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RISK AS AN ARENA OF STRUGGLE

Richard L. Abel*


The legal response to risk used to be confined to tort law, which was conceived as the quintessential private law subject. It was taught in the first year of law school and rarely thereafter. Scholars wrote endless articles about proximate cause. Yet the boundary between public and private law never was observed. Morton Horwitz has shown us that tort law played an essential role in resource allocation in the nineteenth century. Workers' compensation was the focus of constant struggle around the turn of the century. And recently legislatures have introduced public law solutions to the risks that arise in automobile travel, pollution, the use of consumer products, the workplace, encounters with crime, medical care — the list is virtually endless. The fundamentally political nature of the struggle over who will inflict risk on whom and with what consequences no longer can be obscured. During the second Reagan administration these struggles will become more acute and more visible. The three books reviewed here inescapably are part of that struggle. The first is a thinly disguised apology for capital. Bardach and Kagan urge that the state defer to capital, which will exhibit paternalistic concern for the risks it inflicts on all citizens. The other two books openly champion the victims. Carson locates the source of risk in the political economy of Britain's North Sea oil exploration. Nelkin and Brown allow victims

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to speak about their struggles to control risk in the workplace. Scholarly disagreement over the response to risk mirrors the political struggle between those who inflict it and those who suffer it.

I. MALIGN NEGLECT

In *Going by the Book*, Bardach and Kagan direct their criticism against the regulatory agencies that enforce environmental, worker health and safety, and other “social” regulations. Their object is to show that much regulation is unwarranted and its enforcement counterproductive and to propose an alternative. The villain of the piece is the “unreasonable” inspector who follows the letter of the law.

Evaluating this book poses serious difficulties, chiefly because the empirical status of the authors’ arguments is unclear. They base their judgments about the “reasonableness” of regulatory behavior almost entirely on discussions with the owners and managers of regulated industries and virtually never talk to those the regulations were intended to benefit — workers, in most instances. As we shall see,3 the latter offer a very different assessment. Even among the regulated industries, however, Bardach and Kagan make no effort to obtain a representative sample. Indeed, it is not clear that they are describing reality at all. In their one explicit discussion of method they concede:

Our objectives . . . are more analytical than empirical. Hence any errors in interpreting a firm’s real motives are not damaging to our argument, as long as responses of the kind we describe are plausible responses to legalistic enforcement and occur in the world with at least some frequency. [P. 113 n.27.]

This attitude toward evidence may explain why the authors sometimes concoct “quotations,” which they present as what some unreasonable inspector *might* have said (pp. 85-86), why they offer imaginary accounts of what a regulatory agency legally *might* do as proof of its unreasonableness in fact,4 and why, while acknowledging the dangers of generalization, they repeatedly present horror stories as representative examples (pp. xiii, 7). It is difficult to criticize the social science of “as if.”5

If Bardach and Kagan are cavalier in their treatment of evidence, at least they are explicit about their political allegiances. They begin the book by declaring that they are “greatly pleased” at the “general direction and strength” of “the Republican regulatory counter-revolution in mid-1981” (p. xii), and later they extol those “heroes in regula-

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3. See Part III infra.
4. See, e.g., pp. 51-53 (examples of authorized fines, not those imposed).
tory affairs” who have relaxed rules and withheld sanctions (p. 213).6

Although the authors began with some concerns about the effectiveness of regulation, they concluded that so many others were studying the problem that they would do better to focus on unreasonableness (p. xv, n.*). They quote approvingly those who argue that excessive government spending and regulation have been responsible for high inflation, interest rates, and unemployment (pp. 14-15). And they invoke the fear that strict enforcement can drive entrepreneurs out of business (p. 137). Occasionally they reveal that their antipathy to enforcement actually reflects their opposition to the substance of the regulation. Thus, they are unhappy with affirmative action programs designed to redress discrimination or disadvantage.7 And, similarly, they seem to find acceptable the present level of risk in the environment and at work.8 Bardach and Kagan, in short, favor the status quo.

The authors also disclose their politics in the image of society that underlies their critique of regulation. For Bardach and Kagan, the good society, which we can and should try to achieve, is the “well-ordered society” (p. xi), in which order is identified with submission to authority. It is a society without serious structural conflicts: “[e]xplanations of American politics that rely heavily on the idea of ‘class’ have never been very satisfactory” (p. 17). Members of this society respect “the basic norm of reciprocity that is essential to all cooperative relationships” (p. 106). Relationships can be cooperative because capital is essentially well-meaning and benevolent: “[M]anagers have at least some concern about the same social problems that preoccupy the regulators . . . .” (p. 132). Indeed, most capitalists wish to comply with reasonable regulations. The authors assume (without any evidence whatsoever) that eighty percent of entrepreneurs are “arrayed over a spectrum of borderline to moderate to really good apples” (p. 65).9

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It is instructive to contrast the authors’ paean to deregulators with the position of Leonard Horner, the champion of the nineteenth-century British Factory Acts. See 1 K. MARX, CAPITAL 340-416 (B. Fowkes trans. 1977); MEMOIR OF LEONARD HORNER (K. Lyell ed. 1890); Martin, Leonard Horner: A Portrait of an Inspector of Factories, 14 INTL. REV. SOC. HIST. 412 (1969).

7. See, e.g., pp. 21, 50, 71, 199, 241, 322.

8. Thus they suggest that the level of work accidents was acceptable until “new hires” drove it upward, p. 105, and are prepared to tolerate the industry average of lost workday injuries. P. 162. They endorse the “bubble” concept and an offset policy with respect to air pollution, both of which would allow pollution to increase in some places if it declines in others. See pp. 175, 298.

9. They invoke the research of Keith Hawkins on the regulation of water pollution in Britain in support of this position. But Hawkins actually says something quite different:
What, then, is the problem? Why do we not find the “cooperative relationships” that underlie the “well-ordered society”? The serpents in this garden are the regulator and the worker. Regulators are too tough, unyielding, formalistic. The authors urge us to “think of [regulatory] unreasonableness as an epidemic sort of injury inflicted on society by careless regulators . . . or as a form of injustice inflicted by the strong upon the weak” (p. 305). But regulators really are just the pawn of the workers— the real culprits, the origin of the “threat of unreasonableness” (pp. 230-31). Workers are likely to “abuse” their right to refuse to work in highly dangerous situations (p. 230). This view of relations between labor, capital, and the state reminds me of nothing so much as the claim by many Southern whites in the 1950’s and 1960’s: our Negroes like the way we treat them; it’s just those outside agitators who stir up trouble.

In this peaceable kingdom, conflict not only is the product of “unreasonable” resistance by the victims rather than risk inflicted by employers and polluters but also is attributed to defects in individual character rather than to structural opposition. If some twenty percent of capitalists are recalcitrant, it is because they have a bad “attitude” (pp. 99-100), or perhaps because they have developed a “culture of resistance” (p. 114) through experiencing regulatory unreasonableness. Conflict is aggravated by “tough” inspectors and thus can be

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Securing compliance is a game to be played, in which the polluter's moves are directed toward resisting efforts at enforcement. Such resistance is portrayed as a ritual response even from a polluter who will be described as responsible or cooperative. For dischargers to “try it on” or “try to pull a fast one” is thought to be entirely normal behavior; they are expected to drag their heels or seek to avoid adopting in their full extent the measures required by the officer; “usually people are pretty slow to spend money,” said an area man, “no matter which sector of the public they come from.”

Hawkins, Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation, 5 LAW & POLY. Q. 35, 44 (1983). It is hard to imagine how anyone could expect it to be otherwise.


To offer an illustration closer to home, “the [Los Angeles] City Attorney's office has charged the Todd Shipyards Corporation, one of the nation's largest shipbuilders, with illegally disposing of polychlorinated biphenyls, or PCB's, by arranging to have the toxic chemical hauled to the Mojave Desert.” Shipyard Charged in Illegal PCB Disposal on Coast, N.Y. Times, Dec. 4, 1983, at 39, col. 1. The City Attorney alleged that the company had obtained a bid of $43,915 to dispose of the transformers and oil legally but decided instead to have them removed on a no-questions-asked basis. “Tests at the Park Metal Company, where the transformers were dismantled, showed the level of contamination as high as 71,000 parts per million, and contamination on a suburban street was 56,565 parts per million.” Id. The legal limit is 50 ppm. The only dumps authorized to accept PCBs are in Louisiana and Arkansas. Id. I doubt that Bardach and Kagan would characterize Todd Shipyards as a “bad apple.”

10. For a discussion of the right of workers to refuse dangerous work, see note 126 infra and accompanying text.

11. For a critical view of this tendency to blame everything on “operator error,” see C. PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES 9, 246-49 (1984).
eliminated or at least alleviated by "good" inspectors who have an "ability to get along with people" (pp. 123-24, 127).

