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55 Tex. L. Rev. 359-369 (1977) (reviewing Nicholas A. Ashford, Crisis in the Workplace: Occupational Disease and Injury (1976))

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Book Review

Workers' Health and Safety: Whose Costs, Whose Benefits?

By Joseph A. Page*


Health and safety on the job remain sources of bitter controversy in the public forums. Businessmen rail against the Occupational Safety and Health Administration (OSHA) for its "dictatorial" enforcement of "oppressive" regulations,1 leading President Ford in early 1976 to demonstrate sympathy for their concerns.2 Labor leaders deplore the failure of industry and government to stem the toll of death and disablement from work-related disease.3 Members of Congress, responsive to pressures from constituents, fill pages of the Congressional Record with reports of both employer vexations4 and employee tragedies.5

Like ships passing in the night, advocates on both sides tend to regard one another at a distance and seldom join issues in rational debate. Industry

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harp on the bewildering multiplicity of OSHA standards, many of them trivial or vague. Some authors have deemed the nexus between standards and safety dubious and have further maintained that standards impose costs far in excess of any benefits they may bring. Small businesses feel at a particular disadvantage since they find it burdensome both to learn what the law requires of them and to fulfill their legal obligations. Labor, on the other hand, prefers to stress the menace of occupational disease. The silent violence inflicted upon workers by toxic substances gives no sign of abating. Indeed, recent reports indicate that the current knowledge of health hazards on the job signals but the tip of a deadly iceberg.

Although Congress designed the Occupational Safety and Health Act of 1970 in large measure to protect employees from these very risks, agency development of OSHA standards restricting exposures to harmful chemicals, dusts, and stresses has proceeded at an agonizingly slow pace.

Instinctively, one would expect that efforts to save the lives of workers threatened by industrial disease would command a higher priority than measures to trim back excesses visited by OSHA upon employers in the name of safety regulation. Nevertheless, this does not seem to be the case. Managerial irritation at OSHA, coupled with the general concern over the costs and inflationary impact of health and safety standards, has helped fuel a

6. The industry position is aptly stated in testimony by Rep. Richard White in House Hearings, supra note 1, at 3-10, 17.
12. See id. §§ 651(b)(6)-(7). See also id. §§ 669, 671. For a discussion of the background of the Act, with references to the significance of occupational health concerns as catalysts for its passage, see J. Page & M. O'Brien, Bitter Wages 47-189 (1973).
broad congressional backlash against federal regulation. The reaction has spawned bills authorizing congressional power to veto agency rules and to initiate programs for regulatory reform. Meanwhile, industry has been vigorously opposing OSHA health standards on the ground \textit{inter alia} of economic infeasibility. The reaction has placed labor very much on the defensive, struggling to preserve the Act against amendments that it perceives as crippling and to oppose an alleged overemphasis on costs in the standard-setting process. Consequently, labor organizations have not been able to mount an all-out affirmative effort to reduce health hazards to workers.

The time is therefore propitious for a fresh analysis of the core issues that give rise to the current disagreements over occupational health and safety. \textit{Crisis in the Workplace} presents itself as such an endeavor. The fruits of a two-year study supported by the Ford Foundation, the book attempts to explore in a definitive, dispassionate manner the technical, legal, political, and economic aspects of safety and health regulation for the workplace. Its author, lawyer-economist Nicholas A. Ashford, sets his work apart from the horror story genre into which many prior books on the subject fall—a worthy goal since a clear and pressing need exists for the development of policy and strategy options.

\textit{Crisis} offers an incredible wealth of detail in its survey of the dimensions of the problem and the various responses by the public and private sectors. It also catalogues an array of options for reform. The book's major weakness derives from the sin of overextension, which raises the suspicion that too much of the book is an attenuated rehash of previously published material. In addition, Dr. Ashford often fails to meet the challenge posed by the time lag inherent in the publication of a study of this size—that of maintaining relevance and utility in the face of subsequently unfolding events. Part of the book emerges as far superior to the rest: the materials on the economics of


occupational health and safety shed invaluable light upon the uses and abuses of cost-benefit analysis (pp. 308-423). They present insights into complexities that current criticism of OSHA tends to ignore and, as a welcome bonus, offer discussion comprehensible to the noneconomist, a rare quality for interdisciplinary writing in law and economics. Indeed, one leaves this portion of the book with a thirst for more and a regret that the project did not confine itself to this jugular issue. The strengths and weaknesses of Crisis merit elaboration, first, by focusing on the book's treatment of the performance of the federal government concerning health and safety on the job and, second, by examining Ashford's contributions to the evaluation of costs.

