refuse work that involves chronic exposure to a carcinogenic chemical that is not acutely toxic. Presumably, the ability to deal with the problem through normal enforcement channels would deprive employees of any legitimate reason to walk off the job. If employers are able to confine the OSHA right-to-act regulation to egregious situations where an employer blatantly violates an OSHA directive by ordering employees to work under extremely risky conditions without opportunity to seek alternative relief, then few employees will risk losing their jobs by taking legal action under the regulation.

There are many good reasons for expanding the right-to-act beyond its current narrow confines. Giving workers the right to...
to refuse hazardous work without retaliation would allow them to control the essential areas of safety and health. It would also equalize the parties’ bargaining positions. The overall result should be workplaces that are considerably safer and, to a lesser extent, more healthful than in the past.24

Most employers are predictably opposed to expanding the right-to-act.25 At the same time that it empowers workers, it removes power from the boss. One employer representative characterized the right-to-act as a “euphemism for allowing employees to determine on a subjective basis that the job or a condition in a workplace that they confront is dangerous such that they can remove themselves from the job or condition without suffering a loss in pay and benefits.”26 A former Deputy Assistant Secretary of Labor for OSHA predicted that full implementation of the right-to-act would bring about a “fundamental rearranging of our entire American business.”27 Accepting this assessment of the right-to-act, the question remains whether such a reordering of the employment relationship is necessarily bad. It would admittedly represent a rejection of the authoritarian premises underlying the employment at will doctrine, but this may be necessary for a properly functioning twenty-first century workplace.

There can be little doubt that the right-to-act carries the potential for abuse. A critically situated employee could refuse to work for reasons unrelated to health and safety and thereby disrupt the entire workplace. Wildcat strikes could be justified after-the-fact as concerted refusals to perform hazardous tasks. Yet employees who currently possess a limited right-to-act are apparently not disruptive. More importantly, employers are not powerless to persuade the court or the administrative decisionmaker that the right is being abused in particular cases. In the final analysis, the threat of the loss of a job should discourage employees from exercising the right indiscriminately.

The highly fragmented existing statutory regime for protecting the employee’s right-to-act places the burden of justification on employees.28 The workers’ burden of demonstrating that a work situation was “abnormally dangerous” and that employees were “reasonable” in concluding that the hazards were real and substantial makes it very difficult for employees to prevail. The solution may lie in a burden shifting device. Employees should have the initial burden of demonstrating that the employer took adverse employment action in response to employee conduct regarding workplace conditions that either violated an OSHA standard or gave rise to a reasonable apprehension of serious injury.30 Employees should also have the burden of showing that they gave the employer a reasonable opportunity to correct the problem or that they reasonably believed the employer would not correct the problem even if informed.31 The test for whether the employees’ position was justified should be an objective one, but the burden should be on the employer to demonstrate that the employees’ conduct was “unreasonable under the circumstances” or that the primary motivating factor behind the employees’ action was not their reasonable belief that the workplace conditions were unsafe.32 If employees demonstrate that the workplace condition violated an OSHA standard, the fact that the employees knew about the condition at the time of employment or that the employees willingly encountered the risk in the past should not be a defense.

The International Dimension

Empowering workers to reject unsafe employment without fear of retaliation is not a complete solution to the occupational safety and health problem. The workers in other countries (the foreignnomes) who must live under less favorable conditions than workers in the United States are still willing to accept unsafe work at far lower wages than their United States counterparts. Empowering existing workers with the right to refuse hazardous work may simply induce employers to move their operations to developing countries that do not have effective worker protection laws. In the imagery of the fable, the trolls might migrate to other kingdoms. If workers in developing countries do not demand risk premiums, then the goods that they produce should be cheaper in world markets, thus placing the foreign manufactured goods at a competitive advantage in world markets. In other words, in an age in which capital is increasingly mobile, the occupational safety and health problem is global in nature.
The existence of the maquiladoras, foreign owned plants operating in the border area between Mexico and the United States, illustrates why foreign owned plants have even less bargaining power than domestic workers. In the last two decades, approximately 1,800 plants called "maquiladoras," employing over 500,000 workers have been built in Mexico. The vast majority are owned by United States companies, although an increasing number are owned by Japanese and German companies. Since over one million persons enter Mexico's workforce each year although its economy generates far fewer jobs, the state of the Mexican economy creates ample opportunity for the exploitation of workers. That workers are easy to replace is confirmed by monthly turnover rates of twenty percent or higher at many maquiladoras. Thus, it is hardly surprising that workers are known to be exposed routinely to toxic substances, poor work station design, and excessive work pace. Given this state of affairs, the National Safe Workplace Institute, an advocate for worker safety, concludes:

Not only is maquiladora disregard for employee health disturbing, but it is disconcerting that gains in U.S. occupational safety and health policy may be offset by a trade agreement with Mexico that allows and encourages negligent U.S. employers to move their operation to Mexico and still export goods to the U.S. Employers who have remained in the U.S. must then compete with the maquiladoras at an unfair disadvantage, thereby increasing the pressure on U.S. employers to cut costs, including those associated with health, safety and the environment.