Bardach and Kagan construct a model of society that fundamentally mystifies power. In their world workers harass managers (p. 231), regulators are strong and regulated industries weak (p. 305). The authors appear wholly insensitive to the possibility that workers may fear to complain in front of their bosses and risk retaliation (pp. 147-48, 168, 231). They further obscure power relationships by drawing wildly inappropriate analogies between the regulator confronting the corporation and the police officer seeking to control "gatherings of juveniles or domestic quarrels" (p. 125). Inspection punishes a corporation, the authors suggest, in the same way that "the process is the punishment" when minor individual offenders are prosecuted criminally but ultimately discharged without fine or imprisonment (p. 163). And they note that "parents are not licensed for safety and effectiveness," implying that capital need not be either (p. 304). But the corporation does not resemble the individual accused, the adolescent, the abusive husband, or the parent — in either power, motivation, or resources. To substitute one for the other is to reduce class conflict to a domestic tiff. Bardach and Kagan also draw a false analogy between the consumer and the worker (p. 246). Because the former appears to exercise the "liberty" to choose among consumer products, trading off safety and quality for price, so the worker does,

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12. A recent empirical study found that about half of several categories of inspectors in Wisconsin had experienced threats or physical abuse at the hands of the industries they regulated. Frank, Assaults Against Inspectors: The Dangers in Enforcing Corporate Crime, 6 LAW & POLY. 361 (1984).

13. Workers are said to be "protected" by their right to sue for reinstatement if fired for reporting regulatory violations. P. 229. For a description of worker fears, see note 117 infra and accompanying text.

14. The authors' strategy is similar to that of the tobacco companies, which seek to portray the infliction of passive smoking on nonsmokers as an interpersonal conflict. Taking full page advertisements in major newspapers "in the interest of common courtesy," R.J. Reynolds Tobacco Co. depicts the nonsmoker as suffering something between a "minor nuisance" and a "real annoyance" — never illness or death. Nonsmokers feel "a little powerless" in the invasion of their "privacy." Smokers, on the other hand, have made "a very personal choice" of something that gives them "enjoyment." They are "doing something perfectly legal," yet they are "segregated, discriminated against, even legislated against." N.Y. Times, Nov. 11, 1984, (Magazine), at 97. (I am particularly offended by this appropriation by the tobacco companies of the concept of discrimination against racial minorities, women, the disabled, and the elderly.)

This dispute is not between individuals but between the majority of nonsmokers and the tobacco companies that have fostered addiction to nicotine. See C. PERROW, supra note 11, at 312; P. TAYLOR, THE SMOKE RING: TOBACCO, MONEY, AND MULTINATIONAL POLITICS (1984). Furthermore, the dispute is about illness and death, not "nuisances" or "annoyances." Studies in the United States, Britain, and Japan have documented an increase in lung cancer deaths among nonsmokers exposed to smokers. In the United States, passive smoking is estimated to cause between 500 and 5000 deaths a year, making it far more serious a threat than coke oven emissions, vinyl chloride, or benzene. Molotsky, E.P.A. Study Links Deaths of Non-smokers to Cigarette, N.Y. Times, Nov. 3, 1984, at 8, col. 1. Yet Reynolds continues to maintain that "there is little evidence — and certainly nothing which proves scientifically — that cigarette smoke causes disease in non-smokers." TIME, July 23, 1984, at 48 (emphasis in original).
and should, have the same “moral autonomy” to exchange bodily safety for higher wages (p. 246). This, of course, is precisely the commodification of labor by capitalism that obscures the compulsion and exploitation of workers in the guise of “freedom of contract.”

15. The problem with equating workers and consumers is that, while consumers are free to buy any product they can afford, workers cannot choose any job; they are restricted by age, race, class, education, experience, gender, and geography, among other factors. Whereas the consumer can switch products or services with little or no cost, the worker is likely to experience at least temporary and possibly permanent unemployment — an unacceptable cost to anyone. The worker also must abandon the workmates and friends of a lifetime and may have to relinquish skills whose exercise gives great satisfaction. For the critique of the commodification of labor, which is at the root of economic analysis, see K. Marx, supra note 6, at 270-82; Abel, A Socialist Approach to Risk, 41 Md. L. Rev. 695 (1982); Young, Marx on Bourgeois Law, 2 RESEARCH IN L. & SOC. 133 (1979).

Economists who explore “compensating differentials for risk” necessarily contribute to this mystification. One of the most extensive analyses of wage differentials, W. Viscusi, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 37 (1983), begins:

Exposure to various risks is an intrinsic aspect of many daily activities. Car travel may lead to accidents and even death, plane flights raise the risk of cancer and pose the risk of a crash, and the foods we eat create a seemingly endless variety of carcinogenic hazards. Participating in sports is an enjoyable form of recreation despite the risk of injury. Other risks are incurred for financial reasons, as in the case of the five hundred people who are electrocuted each year installing their own TV and CB radio antennas in an effort to avoid professional installation charges.

Workers make similar choices. They do not.

Economists are led into dangerous absurdities by their erroneous starting point. For instance, they calculate the value a worker places on his life from the wage differential the worker receives for a more dangerous job and conclude that non-manual workers value their lives almost four times as highly as manual workers. Marin & Psacharopoulos, The Reward for Risk in the Labor Market: Evidence from the United Kingdom and a Reconciliation with Other Studies, 90 J. POL. ECON. 827 (1982). From this they deduce that “those prepared to work in . . . exceptionally risky jobs may well have a lower dislike of danger . . . .” Id. at 841. The callousness of this remark recalls the assertions by the American military that it was morally acceptable to bomb civilian Vietnamese populations because the Vietnamese did not value life as highly as Americans. For more cautious views on risk premiums, see M. Gunderson & K. Swinton, COLLECTIVE BARGAINING AND ASBESTOS DANGERS AT THE WORKPLACE (1980); W. Viscusi, EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE (1979); Chelius, The Control of Industrial Accidents: Economic Theory and Empirical Evidence, 38 LAW & CONTEMP. PROBS. 700, 714 (1974). For a critique of the application of cost-benefit analysis to worker health and safety standards, see Tucker, The Determination of Occupational Health and Safety Standards in Ontario, 1860-1982: From the Market to Politics to . . .?, 29 MCGILL L.J. 260, 297-309 (1983).

Even were we to find two jobs, similar in training, experience, and responsibility but different in risk, that were paid differently, we would know only that people are risk averse and that their preferences have some effect on wages. But this certainly does not prove that the particular difference correctly reflects the value workers place on risk, nor does it show that regulation and compensation are unnecessary. Even economists sometimes concede this. See McLean, Wendling & Neergaard, COMPENSATING WAGE DIFFERENTIALS FOR HAZARDOUS WORK: AN EMPirical ANALYSIS, Q. REV. ECON. & BUS., Autumn 1978, at 97, 105.

Economists rarely ask workers whether they would prefer higher wages in exchange for greater risks. A British survey asked respondents which of three jobs they would choose if, all else being equal, job A had an average amount of risk and reasonable pay, job B had twice as much risk and paid £10 more a week, and job C had three times as much risk and paid £20 more a week. Two-thirds of all respondents chose job A. Women were more reluctant to accept a riskier job for higher pay. Those in relatively risk-free work environments also were more reluctant and demanded higher risk premiums. P. Prescott-Clarke, Public Attitudes Towards Industrial, Work-Related and Other Risks 145-49 (1982). This suggests that people do not choose risk but strongly prefer the least risky work environment they believe they
Looking at the world through the political and sociological lenses just described, Bardach and Kagan offer an explanation for the growth of regulation and the opposition it engenders, a critique of regulation, and proposals for an alternative. Their explanation inverts the customary understanding: regulation is not a response to special interests but an expression of those interests. Yet where the revisionist historians see these special interests as capital, Bardach and Kagan appropriate that term (in a prime example of Newspeak) to refer to the mass of workers or the general public (p. 16). Since these latter do not engage in spontaneous mass action, the authors must affix the blame elsewhere, indulging in the genetic fallacy to impugn the value of regulation by associating it with undesirable elements. They attribute pressure for regulation to unions (p. 16), the civil rights and anti-war movements (p. 13), “senators looking for issues with wide public support” (p. 14), “young lawyers” (p. 14), the “intelligentsia” (p. 17), and of course the media (p. 23) — all of which they characterize as “dangerous potential predators” infesting “the political environment of regulatory officials” (p. 206). They attribute extraordinary influence to these forces: “During the 1960’s and 1970’s, these risks [of being criticized for leniency] were generally more threatening to regulators than were the risks of criticism from the business side . . .” (p. 198). To the extent that such external forces do not explain the growth of regulation, Bardach and Kagan attribute it to spontaneous changes in personality — the “newly evolved, tougher breed of inspector” (p. 123); to “intermittent events” that are merely chance occurrences, not the product of any structural forces; and to the inevitable tendency of

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17. The circumstances in which the media can be effective in arousing public opinion are narrowly limited. For an example of a successful campaign against an Australian asbestos manufacturer, see Braithwaite & Fisse, Asbestos and Health: A Case of Informal Social Control, 61 AUST. & N.Z. J. CRIMINOLOGY 67 (1983); see also B. FISSE & J. BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORAIDE OFFENDERS (1983). In the Australian case, the manufacturer simply moved its manufacturing facilities to Indonesia, which has no controls on asbestos exposure. Similarly, a Hamburg asbestos factory was dismantled and reconstructed in Capetown, South Africa. Braithwaite & Fisse, supra, at 69, 77. Lay judgments about the magnitude of risks seem to be strongly influenced by the experience of victimization but not by media campaigns. Tyler, Assessing the Risk of Crime Victimization: The Integration of Personal Victimization Experience and Socially Transmitted Information, 40 J. SOC. ISS. 27 (1984).

18. Bardach and Kagan deplore criticism of regulators for failing to inspect sanitary violations in the food processing industry, for failing to respond to complaints of discrimination, and for failing to conduct sufficiently rigorous inspections of building code violations, unsanitary conditions in restaurants, slum housing, and nursing homes. Pp. 204-07.