The 1970 Act gave the federal government for the first time a dominant role in the struggle against industrial accidents and diseases. OSHA, within the Department of Labor, was assigned responsibility for the promulgation and enforcement of safety and health standards, the latter regulations evolving from recommendations of the National Institute for Occupational Safety and Health (NIOSH). Whenever an employer contests a citation issued by OSHA while acting in its capacity as enforcer, the independent Occupational Safety and Health Review Commission (OSHRC) adjudicates the case. The United States courts of appeals have jurisdiction to review both OSHA standards and decisions of the OSHRC. The Congress appropriates funds for the administration and enforcement of the Act, oversees the work of the various agencies involved, confirms the President's high-level appointments to OSHA and the Review Commission, and considers proposed amendments to the Act (pp. 141-50). Thus, an assessment of the Government's performance requires a hard look at the judicial, legislative, political, and administrative processes and their interaction.

Crisis provides a summary of administrative and judicial interpretations of the Act during the first three years of its existence. The major disappointments in this section, apart from a lack of clarity on some minor matters, stem from a failure to pursue the implications of several significant points

21. For a history of the federal role, see J. PAGE & M. O'BRIEN, supra note 12, at 167-90.
23. Id. §§ 669(a)(2), 671.
24. Id. §§ 659(c), 661.
25. Id. § 655(f).
26. Id. §§ 660(a)-(b).
27. For example, in comparing the quantum of proof required for scientific conclusions with that deemed necessary for legal decisionmaking, Ashford makes the following dubious assertion: "When it comes to safe-guarding rights generally under the law, a 'scintilla of evidence' may justify legal sanctions, control, and even the establishment of liability" (pp. 41-42). Without attempting to explain the discrepancy, he records in successive paragraphs that the Act provides that existing federal standards come into effect automatically on the effective date of the law and that OSHA utilized a different section of the Act to promulgate these same existing federal standards some time later (p. 153).
OSHA

raised and to lead the discussion of the developing case law beyond the horizontal digest level. For example, Ashford observes that employers have challenged the constitutionality of the Act, but does not delve past a mere recitation of the various grounds asserted (p. 167). The Supreme Court may soon decide whether the assessment of OSHA penalties without opportunity for a jury trial violates the Constitution, and a ruling against the Government would seriously jeopardize the enforcement of the Act. Indeed, one federal district court has declared the OSHA inspection provision unconstitutional as a violation of fourth amendment limits on government searches. The book contributes nothing to an understanding of the issues or of the potential significance of the case.

Ashford suggests that the promulgation of health standards that do not provide special protection for pregnant women workers may violate Title VII of the Civil Rights Act and the Constitution (p. 168). His anticipation of the potential legal problem is praiseworthy, particularly since recent disclosures have called attention to the special hazards that may endanger both working women and their future children. Despite his prognosis he does not go further to consider the very live problem of whether, in the absence of an OSHA standard dealing with this particular risk, an employer may legally limit the work assigned to women generally or women of childbearing age, or even refuse to hire them.

The legal material contributes little to the goals of the book. It remains too skimpy to serve as a mini-hornbook, and merely catalogues unresolved legal issues without any attempt at analysis (pp. 181-82). Crisis offers little

31. See 1977 Appropriation Hearings, supra note 13, at 846 (testimony of David J. Sencer, Director, Center for Disease Control). See also [1975] OCCUPA. SAFETY & HEALTH REP. (BNA) 980; Burham, Rise in Birth Defects Laid to Job Hazards, N.Y. Times, Mar. 14, 1976, at 1, col. 2. Recently the Court has indicated a curious lack of logic in the definition of pregnancy as a sex-related phenomenon, General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976), which might weaken the chances of better occupational safety and health for pregnant women. See also Mathews v. De Castro, 97 S. Ct. 431 (1976). Instead of sex-related claims, advocates for protection of pregnant workers may find some relief through Department of Labor regulations allowing an employee a right to refuse work when he or she feels a dangerous working condition exists. 29 C.F.R. § 1977.12(b)(2) (1975). Federal district courts currently disagree over the validity of this right. See [1976] OCCUPA. SAFETY & HEALTH REP. (BNA) 852-53.
new insight on the institutional weaknesses of NIOSH, which has never emerged from the interstices of the Department of Health, Education, and Welfare. Ashford raises the point that, while NIOSH technicians conduct workplace inspections to evaluate hazards, they have no authority to issue citations for any violations they may find (p. 279). A lamentable need continues for an investigation into the extent to which NIOSH personnel inform OSHA of the existence of these hazards and the extent of action by OSHA inspectors on the basis of those reports. Unfortunately, the Ford Foundation study did not undertake the task.