One obvious solution to the "mobile troll" problem is universal occupational safety and health standards and a corresponding international right-to-act. Given the intense hunger of developing countries (as well as countries formerly in the Eastern Bloc) for outside capital, to suggest that countries would cut off potential sources of capital and jobs by agreeing to high occupational safety and health standards is probably quixotic. In any event, the institutional problems involved in creating a global capacity to implement uniform standards and an international right-to-act may well be insurmountable.

A second possible solution is for countries with high worker protection standards and policies to encourage other nations to implement similar standards and policies by threatening unilateral trade sanctions against countries to which mobile companies migrate. An importing country could go even farther by enacting a tariff aimed at offsetting any advantage gained by an exporting country's lower worker protection standards. Although this approach may involve difficulties in investigating worker protections and in calculating precise differentials, it might help reduce the depressing effect of employer threats to invest capital elsewhere on employer-employee risk negotiations. Trolls who leave the kingdom in search of gnomes with fewer choices should not have the same access to the kingdom's markets as the trolls who abide by the benevolent laws of the realm.

And They All Lived Happily Ever After . . .

Solutions to the occupational safety and health problem may not be easy to identify and implement if we persist in seeing the world through the adversarial lens of the gnome-troll metaphor. It may well be that we need to hear more fairy tales about cooperation, like the fable of the lion and the mouse. International cooperation, however, will be difficult to achieve in a world in which resources are unevenly distributed, absent a strong commitment from the developed countries to eliminate the vast disparities in wealth and a corresponding commitment from the developing countries to limit population growth. But that is another story.

Notes

3. F. Knight, Risk Uncertainty and Profit 301 (1921).
9. See Graham, Shakov, & Cyr, Risk Compensation In Theory and Practice, 25 Environment 14, 17 (1983); W. Dickens, Differences Between Risk Premiums in Union and Nonunion Wages and the Case

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11. Id. at 469.
14. The second act of the fable is the author’s creation. Professor Smith, who may disagree with the outcome, does not share any blame.
18. The regulation states:

[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protect against subsequent discrimination. The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

20. Id. at 10-11.
21. Id. at 5-6.
24. The right to act is not, however, a panacea. In particular, it is likely to be of limited utility in the context of health risks. Many of the risks posed by exposure to toxic substances and harmful physical agents are so heavily clouded in uncertainties that it is literally impossible for workers to become fully informed about the nature and extent of the risk that they face. Indeed, not even the most highly trained scientists are fully informed about many of these long-term risks. It will be very difficult, therefore, for employees to know when to refuse employment that may be hazardous because of chronic health risks. Even when employees decide to act to avoid chronic health risks, absent a violation of an OSHA health standard, it may be difficult for them to prevail if the employer takes the position that the risks did not justify the employees’ action.
28. See Note, supra note 22, at 566.
29. See Whistleblower Hearings, supra note 25 at 294-295. Employers would generally prefer that the provision require employees to establish the violation of the OSHA standard as a “serious” one. Although this highly discretionary determination might be useful in assessing the magnitude of an employer’s culpability, it should not be a threshold test for determining whether a fired employee has a claim. It should be enough that the employee establish that an OSHA standard was violated and that the violation impelled the employee to complain or take other action.
30. Id. at 295. (The “reasonable apprehension of serious injury” test is taken testimony against this provision by the National Association of Manufacturers at the Whistleblower Hearings).
31. Id. at 295-296. The OSHA regulation currently requires the worker to attempt “to the extent possible” to resolve the problem with the employer prior to exercising the right-to-act. Employers rightly insist that they be given an opportunity to resolve the problem before employees take matters into their own hands. See also, id. at 297-98, reprinted letter from Albert D. Bourland to the Honorable William L. Clay, Nov. 14, 1989. But the employee should not be required to do so if he reasonably believes that the effort would be unavailing.
32. This requirement appears to exist under current interpretations
of section 11(c) of NLRA, 29 U.S.C. § 161(c) (1986 & Supp. 1990); see Note, supra note 22, at 567 (citing Marshall v. National Indus. Constructors, Inc., 8 O.S.H. Cas. (BNA) 1117 (D. Neb. 1980)) ("There exists a presumption of good faith, which can be overcome by a sufficient factual presentation of the employer that the primary motivation of employee action was something other than the dangerous condition. . . .")

34. Id.
35. Id. at 13.
36. Id. at 31.