19. “Most prominent are physical catastrophes; scandals that expose presumptive laxity, corruption, or incompetency in the regulatory agency; dramatic scientific discoveries; flare-ups of racial or intercommunal violence; and changes in administration . . . .” P. 22.
regulation to expand and rigidify (p. 184). No mention is made of changes in the physical environment that might call for greater regulation or shifts in the configuration of political power that might explain why those who favor regulation temporarily prevailed.

Bardach and Kagan stay on the other side of the looking glass when explaining opposition to regulation: it is not resistance by regulated industries (compelled by the dynamic of capitalism) that engenders more vigorous enforcement but "regulatory unreasonableness" that drives otherwise compliant entrepreneurs to reluctant opposition (p. 26). Regulation destroys the "generalized commitment . . . 'to comply with the law'" (p. 113). The problem is "legalistic narrow-mindedness" in enforcement (p. 92), which can spawn an organized culture of resistance (p. 114). Corporations are outraged by fines they view as undeserved, even if the fines are small (pp. 52, 105). They conceal information, even solutions to safety problems, out of fear of and resentment toward regulation (pp. 109, 145) and anger at the aggressive behavior of the public interest lobby (p. 256). Unfortunately, the authors offer no evidence for their assertion that capital has a "generalized commitment" to comply with the law; that, absent regulation, it spontaneously enhances safety and reduces pollution; or that it voluntarily discloses dangers and safety solutions. Indeed, their own evidence shows that capital vigorously opposes the enactment of regulations (p. 189), conceals information in order to secure competitive advantages (p. 110), and initiates legalistic objections in order to reduce both inspections and prosecutions (pp. 113, 118-19).

The authors' view of the pressures for and against regulation sets the stage for their critique. Bardach and Kagan begin with a structural explanation for why regulation tends to be unreasonable. 23 Rules in-

20. In fact, they do so because of the goal of competition. The 80 nuclear power plants operating in the United States do not share information about failures or accidents. Partly as a result, they experience six and a half times as many shutdowns as Japanese plants, which do share information. Some of the problems that led to the incident at Three-Mile Island (TMI) had occurred previously at similar plants, but TMI was unaware of these events or the responses of the plant operators. After TMI the industry created a private Institute for Nuclear Power Operations, endowed with massive resources and personnel. But operators remain reluctant to give it data: only 21 of the 104 component failures in the first half of 1983 were reported to the Institute. Nevertheless, the Nuclear Regulatory Commission has delegated responsibility for recording such incidents to the Institute. Report Faults Data on Nuclear Plant Mishaps, N.Y. Times, Nov. 25, 1984, at 36, col. 1. These events counsel skepticism about the enthusiasm that Bardach and Kagan display for self-regulation. See notes 67-73 infra and accompanying text.


22. For an early account of industry resistance to environmental regulation, see N. GUNNINGHAM, POLLUTION, SOCIAL INTEREST AND THE LAW (1974).

23. For a detailed empirical account of the actual behavior of OSHA in setting health regulations, which strongly contradicts the claim by Bardach and Kagan that it has been overly rigid and insufficiently responsive to the industry, see D. McCaffrey, OSHA AND THE POLITICS OF HEALTH REGULATION (1982). For an analysis of the ways in which courts can interpret statu-
evitably are overinclusive (p. 25) because government can act only by means of generalizations. Furthermore, the ideology of equality before the law continually encourages the extension of rules to new settings (p. 67). In order to permit inspectors to monitor compliance, regulations must insist on simple and easily measurable proxies for the desired behavior (p. 70). These objections are sound, if hardly novel. But the authors then purport to quantify the harm caused by overinclusion and by the crudeness of the indicators of compliance. First, they assert, without any evidence, that about eighty percent of all businesses either already have attained the goals that regulation seeks or will conform to rules without any inspections or sanctions (pp. 65-66). 24 For such enterprises, regulation is wasted effort and may be seriously counterproductive. Second, Bardach and Kagan blame regulatory unreasonableness on the inspectors themselves. They are excessively theoretical, insufficiently disciplined by experience (pp. 154-55), hypersensitive to risk (p. 82), inattentive to the costs of compliance (pp. 154-55), and more concerned with winning cases than solving problems (pp. 79-80). 25 Once again the authors conclude these generalizations (which undoubtedly are true of some inspectors some of the time) with a wholly unsupported estimate of their significance: “clashes between the official and the civilian perspectives” are “common indeed”; the absolute number is “very high” (p. 79). This seems sharply inconsistent with the authors’ earlier assertion that eighty percent of all entrepreneurs comply without any enforcement.

Bardach and Kagan supplement these unsubstantiated conclusions with what they claim are specific instances of regulatory abuse. But on inspection these prove to be nothing of the sort. The outer limits of regulatory power are presented as descriptions of the actual exercise of those powers, when the evidence in this book alone shows that such authority rarely is invoked. Bardach and Kagan maintain that “inspectors are regularly engaged in searches and seizures, often without ‘probable cause’ ” (p. 32), and that “inspectors in some agencies are granted summary powers to impose severe restrictions . . . [which] raise the possibility of misuse” (p. 32). But all the authors have shown is the “possibility of misuse,” not the reality. In a chapter tenden­tiously entitled “Toward Toughness,” they deplore the fact that regulatory agencies are authorized to seek corporate fines as high as $25-

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24. A useful antidote to such polyannaism is Charles Perrow’s description of the safety records of nuclear energy, the petrochemical industry, air and marine travel, dams, and mining — all highly regulated activities. See C. PERROW, supra note 11.

25. Somehow the authors overlook the fact that inspectors only have authority to order compliance with rules; their suggestions for “solving problems” are likely to be ignored. See note 83 infra and accompanying text.
50,000 a day, to request the imprisonment or fining of corporate officers, and to impose regulatory penalties without judicial intervention (pp. 51-52). Yet their only concrete example of punishment is a large aluminum manufacturer with numerous plants who was fined a total of $25,000 for 225 citations over a period of seven years, an average of $3500 a year and $15.56 a citation (p. 4). They insist, without evidence, that small civil penalties are "troubling even to very large corporations." Yet even these mild fines rarely are imposed; the record of regulatory enforcement is actually one of extreme laxity, not rigidity.27

26. P. 52. This is a very strange approach to punishment — the notion that the sensitivities of the offender should be taken into account. But eventually it becomes clear that Bardach and Kagan believe that entrepreneurs do nothing wrong when they violate regulations and endanger person and property:

[V]iolations often involve failure to take some precaution that only might lead to harm . . .

Moreover, regulatory offenses often are not clearly wrong, as are theft and assault. Unlike the burglar or the narcotics dealer, the regulatory offender often is a legitimate, socially useful enterprise whose officers believe sincerely, and sometimes justifiably, that their behavior was not really very bad.

P. 42 (emphasis in original). Of course, most criminals also think they are justified, and outside of working hours many are real nice guys. As Gilbert and Sullivan put it:

When the felon's not engaged in his employment —
Or maturing his felonious little plans —
His capacity for innocent enjoyment —
Is just as great as any honest man's . . . .

... When the enterprising burglar's not a-burgling —
When the cut-throat isn't occupied in crime —
He loves to hear the little brook a-gurgling —
And listen to the merry village chime . . . .

THE PIRATES OF FENZANCE, act II (chorus omitted). Yet fine feelings usually do not exculpate.

Regulatory offenses often are clearly wrong and committed with knowledge of their wrongfulness, as in the cases of asbestos, the Ford Pinto, the Dalkon Shield, Love Canal, and thalidomide. See notes 46-48 infra and accompanying text.

27. A random sample of 23 OSHA noise violations revealed an average abatement period of two years and numerous additional extensions. P. 139. Between the enactment of the Occupational Safety and Health Act in 1970 and 1982 there were a total of 12 criminal prosecutions, or an average of one a year, each one following the death of a worker. These prosecutions resulted in three acquittals, one hung jury, and the conviction of eight corporate defendants, seven of which pleaded either nolo contendere or guilty. Only two individual defendants were convicted, both after pleas of nolo or guilty, and both were sentenced to probation. The nine corporate defendants convicted on ten counts were fined a total of $48,500, or an average of about $5390 per defendant and $4800 per count. Note, A Proposal to Restructure Sanctions Under the Occupational Safety and Health Act: The Limitations of Punishment and Culpability, 91 YALE L.J. 1446, 1448-49 & n.17 (1982). In the first seven years of the Act, OSHA sought only nine injunctions; it obtained four, was denied one, and accepted consent decrees in four. Id. at 1462 n.79.


The number of OSHA inspections gradually increased from 1972 until 1976, when it dropped by a third and remained at the latter level through 1980. The number of violations cited dropped by more than half as a result. However, the average penalty per violation increased during this period from $23.40 to $192.60. W. VISCUSI, supra note 15, at 18-19. In the first year of the Reagan administration, fiscal 1981, the number of inspections declined by another 10%. Kel-
Bardach and Kagan also deplore procedures and practices that might seem the essence of democracy to others. Under the heading of “toughness,” they bemoan the fact that many statutes and judicial decisions expanded citizen-group rights to participate in the regulatory policymaking process; stipulated that agency decisions must be made in public session, after open public hearings; held that agency rulemaking decisions must be based on a publicly disclosed evidentiary record; and made agency rules appealable to the courts by almost any “aggrieved citizen.”

The Freedom of Information Act expands the access of citizens, including investigative reporters, to agency inspection records. [P. 55.]