The book’s analysis of OSHA is disappointing because it conveys no sense of the difficulties the Agency has encountered in developing standards through the informal rulemaking procedure mandated by the Act and refined by judicial review. OSHA promulgated final standards limiting the exposure of employees to asbestos dust, vinyl chloride, and certain other carcinogens well before the completion of the manuscript of the book; thus it should have been apparent that the rulemaking process followed by the Agency had become incredibly cumbersome, fraught with complexity, and vulnerable to delay tactics by the parties. The necessity for streamlining procedures has not diminished in light of recent OSHA efforts to promulgate rules for noise and coke oven emissions. Legal issues, such as whether OSHA may exercise subpoena power provided for in section 657(b) of the Act to gather data needed for the development of standards, lurk beneath the surface. Crisis, however, makes no contribution to a resolution of these difficulties.

34. For a discussion of the history of NIOSH (formerly known as either Bureau of Occupational Safety and Health or BOSH) and its problems, see J. Page & M. O’Brien, supra note 12, at 88-94; Page & Munsing, supra note 13, at 654-57.
38. OSHA has adopted a 22-step process, beginning with the development of a proposed standard, followed by various internal reviews, five internal revisions, Federal Register publication of the proposed standard, two more reviews and revisions, and culminating in Federal Register publication of the final standard. For a summary of the process, see Hearings on Departments of Labor and Health, Education, and Welfare Appropriations for 1976 Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess., pt. 5, at 625-26 (1975). For an account of the asbestos proceedings, see P. Brodeur, EXPENDABLE AMERICANS (1974). For an account of the carcinogen proceedings, see Page & Munsing, supra note 13, at 657-65.
42. See note 29 supra.
beyond a factual and somewhat critical description of the rulemaking procedure used to set carcinogen standards (pp. 154-59).

Further, the book fails to discuss adequately industry’s objections to the plethora of job safety rules. This drumfire of criticism falls upon the number and complexity of safety standards, most of which were promulgated without hearings in accord with section 655 of the Act, and upon the allegedly arbitrary enforcement of these rules by OSHA inspectors. Although Ashford recognizes these problems, he does not address them in a format that would contribute to the resolution of the continuing brouhaha. He criticizes OSHA’s compliance program, but suggests no more than increased dedication and perseverance (pp. 253-60, 298-99).

The clean bill of health Ashford gives to the three-member OSHRC has proved a faulty diagnosis. The removal of the OSHRC’s first chairman under cloudy circumstances and the subsequent filing of a suit by the ex-chairman against his two colleagues suggest that the Commission is not functioning well. This suspicion derives further support from the acrimonious relationships among the commissioners, the continuing uncertainties about the structure and role of the Commission, and the staggering backlog of pending

43. See note 6 supra; e.g., Allis-Chalmers Corp. v. Occupational Safety & Health Review Comm’n, 542 F.2d 27 (7th Cir. 1976) (corporation unsuccessful in appealing scaffolding standards as vague).


45. See note 1 supra.

46. “On balance, the Commission maintains the degree of competence one would expect on the basis of its high GS level” (p. 302).

47. See [1975] OCCUPA. SAFETY & HEALTH REP. (BNA) 347. Former OSHRC Chairman Robert D. Moran claimed that he was removed from the chairmanship because he had complained to the White House about Labor Department involvement in the nomination of OSHRC commissioners. See 5 OCCUPATIONAL HEALTH & SAFETY LETTER 1 (Dec. 8, 1975). He has also asserted that his policy of issuing press releases about cases that OSHA had lost before the Commission angered the Labor Department and contributed to his dismissal as Chairman. See Pike, Press Releases on Failures Helped Demote Chief of Health Unit, Wash. Star, Nov. 27, 1975, at Al, col. 1.

48. Moran v. Barnako, No. 75-1981 (D.D.C., filed Nov. 25, 1975). The suit alleged that the other two commissioners were disposing of cases without notice to Moran. It was dismissed when all three commissioners adopted a statement clarifying the Commission’s decisional procedures. See [1975] OCCUPA. SAFETY & HEALTH REP. (BNA) 1019.