To encourage complaints, agencies are forbidden to reveal the complainant’s name, and in many regulatory schemes, discrimination by the enterprise against complaints is a punishable offense. [P. 55.]

They also condemn mandatory labelling of packages, such as the warnings on cigarettes, characterizing it as a mechanism whereby the government forces sellers to undertake an un-

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In the regulation of water pollution in Britain, which Bardach and Kagan cite as a model of “reasonableness,” the maximum penalties until recently were £100 for a summary conviction and £200 following an indictment in the Crown Court; these were “universally regarded by staff of all ranks as inconsequential as deterrents for all offenders except the most impecunious of farmers.”

As an example of what toughness might mean, consider the following. Precision Specialty Metals Inc. pleaded no contest to illegally dumping 4000 gallons per day of hexavalent chromium, a carcinogenic waste, and corrosives into city and county sewer systems in Los Angeles. The prosecutor maintained that the dumping was willful, as evidenced by the company’s action in building a second illegal discharge system when it believed that the first had been discovered. The penalty was $325,000 in fines, of which $25,000 will defray the cost of hauling away contaminated soil and $250,000 will reimburse the city and county for the cost of cleanup. The company's vice president was sentenced to 120 days in jail, to be served on nights and weekends to allow him to keep his job. The plant manager was required to perform 1000 hours of community service. And the company was required to spend $34,410 to buy a full page advertisement in the Wall Street Journal to acknowledge its culpability.

But even substantial penalties may have little impact. See A Waste Hauler Under the Gun: Giant Waste Management is Flourishing Despite Lawsuits and Fines, N.Y. Times, Nov. 25, 1984, at C4, col. 3 ($10 million fine for company with annual sales of $926.8 million and net earnings of $103.3 million).

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28. P. 54 (footnote omitted).


30. Workers hardly abuse this protection. According to O.S.H. DEC. (CCH), there were no cases brought to protect workers from retaliatory action in 1972, 1973, or 1974, and an average of fewer than seven cases a year between 1975 and 1980. Workers remain very fearful of employer retaliation. See note 119 infra and accompanying text.
compensated program of public education — or propaganda, depending on one's viewpoint — thereby turning their packages into minibillboards for messages designed to persuade rather than to prevent deception. [P. 259.]

Finally Bardach and Kagan criticize the "potential for abuse" of the right of workers to refuse highly dangerous work, suggesting that "it could lead to considerable labor-management-OSHA conflict" (p. 230). And they note with concern that safety stewards in Sweden have the power to halt production "on any machine or assignment they consider unsafe" — ignoring evidence that this power rarely is invoked and certainly is not misused. On the basis of these unproven assertions that regulatory power leads to abuse, Bardach and Kagan conclude that "the formalized statements of general normative beliefs incorporated in legal regulations by the institutions of the state may not correspond closely to the norms of social responsibility found in society." In other words, although the regulatory regime was enacted by Congress, Bardach and Kagan argue that it does not deserve respect because it deviates from "norms of social responsibility" — although once again they offer no evidence for the content of these norms, who holds them, or how they deviate from the regulations.

But although Bardach and Kagan attack regulation for causing inefficiency in the form of inspections, record keeping, and dysfunctional precautions, they are even more critical of the tendency they attribute to regulation to undermine the responsibility of the "trusteeship stratum" (pp. 28-29, 321-23). This notion, though barely described, appears to be the keystone of the "well-ordered society," in which individuals whose roles should entitle them to respect wield paternalistic authority. Examples include the safety engineer, the university administrator, the marine biologist, the plant foreman, "teachers, doctors, hospital administrators, factory food inspectors, plant managers, fire chiefs, auditors, journalists, public school principals, city planners, nurses, presidents of large corporations, nuclear safety engineers,"

31. I wonder how Bardach and Kagan would feel about grants by the U.S. Department of Energy to private groups that promote nuclear energy, or expenditures of more than $25 million for the same purpose by private utilities. See C. PERROW, supra note 11, at 350. In both instances government forces taxpayers and consumers to pay for corporate propaganda with which many of them disagree strongly.

32. P. 230 (emphasis added). Of course, Bardach and Kagan offer no evidence of abuse. Furthermore, they totally fail to consider the normative issue: should workers be compelled to accept extreme danger by the threat of being fired for refusing to work? See note 126 infra and accompanying text.

33. P. 231 (footnote omitted).

34. See Fleischauer, supra note 9, at 311 n.157 (work stoppages dropped from 167 in 1978 and 171 in 1979 to 99 in 1980); Kelman, supra note 27, at 115 (anecdotal evidence suggests that the power is invoked 100 times a year, but its significance is largely symbolic); Stearns, Fact and Fiction of a Model Enforcement Bureaucracy: The Labour Inspectorate of Sweden, 6 BRIT. J.L. & SOCY. 1, 14-18 (1979).

35. P. 319 (emphasis added).
lawyers, and so on” (p. 322). What are we to make of such a hodgepodge? What do nurses and nuclear safety engineers, fire chiefs and presidents of large corporations have in common? Bardach and Kagan are not simply confused, though they may be incoherent. The underlying unity is revealed in their assertion that these people are “the cultural carriers of the idea of responsibility” (p. 322), which they define as “doing what one judges to be right in a problematic situation involving someone else’s welfare.” Members of the “trusteeship stratum” are accustomed to exercising authority, to having their opinions respected: nurses dominate patients, foremen command workers, fire chiefs decide whom to hire, and so on. Regulation challenges this authority. Thus, “[a]n instance of regulatory unreasonableness can . . . be experienced as an instance of government-imposed injustice” (p. 28). Such experiences are “infuriating,” and the result may be “the erosion of self-confidence and morale on the part of the private trusteeship stratum” (pp. 28-29).

To put the matter somewhat more systematically: injustice is not inflicted by the powerful on the weak — bosses compelling workers to endure unsafe conditions, employers engaging in racial discrimination, industry polluting our environment, producers endangering consumers. Rather, injustice is inflicted on the powerful by the weak when their governmental surrogates (regulators) seek to compel the powerful to obey the law. What corporations “experience” as injustice is assumed to be injustice — the clearest possible indication that the authors are apologists for capital. The powerful are accustomed to command; governmental challenges to their authority undermine their “generalized commitment . . . ‘to comply with the law’” (p. 113), which cannot have been very strong. Threats of nullification are invoked by the powerful every time the powerless attempt to curtail their “prerogatives” or to limit their “discretion.” Such threats were invoked by the slave states before the Civil War and by the champions of segregation during the civil rights movement and are being renewed today in the form of capital flight and runaway plants in response to demands by workers, consumers, and environmentalists.

If regulation is not the solution but the problem, what is the solution? First, we should place more reliance on those familiar alternatives, the market and liability rules (pp. 9-11, 60-61). The authors attribute market failure to lack of information.

Information that affects the decisions of even a small number of individuals can exert large pressures on producers, since the mechanisms of the marketplace make producers especially sensitive to changes in the marginal demand for their products or for jobs in their workplaces. [Pp. 243-44.]

Yet Bardach and Kagan do not support government intervention to

36. P. 321 (emphasis added).
ensure adequate information. First, they maintain that the market already offers sufficient incentives to entrepreneurs to disseminate safety information: “[m]anufacturers who want to make safety a selling point will go to some lengths to advertise this feature” (p. 250). Few manufacturers seem to find safety an effective “selling point,” however, for it hardly figures prominently in their advertising. The problem, of course, is that advertising one’s own safety or the dangers of a competing product or service simultaneously alerts consumers and workers to risk. Second, the authors claim that people already have as much information as they want. The assumption that “[w]e are awash in a sea of ignorance and therefore vulnerable to any and every predatory move by producer and employer interests . . . is almost surely further from the truth” than the assumption that “[t]he marketplace plus word-of-mouth communication channels probably manage to supply nearly all the information needs and wants of nearly all the citizenry; hence there is not much left of general interest for mandatory disclosures to disclose” (p. 249). The authors offer no empirical evidence for this extraordinary conclusion. Third, information only causes trouble, because its intended beneficiaries do not know how to use it: “dramatically stated blanket warning labels on drums of solvents containing substances such as benzene often get workers upset and reluctant to use them, even though no hazard is


A National Academy of Sciences study in 1984 found that we have adequate information about the hazards of only 10% of 3350 pesticide ingredients, 2% of 3410 cosmetics ingredients, 18% of 1815 pharmaceuticals, 5% of 8627 food additives, and 11% of 12,860 other commercial chemicals with sales of at least a million pounds a year. Salpukas, A Three Mile Island for Chemicals, N.Y. Times, Dec. 16, 1984, at sec. 3, col. 3.

38. Bardach and Kagan “demonstrate” the incentive to warn by reference to Volvo’s advertisements. P. 250. But what would they make of the deliberate decision by the world’s second largest automobile manufacturer, the Ford Motor Company, to hide the design defect in the Pinto? See note 46 infra and accompanying text. For a dramatic account of the extraordinary lengths to which Japanese automobile manufacturers went in order to conceal dangers and the obstacles encountered by the campaign to force disclosure and obtain regulation, see Otake, Corporate Power in Social Conflict: Vehicle Safety and Japanese Motor Manufacturers, 10 INTL. J. SOC. L. 75 (1982).