49. For example, Chairman Moran’s publication of proposed Freedom of Information Act regulations over the objections of his two colleagues drew a stinging comment from Commissioner Timothy F. Cleary. See [1975] OCCUPA. SAFETY & HEALTH REP. (BNA) 1040-41. The attitudes of the commissioners occasionally surface in their opinions. See, e.g., D. Federico Co., 3 O.S.H.C. (BNA) 1970, 1975 (OSHRC 1976) (Moran, C., dissenting): “The logic of the majority is such that if someone refers to a dog’s tail as a leg, that particular dog would thereafter have five legs. Come to think of it, a five-legged dog makes more sense than the Barnako-Cleary logic used throughout the foregoing opinion.” See also Francisco Tower Serv., Inc., 3 O.S.H.C. (BNA) 1952, 1961 (OSHRC 1976) (Moran, C., dissenting): ‘This kind of ‘logic’ could equally be used to prove that Messrs. Barnako and Cleary are really justices of the United States Supreme Court or members of the Holy Trinity.”

50. For example, is the Commission a “court” exercising solely adjudicative functions or does it also have the characteristics of an agency? See Moran, A Court in the Executive Branch of
cases. Although the OSHRC would benefit greatly from close scrutiny, *Crisis* sheds no light on its problems.

Ashford recognizes the existence and importance of the political impact of job-related health and safety regulation, but he approaches this delicate area like a conscript entering a mine field. He includes at the beginning of the Appendix the infamous Guenther memorandum, written in 1972 by the then Assistant Secretary of Labor for Occupational Safety and Health to describe how OSHA might help in the campaign to reelect Richard Nixon by not proposing any highly controversial standards and by exploiting "the great potential of OSHA as a sales point for fund raising and general support by employers" (pp. 543-44). Ashford merely deplores the memo as "a sad commentary on the lack of government responsibility" (p. 538) and treads no further. The *New York Times* has reported that, at a time when in his reelection campaign President Ford was criticizing OSHA for being too tough on industry, OSHA postponed until after the 1976 elections the promulgation of a number of important health standards. Thus, the problem symbolized by the Guenther memorandum has not disappeared and deserves careful attention.

Congressional oversight provides a countervailing force that could offset the political machinations of the executive branch. As with his executive analysis, Ashford backs off and refuses to analyze the forces that interact on Capitol Hill. *Crisis* offers no insights into the committees that control the legislation concerning safety and health in the workplace, confirmations, and appropriations, nor does it critique the performance of Congress since the effective date of the Act.

Although Ashford's review of the performance of the public sector falters at points, he redeems these shortcomings in his delineation of the limits of applying economic analysis to governmental efforts to protect workers from injury and disease. A weighing of costs and benefits is appropriate at

*Government: The Strange Case of the Occupational Safety and Health Review Commission*, 20 WAYNE L. REV. 999 (1974). See also Moran, *Discretionary Review by the Occupational Safety and Health Review Commission: Is it Necessary?*, 46 COLO. L. REV. 139 (1974) (Should the current system, whereby OSHRC commissioners have discretion to call cases for review, be replaced by a system limiting OSHRC review to cases in which affected parties petition OSHRC?).

51. At the end of fiscal year 1975, there were 466 cases pending for review by the full Commission. After the first six months of fiscal year 1976, that figure had increased to 621. See 1977 Appropriation Hearings, supra note 13, at 1347.

52. See Burnham, supra note 2.

four points in the decisionmaking process: (1) the threshold determination of whether any need for governmental intervention exists; (2) the delineation of the general strategy any needed intervention should assume; (3) case-by-case decision, in which governmental intervention takes such forms as the setting and enforcing of mandatory standards; and (4) subsequent evaluations of the effectiveness of governmental intervention. Ashford makes a major contribution by demonstrating that a cost-benefit approach in and of itself offers no easy answers at any point in the process.

Governmental intervention through the workmen’s compensation laws and health and safety codes derives from the realization that “placing sole reliance upon the unregulated free market leads to a socially unacceptable level of workplace injury, illness, and death” (p. 311). Without intervention, employers would not bear the costs of preventing or compensating for harms caused by industrial accidents and diseases and therefore would permit the financial burden to fall upon employees and the public. Economically, it is in society’s best interest to minimize the sum total of these costs. Therefore, within the framework of a free-enterprise system, government should intrude, but only to the extent necessary to create economic incentives that will induce industry to take measures to achieve the goal of cost minimization. Cost-benefit analysis furnishes a tool for calculating the appropriate degree of governmental intervention; the analysis has become very important to the 1970 Act, which the courts have interpreted to require consideration of costs and benefits in the creation of health and safety standards.

Ashford launches a double-barreled attack on cost-benefit analysis as it has been applied to occupational health and safety regulation. He points out numerous market imperfections, including the interplay of nonmarket factors, that make it exceedingly difficult—if not impossible—to decide the necessary level of governmental intervention on a cost-benefit basis. He then raises the critical query whether the socially acceptable level of work hazards should derive solely from economic considerations.