Even when consumers do change their preferences in response to perceived risk, they often are responding to the actions of regulators and courts, and the level of safety secured remains unacceptable. Merrell Dow Pharmaceuticals Inc. manufactures Bendectin, a drug that claims to alleviate morning sickness. More than 33 million prescriptions have been written since the FDA approved it in 1956. Recently the drug has been blamed for birth deformities. Some 600 lawsuits have been filed. Sales of Bendectin dropped from 3.4 million prescriptions in 1979 to 1.9 million in 1981. 400 Suits Against Drug Firm to Be Heard by I Jury, L.A. Times, June 11, 1984, § 1, at 3, col. 4. But this decline was caused by the lawsuits, which publicized the alleged link. Furthermore, if the charge is true, should Merrell Dow have continued to sell at the 1981 rate of 1.9 million prescriptions a year?

39. For poignant testimony that workers want more information than they receive, see notes 96-97, 101-02 infra and accompanying text. For an eloquent moral defense of that demand, see M. GIBSON, WORKERS’ RIGHTS 28-56 (1983).
posed under the circumstances . . .” (p. 263). Hence the market works adequately even without the regulation of disclosure.

The fiction of the market as the guarantor of optimum safety has been exploded so often\textsuperscript{40} that I will limit my criticisms to the inconsistencies within this book. Bardach and Kagan acknowledge that information often is withheld until the consumer already is hooked (p. 245). They contradict their claim that mandatory disclosure can exert large pressures on producers: because “disclosure policies may directly affect only a small percentage of the consumers and workers whose interests are to be protected . . . regulated enterprises may not take their disclosure obligations very seriously; they may treat non-compliance as a ‘mere technical’ violation” (p. 266). The authors systematically confuse workers with consumers and real choices (such as how to spend leisure time) with highly constrained behavior (habitual use of tobacco or alcohol, driving to work, residing in a polluted environment).\textsuperscript{41} In the end, they seem less concerned that the market work than that its participants believe it is doing so:

Although there is no conclusive evidence that the [Securities and Exchange Acts of 1933 and 1934] have prevented fraud and price manipulation . . . they seem to have bolstered the widespread belief that the SEC is an effective antifraud enforcer, and this belief has probably contributed to the pool of social trust necessary to maintain a healthy commercial system.\textsuperscript{42}

If the market is the first line of defense against danger, liability rules should be the principal backup system. Bardach and Kagan make all the usual mistakes in exaggerating the efficacy of liability rules as a deterrent. By conceding that “the liability system probably does not in fact force all enterprises to ‘internalize’ all the social costs” (p. 273), they strongly suggest that liability rules do internalize most such costs. But the opposite is true. Repeated empirical studies over the last half century have shown that liability rules internalize hardly any of the accident costs of entrepreneurial activity\textsuperscript{43} and have only the most problematic effect on behavior.\textsuperscript{44} The very evidence that

\textsuperscript{41} See C. Perrow, supra note 11, at 312-13.
\textsuperscript{42} P. 244 (emphasis in original).
\textsuperscript{44} Liability rules, like the market, control effectively only if victims or potential victims
Bardach and Kagan themselves adduce to demonstrate the deterrent effect of liability rules actually reveals its failure. They claim that "[m]anagers . . . are well aware of recent multimillion dollar damage awards for personal injury or concentrated environmental damage. . . ." But then they have the brazen effrontery to cite as support for that in terrorem effect the Pinto, asbestos, and Buffalo Creek disasters (p. 334 n.8), when for years before the injuries Ford knew the gas tank might explode, Johns-Manville knew asbestos caused lung damage and cancer, and the Pittston Corporation knew its dam was likely to collapse, yet each disregarded the danger despite the threat of liability. They have the nerve to claim that liability for workers' compensation "would seem to provide considerable incentive to cut accident rates and severity" (p. 356 n.3), when it is notorious that such payments grossly and systematically undercompensate workers, thereby encouraging employers to expose workers to risk. And they possess complete information about the risks to which they have been exposed or the injuries they have suffered. Regulation may be necessary to transmit this information. But agencies under the Reagan administration appear reluctant to notify those at risk precisely because they fear that victims will sue employers or manufacturers. The National Institute for Occupational Safety and Health has compiled a list of 66 studies involving 200-250,000 workers who might benefit from learning about their exposure to toxic substances but have not been notified. One reason is cost: a $1.3 million item for notification, to be included in the budget of the Department of Health and Human Services, was cut at the insistence of the White House. But another factor is the fear of lawsuits. Dr. Glenna M. Crooks, deputy to the Assistant Secretary of DHSS (of which NIOSH is part), asked in a memorandum: "Does it make any difference that in Niosh's 1980 Augusta pilot notification program [which informed chemical plant workers of the increased risk of bladder cancer as a result of exposure to beta-naphthylamine], more than $300 million in litigation claims have reportedly been filed against the companies involved?" 'Cruel Cover-Up' on Job Poisons Charged to U.S., N.Y. Times, Oct. 23, 1984, at 19, col. 1. Responding to criticism of the agency's failure to notify, Dr. Edward N. Brandt, Jr., Assistant Secretary for Health (and Crooks' immediate superior), said: "we do not intend to yell fire in a crowded theater." Letter to the Editor, N.Y. Times, Nov. 24, 1984, at 22, col. 5. But perhaps he should tell the people in the theater that it is on fire before they burn to death.


45. Pp. 60-61. I have argued elsewhere that large tort judgments perform the symbolic function of creating the impression that liability rules overcompensate victims, when they do just the opposite. Abel, supra note 40, at 207. To the extent that such judgments have any effect, they direct the concern of entrepreneurs to catastrophes rather than the routine carelessness that causes the vast majority of injuries and illnesses, see note 89 infra and accompanying text, and they encourage entrepreneurs to avoid liability, not risk. Abel, supra note 40, at 204. If managers are aware of multimillion dollar awards, they also may know that most tort judgments are very small: half of the plaintiffs' awards in one study were under $8000. M. PETERSON & G. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS (1981), quoted in INSTITUTE FOR CIVIL JUSTICE, A REPORT ON THE FIRST FOUR PROGRAM YEARS 18 (1984).

46. On the Ford Pinto, see Dowie, Pinto Madness, MOTHER JONES, Sept.-Oct. 1977, at 18; on asbestos, see note 48 infra and accompanying text; on Buffalo Creek, see K. ERIKSON, EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD (1976); G. STERN, THE BUFFALO CREEK DISASTER (1976).

47. On the inadequacy of workers' compensation, see P. BARTH & H. HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES (1980); R. CONLEY & J. NOBLE, JR., WORKERS' COMPENSATION REFORM: CHALLENGE FOR THE 80s (1980); P. NONET,
have the shamelessness to assert that lawsuits by the victims of exposure to asbestos "would seem to provide a strong incentive for adequate care by chemical companies in the future," without mentioning that Johns-Manville, the principal culprit, and several


48. Pp. 274-75 (footnote omitted). The asbestos tragedy, which Bardach and Kagan cite as an example of how well the tort system controls negligence, actually shows just the opposite. The dangers of asbestos have been known for more than half a century. Indeed, discovery by plaintiffs' lawyers in recent litigation revealed a 1935 exchange of letters concerning contemporary British studies of the dangers of asbestos. The president of Raybestos-Manhattan wrote the general counsel of Johns-Manville: "I think the less said about asbestos, the better off we are." The latter replied: "I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity." Chen, Asbestos Litigation is a Growth Industry, The Atlantic, July 1984, at 24, 26, 29. Yet the asbestos manufacturers ignored the dangers and exposed workers and consumers to enormous risks. It is estimated that between 154,000 and 450,000 people will die as a result of exposure to asbestos before the year 2015. As of March, 1983, 24,000 lawsuits had been filed. It is estimated that the number will reach between 83,000 and 178,000 by the year 2010 and that total liability will fall between 7 and 8 billion dollars. J. Kakalik, P. Ebener, W. Felstiner & M. Shanley, Costs of Asbestos Litigation 9-10 (1983).

It is hard to sustain a belief in the efficacy of tort liability as a control mechanism in light of the staggering risks capitalists have inflicted in their drive for profits. In the early 1970's, A.H. Robins Company manufactured and sold 2.5 million Dalkon Shields, which have been held responsible for pelvic inflammation, miscarriages, sterility, and death. A former Robins quality control supervisor has testified that he told the company that the design was flawed as early as the summer of 1971. But the company notified the FDA of the problem only in 1973. In mid-1974, at the FDA's request, Robins ceased production and wrote to all doctors, hospitals, and birth control organizations. Yet only in 1980 did Robins recommend to doctors that they remove the shield from women still using it. The FDA did not get around to issuing such a

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other defendants have declared bankruptcy in an effort to evade liability.49

Yet Bardach and Kagan downplay the weaknesses of the liability regime (pp. 277-82). Indeed, they think it too severe. They deplore the fact that patients overcame the professional conspiracy of silence protecting physicians from malpractice liability, they raise the spectre of “defensive medicine,” and they applaud the new limitations on malpractice liability and damages — limitations that prevent tort claims from acting as effective deterrents to physician negligence (pp. 283-87).50 They misstate the effect of statutory rules on the determination of liability and urge “limits on the impulses of juries” (p. 289).51 They

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50. The authors note that the ratio of malpractice suits per New York physician more than doubled between 1969 and 1974. P. 284. But they do not mention that only about 4 plaintiffs in 10 won those suits. See Peterson & Priest, supra note 45, at 18. Although the number of malpractice claims increased from 1966 to 1975, it declined thereafter. The size of the average claim grew at an annual rate of 12.4% for physicians and 18.9% for hospitals between 1971 and 1978. P. DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS (1982), quoted in INSTITUTE FOR CIVIL JUSTICE, supra note 45, at 31, but the rate of inflation for medical costs during those years was almost as high. Furthermore, the limitations on medical malpractice litigation, successfully lobbied through state legislatures by state and national medical associations, have had a dramatic effect on tort claims:

When a state moved to cap verdicts or eliminate specific dollar requests by plaintiffs or permit payment of awards for future losses in periodic installments, the net effect was to reduce trial awards by 30 percent, cut the average out-of-court settlement by 25 percent, raise the portion of cases dropped from 43 percent to 48 percent, and reduce the share of cases going to actual verdict from 5.1 to 4.6 percent. Relaxing the ban on evidence of collateral sources of compensation for injuries appeared to reduce trial awards by 18 percent. Statutory limits on contingent fees charged by plaintiffs’ attorneys also aided in depressing settlement amounts — and somewhat increased the proportion of cases dropped.


Another recent limitation on “jury discretion” was the grant of sovereign immunity to government contractors sued by civilians injured by radioactive fallout from nuclear tests. Ten victims won a total of $2.66 million in May, 1984. But recent legislation converts all pending and future suits against an atomic test contractor into suits against the federal government. Such suits must be brought under the Federal Tort Claims Act, which allows no jury trial and no punitive damages. New Act Restricts Atomic Test Suits, N.Y. Times, Nov. 4, 1984, at 26, col. 1. It is not clear whether this law also will affect suits like that won by the widow of an employee of the Department of Energy at the Rocky Flats nuclear weapons plant, who convinced a court that her husband had died of cancer caused by handling radioactive materials for 15 years, even though his exposure was within federal limits. Compensation Ordered in Atomic Worker’s Death, L.A. Times, Apr. 25, 1984, § 1, at 7, col. 4.

51. Juries do not seem very impulsive. A major study of Chicago jury verdicts in tort cases
endorse a Republican bill "to make product liability rules more moderate and uniform" (p. 287) but fail to disclose that the bill would obstruct, and often prevent, recovery by injured consumers, nullifying the deterrent effect of products liability law. 52 And they resort to the customary charge that many accidents "can more easily and inexpensively be avoided by the relevant class of plaintiffs," who therefore must be denied recovery in order to motivate them to adequate concern for their own safety (pp. 286-87). Having supported a number of legislative changes in tort liability rules that have been sought or secured by defendant lobbies (physicians, insurers, chambers of commerce), Bardach and Kagan hypocritically praise such rules as "better shielded from the political and bureaucratic pressures that often make direct regulation unreasonably rigid" (p. 271).

Bardach and Kagan clearly believe that the best government is that which governs least: "[u]nder many conditions, we might simply wish to opt for no regulation at all" (p. 304). They accept liability rules and mandatory disclosure only to the extent that these may forestall direct regulation (p. 290). Furthermore, they are confident that technological progress and economic growth, far from increasing the need for regulation, actually diminish it:

"Richer is safer," wrote Aaron Wildavsky, and it is true that if we simply encourage plant modernization through economic incentives, many aspects of product and worker safety and environmental protection will continue to improve. [P. 304.]

Aware that the victims of risk — workers, consumers, and all those affected by environmental degradation — favor greater regulation, they disregard that broad consensus: "If the costs . . . of prevention are very much in excess of benefits, and if there are no overriding egalitarian or paternalistic considerations to offset this imbalance, then one might reasonably say that more mandated prevention was socially irresponsible." 53 In order to justify substituting their own judgment for

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52. The Kasten Bill (Product Liability Act, S. 100, 99th Cong., 1st Sess. (1985)) would override all state laws governing liability for defective products and preempt that subject entirely. It would replace strict liability with negligence, shift the burden of proof to plaintiffs where some state laws had placed the burden of disproof on defendants, eliminate the doctrine of collateral estoppel (thereby requiring every victim of an identical product to establish independently that the product was unreasonably dangerous), preclude liability where the defect is obvious, introduce the defense of comparative fault on the part of the user or consumer, and reduce damages for work injuries by the amount to which the victim would be entitled under workers' compensation.

53. P. 320 (emphasis added).
that of democratic politics, they invoke the scientism of “independent” cost-benefit analysis (p. 312). And they urge that both the promulgation and enforcement of regulations be shielded from the influence of victims, though not of those who victimize them.

The authors propose a number of regulatory reforms to promote these ends. First, they wish to diminish the power of victims. Workers should ask the company to improve safety rather than demand compliance with OSHA rules or threaten inspections and sanctions (pp. 107-09). Inspectors should not waste their time responding to worker complaints, and when the agency must do so it should use less experienced inspectors. When inspectors visit plants they should “spend proportionately more time talking with managers and professionals in the regulated enterprise and interviewing operating employees” and “proportionately less time looking at physical facilities in search of violations.” Bardach and Kagan would expand the role of the union as intermediary between workers and managers because “[r]outing complaints through the union safety specialists . . . seems to cut down on unreasonable employee complaints” (p. 232). The reasons are not hard to find.

A full-time labor union safety representative in a large factory said that he often tours the plant at break time to look for safety problems so that he can avoid getting bogged down with “piddling complaints” from workers and concentrate on things he thinks are most important. Moreover, he says, it hurts his credibility with company engineers when he is obliged to bring up minor problems raised by workers.

As a result, “the worker or his representative has some clout,” and there is “worker-management consultation over safety issues.” Such deference by workers to union officials and management is consistent

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55. They recommend closed-door bargaining over regulations, pp. 179-81, and shielding regulators from a political environment that demands toughness. P. 217.

56. Of course, workers already do just this. See note 113 infra and accompanying text.

57. Pp. 166-68. The Reagan administration appears to have adopted this recommendation. According to the new Field Operations Manual, “OSHA no longer actively pursues formal complaints.” The proportion of worker complaints in Region 2 that resulted in inspections dropped from 64% in 1980 to 45% in 1982. Stearns, supra note 27, at 24. Workers long have complained about the difficulty of securing an OSHA inspection. See notes 121-23 infra and accompanying text.

58. P. 149. Inspectors will talk to employees only in the presence of a manager. P. 147. Employees find this very inhibiting. See note 122 infra and accompanying text.


60. P. 230 (emphasis added).
with the authors' belief that the workplace contains no irreconcilable structural conflicts.

The authors' second proposal is regulation by the "good inspector," who might better be called the "nice inspector," for he is accommodating rather than principled. This inspector does not invoke legal powers but instead relies on "elements of exchange — responsiveness, forebearance, and information" to secure behavioral changes in the industry. He looks for basic problems rather than rule violations (p. 102). He does not insist upon engineering controls to enhance safety and recommends their introduction only as equipment is replaced for purposes of modernizing production. If the inspectors' attitude and modus operandi are to change, they must gain greater technical competence: not more academic education but more experience with the regulated industry in order to make them more "reasonable" (pp. 128, 155). They also should become more specialized, because, "on balance, the potential gains from specialization, in terms of both effectiveness and reasonableness, would probably be larger" than the "improved perception and renewed toughness" that come from rotating inspectors. To increase experience it is necessary to reduce turnover; we can do this by offering inspectors continuing education, even though the starting salary of an OSHA inspector in the 1970's was $10,507 and the ceiling was $19,263 (p. 156 n.11). On the other hand, there is no need to increase the number of inspectors, although each OSHA inspector was responsible for 1515 sites in 1980: "seemingly low budgets may actually be close to some optimum . . . [because] the preponderance of regulated enterprises usually are good apples." Finally, it is essential to dampen the "zeal" and "self-

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62. P. 131. But if the regulator has less to offer than the regulated, this exchange will favor the latter.


64. P. 158. The authors offer no evidence for this proposition. Empirical studies repeatedly have shown that capital finds it easier to capture specialized regulatory agencies than general purpose agencies. See, e.g., Baum, Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals, 11 LAW & SOCY. REV. 823 (1977). W.G. Carson discusses this danger at some length. See text at note 84 infra.

65. P. 162. If evidence is needed to disprove this proposition, Perry, Government Regulation of Coal Mine Safety: Effects of Spending Under Strong and Weak Law, 10 AM. POL. Q. 303 (1982), found that increased federal government spending on mine health and safety inspection sharply reduced bituminous coal fatalities when regulatory standards were strong (though not when they were weak). On the inadequacy of the OSHA inspectorate even before the cuts by the Reagan administration, see Blumrosen, Ackerman, Kligerman, VanSchaick & Sheehy, Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions, 64 CALIF. L. REV. 702, 715-16 (1976); Rothstein, supra note 27, at 94-95. OSHA has sufficient staff to inspect each manufactur-
aggrandizement" of the agencies themselves (p. 309). The authors urge that every regulatory advisory board create a seat for an economist, who can be counted on to favor industry (p. 312). And they recommend that agencies be "obliged periodically to decrease the compliance costs of existing regulations by some percentage, say 5-10 percent every three or four years." 66

But workers will continue to complain even if no one listens, and even the most industry-oriented agency may enforce some rules. The ultimate solution, then, is to hand regulation over to the industries themselves. 67 The justification for doing so is the authors' belief that capital's concern for worker and consumer safety and environmental protection varies with the character of the enterprise — there are good apples and bad. The primary goal, therefore, must be to identify and influence the good apples, to "affect the consciousness, organization, or culture of the regulated enterprise by "training . . . middle- and lower-level personnel" to be more "sensitive" to concerns that otherwise would amplify the demand for external regulation. 68 The organizational solution is to appoint "full-time quality assurance specialists 'who sit equally on the organizational chart with production and sales
... [and whose] words are as important as those of the production manager" (pp. 226-27). It also may be useful to appoint a public director to the board of the corporation "to oversee programs designed to ensure good faith compliance with regulation . . . ."69 Once the "consciousness, culture, and organization" of the enterprise has been professionalized in this fashion, it will be possible to turn over the task of regulation to the enterprise itself, for "[t]he best-developed social expression of self-regulation is the ethic of professionalism."70 Yet there is no reason to believe that self-regulation by industry will be any more effective than self-regulation by the professions.71 Bardach and Kagan nonetheless urge a return to industry responsibility for setting the standards by which they should operate (p. 217), even though the inadequacy of these standards was one of the reasons for the creation of OSHA,72 and the authors acknowledge that encouraging trade associations to formulate and police rules accelerates cartelization of an industry (pp. 173-74, 220-23).