The list of market imperfections begins with the inadequacy of the data base, an insurmountable obstacle to intelligent choice (pp. 335-38). A further flaw is the inadequate dissemination given to available data (pp. 335-37). These shortcomings become particularly acute in the area of occupational health and can lead to an underestimation of the benefits of prevention as well

54. See G. Calabresi, The Costs of Accidents 26 (1970): “Apart from the requirements of justice, I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”

55. See Industrial Union Dep’t, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974). See also Florida Peach Growers Ass’n v. Department of Labor, 489 F.2d 120, 130 (5th Cir. 1974).
as an overestimation of the costs of avoidance. Information obtained after the introduction of a new manufacturing process or substance into the workplace may be useless for regulatory purposes because of the constant innovation characteristic of modern industry. The information gap is widened by a divergence in time horizons, as a result of which initiatives for the prevention of disease must begin long before its possible manifestation. Another divergence weakening the operation of market forces occurs when top management sets long-range corporate goals of accident and illness reduction, but evaluates lower and middle management for promotion purposes on the short-run basis of reduction in costs. These short-run cost reductions rarely reflect consideration of the costs of preventing future job-related diseases.

Both the goal of reducing costs imposed by work hazards and the collateral goal of minimizing the costs of prevention seek to avoid injuries and illnesses worth avoiding and to permit the incurrence of those not worth avoiding. As a necessary corollary to these goals, workers must be free to judge the personal worth of the risk that society has deemed economically not worth avoiding. Ashford argues that, in reality, workers do not have this choice and points to a decrease in interfirm mobility and the psychic stresses associated with loss of employment as chains that bind workers to hazardous jobs. Nonmarket factors also nullify an employee's freedom to assume or reject occupational risks. These include the social conditioning of workers to accept job hazards and the irreversibility of certain diseases, which an employee may have contracted long before he learns of his plight. "A worker can therefore come to have serious cause to regret an earlier decision regarding the assumption of workplace risk, but at that point it may be too late to move to a safe job" (p. 356).

Industry and government must take market imperfections into account to obtain an accurate indication of the economic burdens that occupational health and safety standards may justifiably impose. The imperfections render unintelligible even an approximation of the costs and benefits of regulation by government of workplace hazards. Ashford carries the problem one step further by questioning the propriety of making such decisions in economic terms alone. He asks us to consider who pays the costs and who reaps the benefits (p. 330). Although the public may profit from toleration of a certain level of work hazards, the actual burden of bearing them falls upon a specific group of employees who may not have understood the health risk when they began work and who may not have the ability to change jobs once they discover the risk and desire to avoid it. The selection of workers to endure workplace pollution is nonrandom, Ashford argues (pp. 85-88). They do not comprise a representative sample of the general public, but instead remain concentrated in certain particularly hazardous occupations. Therefore, it is
inequitable to ask them to bear the entire risk so that the entire population may enjoy the fruits of modern technology, even though a cost-benefit analysis may conclude that the risk is economically justifiable. How much weight to accord the "justice factor" (pp. 359-63) may vary according to the values of the person making the judgment. Ashford makes the important point that society ought to pay heed to this consideration in deciding how much occupational health and safety regulation government should impose.

Implicit in Ashford's underscoring the limitations of cost-benefit analysis is the dilemma OSHA must confront whenever it sets standards. The agency must consider the economic feasibility of a proposed standard, a requirement recognized by the courts. Moreover, the requirement has become more onerous as a result of a recent executive order mandating the preparation of inflation impact statements by executive agencies that undertake major regulatory activities. Because accurate measurement of costs and benefits must reflect market imperfections, the complexity may so confound the rulemaking process that it becomes unworkable. OSHA may not have the resources to gather and analyze the necessary data; thus occasions for delay in the promulgation of final standards may multiply. At the same time, the substantial and constantly increasing number of toxic substances in the workplace imposes burgeoning pressures on OSHA to increase its pace of setting standards. In the midst of these travails, the agency has received virtually no help from Congress, which has never expended the time or effort to consider carefully the economic element in occupational health and safety regulation.

_Crisis in the Workplace_ does not offer any solutions, but by pointing out the extent of the problem in terms of economic goals and methods, it performs a service of inestimable value. The shortcomings of the book stem in large part from the high standards against which an opus of this magnitude deserves to be measured. Its merits should attract close scrutiny on the part of individuals and groups in the private and public sectors concerned with reducing the toll of work-related accidents and diseases.

56. _See_ cases cited note 55 _supra_.