Bardach and Kagan are selective in their search for evidence — interviewing managers but not workers — and undaunted by the absence of evidence when they leap to conclusions. They consistently present "might be" as "is." They portray the world as harmonious but for workers who misperceive their own best interests and regulators who possess flawed characters or are carried away by youthful inexperience. Their capitalists are reasonable and well-intentioned but misunderstood and reviled. Misguided efforts to coerce them will just get their backs up and undermine the responsibility of the "trusteeship stratum." They must exercise authority, and they will do so benignly if only they are left alone.

II. RISKY BUSINESS

In The Other Price of Britain's Oil, W.G. Carson returns our attention to where it belongs — to those who inflict risk on others and the

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69. P. 227. The authors seem to believe that corporate organization charts determine power rather than reflect it.

70. P. 316. A striking instance of the refusal of corporations to accept, or even to consider, conservation measures that actually served their self-interest is the battle between the Environmental Defense Fund and Pacific Gas and Electric. It took several years and four lawsuits to compel P.G.& E. to adopt the innovations. When a senior attorney for E.D.F. asked a senior vice president of the company whether it would have been possible to persuade P.G.& E. of the desirability of the idea through less adversarial means, the latter replied: "There was no confidence in your motives. If you had published [the idea] you would have had to invent an E.D.F. to push it. An interesting book is not going to turn any large institution around." Roe, How to Mold the Nation’s Utilities: Building Profits into Conservation, N.Y. Times, Nov. 11, 1984, § 3, at 2, col. 3; see also D. Roe, DYNAMOS AND VIRGINS 197-200 (1984).

71. For critiques of self-regulation by lawyers, see Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639 (1981); Abel, Toward a Political Economy of Lawyers, 1981 Wis. L. Rev. 1117, 1177-82.

nature and magnitude of the risks they create. This superb case study of the dangers of exploring and producing North Sea oil demonstrates that the legal framework of regulation always was inadequate, that the regulatory agency was underfunded and structured in a way that facilitated capture by the industry, that the latter consistently, unreasonably, and successfully resisted safety precautions and opposed enforcement procedures, and that the penalties it incurred were laughable and ineffective. It is a sorry story of the failure of regulation in the real world — an invaluable antidote to the myth of oppressive regulation purveyed by Bardach and Kagan.

Carson begins by situating the phenomenon of risk within the political economy of the industry that generates it. The injuries and deaths suffered by workers on North Sea oil rigs were caused by the decisions of multinational oil corporations and the British state, which benefitted from them. Carson explains these choices through a rich description of the political and economic environment of the 1960's. The feverish search for oil and gas — a constant throughout much of the last half century — was intensified in Britain during this decade by its accelerated industrial decline (p. 86), its need to redress the disastrous balance of payments, the government's determination to defend the pound from devaluation (p. 88), and anxieties about the cost and reliability of other energy sources after the formation of OPEC in 1960 (p. 90). The discovery of North Sea oil seemed an almost miraculous solution to these intractable problems: it quickly reversed the balance of payments (p. 108), and tax revenues (supplemented by royalties once the British National Oil Corporation was created) provided income desperately needed by the rapidly expanding welfare state, especially during the 1973-1974 recession (p. 114). But the urgent need of the British state to reap these benefits meant that the leases and royalty agreements it negotiated with the major oil companies were not nearly as attractive as they might have been had the demand for revenue been less pressing (pp. 99-101), and the government was forced to rely on North American sources for capital (pp. 122-25) and on the industry for technology (pp. 125-26). The result was a relationship of dependency, similar to that which prevails between third-world states and multinational corporations (pp. 116-17).

These same political economic variables determined the extraordinary risks to which workers on the North Sea oil installations were exposed. Even when one excludes the uniquely treacherous diving operations, the exploration and production of offshore oil was the most dangerous industry in Britain at the time (pp. 21, 23-24).

Apologists for the industry typically attributed these dangers to

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the hostile environment — injuries and deaths were the necessary, if tragic, price demanded by a vital resource (pp. 42-45). This view also maintained that work on the oil rigs attracted risk-preferential types, derogatorily termed “cowboys,” who were neglectful of their own safety and actually enjoyed confronting danger (p. 45). But Carson shows that, although the environment undoubtedly was difficult and the workers were drawn by high salaries, injuries and deaths actually were caused by something much more mundane. Most accidents were the result of hazardous working conditions deliberately and consciously created by managers in order to maximize profit. (Yes, even nationalized industries competing within a capitalist economy obey such an imperative.) Workers were exposed to extremes of fatigue, cold, hunger, and boredom during their twelve-hour days and fourteen-day tours of duty on the oil rigs (pp. 72-73). Moreover, partly because of these harsh conditions, turnover was very high — as many as forty percent of each new shift were wholly inexperienced (p. 74). There were constant pressures to maintain production at all costs (pp. 74-75). Workers were reluctant to insist on safety precautions, both because they thought such requests would be ignored and because they feared retaliation (p. 76).

This disregard for safety is reflected in the accident statistics. An internal company survey revealed that half of all injuries were caused by “falling, slipping or tripping” (p. 49). Carson’s own analysis of the 229 fatal and serious accidents between 1975 and 1978 showed that thirty percent were falls and twenty-five percent were the result of crushing. Moreover, the industry failed to report or correct known problems until an accident had occurred (pp. 53, 58, 172).

74. This sort of apology is hardly new. Consider the reasoning of a famous nineteenth-century American case that denied compensation to the owner of buildings destroyed when a steam-boiler on a neighbor’s property exploded and was catapulted onto his land:

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate . . . are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads.

Losee v. Buchanan, 51 N.Y. 476, 484 (1873).

75. See note 15 supra.


77. On the extraordinarily high rates of turnover — up to 100% per year — found in harsh working conditions, see P. Blumberg, Industrial Democracy: The Sociology of Participation 63 (1968); D. Montgomery, Workers’ Control in America 41 (1979); Special Task Force to the Secretary of Health, Education, and Welfare, Work in America 100-01 (1973).

78. See notes 117-20 infra and accompanying text.

79. See note 114 infra and accompanying text.
percent of them to human error (p. 171). Equally correctable errors seem to explain the Alexander Kielland tragedy, in which 123 men were killed on a Norwegian oil platform (p. 288). And the inadequacy of the regulatory scheme must accept partial responsibility for the poor safety record of North Sea oil. Both industry resistance and regulatory failings were products of the dominant role played by private capital and of the political pressures for rapid production. 80

Although exploration of North Sea oil was well advanced by 1963, there was no statutory framework for regulating the industry until the end of the decade. During the 1960’s, the only regulatory device available to government was the draconian sanction of license suspension, which, precisely because of its severity, never was used (p. 148). 81 It took a full five years after the Sea Gem disaster of 1965, in which thirteen men were killed, before the necessary legislation was enacted; during that time another fourteen men died (p. 150). Even then, another seven years had passed before the government implemented this legislation (p. 157). Much of the thirteen-year delay was attributable to the government’s desire to “carry the industry with us” — to achieve that cooperative relationship between regulator and regulated so highly valued by Bardach and Kagan (p. 152). 82 The industry exacted a high price in human life and suffering in return for its dilatory and reluctant cooperation. The legal framework ultimately constructed never was adequate. There were major lacunae: regulation of the construction stage, of the “flotels” in which workers lived, and of the pipelines all were omitted (p. 235). Overlapping and conflicting jurisdictions among governmental bodies caused delays and oversights (pp. 264-65). And because of the industry’s novelty and the rate of technological change, regulations were drafted in very general terms and supplemented by “guidance notes,” a scheme that allowed precisely the flexibility touted by Bardach and Kagan (p. 178). Unfortunately, it also made the regulations legally unenforceable and permitted the industry to ignore them. 83

The administrative structure also reflected the pressures for production. The government had to choose between a horizontal framework, in which a specialized safety agency regulated many disparate industries, and a vertical framework, in which the government agency


81. The inverse relationship between the severity of the penalty and the frequency of sanctions has been observed in other regulatory contexts. See, e.g., Steele & Nimmer, Lawyers, Clients, and Professional Regulation, 1976 AM. B. FOUND RESEARCH J. 917, 998-99.

82. See notes 62-66 supra and accompanying text.

83. For an analysis of the way in which unenforceability was built into the substantive content of Australian coal mine safety regulations through the inclusion of phrases such as “reasonably practicable,” see Hopkins & Parnell, Why Coal Mine Safety Regulations in Australia are not Enforced, 12 INTL. J. SOC. L. 179, 182 (1984).
responsible for promoting oil production also controlled safety (pp. 159-60). In concrete terms, this was a choice between extending the jurisdiction of the Health and Safety Executive (HSE), which already regulated mining, agriculture, and nuclear energy among other industries, or giving responsibility to the Petroleum Engineering Division of the Department of Energy (PED) (pp. 187-92). The latter argued that it could move more quickly, keeping pace with a rapidly changing technology, whereas the HSE was too slow and bureaucratic (pp. 202-03). Ultimately, the PED won the jurisdictional battle (p. 290). The price, of course, was subordinating safety to production — precisely the "reasonableness" and concern for the costs of regulation that Bardach and Kagan champion (pp. 163-66). Yet even with the expertise the PED acquired through its production responsibilities, it had to rely on the industry for technical information and was hampered by the secrecy that competition engendered (p. 171). The PED was grossly understaffed: the first inspector was appointed in 1966, the second in 1968, and the third in 1971 (p. 172).84 Whereas HSE inspectors were recruited from a broad background, trained on the job, rotated every five years to avoid excessive identification with the regulated, and often spent their entire careers in the agency, most PED inspectors were drawn from the industry and returned to it after a brief stint in government (pp. 174, 205).85

Another set of structural factors limited regulatory efficacy. The private companies involved in oil exploration and production soon formed a trade association to negotiate safety matters collectively (p. 181). But workers remained unorganized. By the end of 1977, unions had gained recognition on only six of the twenty-eight rigs; three years later less than twenty percent of the work force was organized (p. 213).86 The explanations for this poor showing include jurisdictional bickering among unions, a transient workforce enjoying high wages, and of course the isolation of the oil rigs (pp. 214-15).87 But much of it must be attributed to vigorous opposition from employers, who often denied organizers access to the installations (p. 217). The low level of unionization, in turn, was one reason for the failure of the HSE to gain responsibility for regulation (p. 223). And the PED, unlike the HSE, made no effort to consult with unions, nor did its enabling legislation provide for union safety representatives or committees (pp. 213, 222).88

84. See note 65 supra and accompanying text.
85. This is exactly what Bardach and Kagan advocate. E. BARDACH & R. KAGAN, GOING BY THE BOOK, supra Part I, at 128, 155.
86. This figure is very low for British industry, although it is average for American.
87. A deckhand told Nelkin and Brown: "Regulating ships at sea is nearly impossible. The captain is the boss, and there is no authority beyond the captain. That's it." D. NELKIN & M. BROWN, WORKERS AT RISK, infra Part III, at 128.
88. Too much should not be expected from safety representatives. Interviews with those
These inadequacies in the regulatory framework reappeared in its actual operations. The PED, like the industry itself, was preoccupied with the fear of a major catastrophe such as the Sea Gem or Alexander Kielland, which could have unpredictable political consequences; the industry and the regulators both tended to ignore the routine carelessness that caused most accidents and injuries (pp. 176, 241).\textsuperscript{89} Inspectors were hampered by the need to give advance notice of visits to offshore rigs (p. 239).\textsuperscript{90} Inspections were conducted and safety instructions were drafted without reference to legal authority and therefore failed to lay a sufficient foundation for subsequent prosecution (pp. 246-47). Indeed, the PED criticized the HSE's tendency to look for violations and to measure regulatory efficacy by the number of prosecutions (p. 249). The PED's determination to accelerate production led it to issue certificates of fitness permitting drilling and production before construction was complete (p. 243). Because of uncertainty about the jurisdiction of Scottish courts over offshore installations, all Fatal Inquiry Inquiries were suspended until new enabling legislation could be passed in 1976; although the latter explicitly was made retroactive, none of the intervening deaths was investigated (pp. 262-63).

If regulatory authorities exercised their powers cautiously, the industry was not timid about resisting. Companies incorporated in the United States vigorously contested the jurisdiction of British agencies and courts (pp. 237-38).\textsuperscript{91} And both American and British companies sought to avoid civil and criminal liability by constructing a complicated web of employment contracts with subcontractors and by invoking the statute of limitations after stalling off claims (pp. 269, 275, 278).

The combination of passive regulators and an obstructionist industry produced the inevitable results. In the years 1978-1980, there were only thirteen prosecutions (pp. 249-50). Six were filed under earlier legislation, five of which resulted in acquittals, and two-thirds of the defendants in the sixth were found not guilty. Less than half of all the appointed under the Health and Safety at Work Act elicited pessimistic evaluations of their efficacy: "The management lets you know what they want you to know"; "we're still treated like mushrooms — kept in the dark and fed with rubbish." L. Stearns, From Promise to Action: A Case Study in the Role of Subordinate Legislation 24-25 (unpublished 1982).

89. This fear of political exposure affects all regulatory agencies and may explain why prosecutions tend to follow deaths or serious injuries — the agency wants to show that it has not been caught napping, when obviously it has. Throughout the 1950's the British Chief Inspector of Factories initiated two-thirds to four-fifths of all its prosecutions with respect to machinery following an accident. Veljanovski, Regulatory Enforcement: An Economic Study of the British Factory Inspectorate, 5 LAW & POLY. Q. 75, 90-91 (1983). We have seen already that all criminal prosecutions under OSHA followed deaths at work. See note 27 supra.

90. Bardach and Kagan deplore unannounced inspections, p. 106; workers believe that notice to employers nullifies the value of the inspection. See notes 122-23 infra and accompanying text.

91. It is worth noting that resistance was not a reaction to unreasonable regulation but opposition to any regulation.
defendants (10 out of 23) were found guilty (8 after pleas, 2 after trial). Of these, one was admonished, and nine were fined amounts between £25 and £400 — an average of £214 each (pp. 267-68). Such leniency in an industry whose annual earnings were in the billions of pounds dramatically illustrates the conventionalization of crime (p. 231).92 Nor did regulatory agencies make use of their extrajudicial powers: they “very rarely” closed down an installation for violating regulations and instead granted temporary exemptions or issued partial certificates (pp. 251-52).

The Petroleum Engineering Division of the British Department of Energy is the “good inspector” lauded by Bardach and Kagan. It is a model of “reasonableness.” It is at least as concerned with production and with industry costs as with safety. Many of its inspectors have had experience within the industry, and many look forward to future employment there. The PED administers a regime of legislation and regulations formulated in cooperation with the industry. It rarely prosecutes violations, and even then it can seek only trivial sanctions. It refrains from using its summary powers.

This reasonable regulatory regime oversees the industry with the worst safety record in the country. The injuries and deaths it condones are caused by carelessness, overwork, inexperience and haste, not by technological limits or an ungovernable environment. Both the regulatory regime and the industry reflect the political economy within which they operate: the market for oil, the structure of producers, the distribution and control of other energy reserves, the vulnerability of the British economy, the exigencies of the Tory Government, and the weakness of labor. It is these factors, not the character of regulatory personnel, that produce the risk and determine the nature of the regulatory response. Carson’s book, in sum, is a powerful antidote to Bardach and Kagan’s mystifications.

III. LISTENING TO VICTIMS

Dorothy Nelkin and Michael S. Brown provide another essential perspective ignored or distorted by Bardach and Kagan. In *Workers at Risk: Voices from the Workplace*, they allow seventy-five workers to speak at length about the experience of being exposed to toxic chemi-

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92. This phenomenon is pervasive. I already have presented American evidence. *See* note 27 supra and accompanying text. In the State of South Australia, there were only six successful prosecutions for health and safety offenses in 1977. In the State of Victoria in 1977, 106 prosecutions secured 88 convictions, but the average fine was only A$95.97. Gunningham & Creighton, supra note 47, 157 n.25. In the nearly seven decades between 1897 and 1965 there were 255 prosecutions for safety violations of the New South Wales Coal Mines Regulation Act, an average of 3.7 a year, of which three-quarters were successful. The maximum fine was £35, but many were much lower. During the same period, however, the state successfully prosecuted 26 miners for safety violations, and mine owners successfully initiated an average of 24 private prosecutions a year, or more than 8 times as many as the successful state prosecutions of owners. *See* Hopkins & Parnell, supra note 83, at 188-89.
The authors make no pretense of "objectivity" or "balance." If justification for such partisanship is needed, Bishop Desmond Tutu phrased it cogently in a speech at UCLA Law School a week before he was awarded the Nobel Prize for Peace: if you want to know whether the noose is too tight, ask the victim, not the hangman. The authors do not claim that these voices are representative, for the sample was not chosen randomly. But they do argue that "the meaning and social context of human behavior, the importance of subjective experience, and the connections between such experience and behavior" are indispensable for understanding the response to risk, and they offer this testimony as evidence of relations between consciousness and behavior that demand further exploration.

In presenting these insights, I will borrow an analytic framework from an article on the transformation of disputes. Workers exposed to toxic chemicals first must name the risk; next they must assign blame for it — to their employer, themselves, or simply the nature of things; and finally they must make a claim — for a lower level of risk, for control over exposure, for information, for compensation, or for some other solution. It is important to understand the factors that influence each stage in this transformation.

Naming the hazards of the workplace may be the most difficult step, for worker ignorance can foreclose any possibility of corrective action. These workers accuse their employers of withholding essential information: failing to warn of the risks associated with PCB (p. 11), methyl chloroform (pp. 38-39), and epoxy (p. 62); concealing dangers — for instance, by adding a mint smell to a toxic chemical (p. 28); refusing to allow workers to see the results of their medical examinations (pp. 19, 158); obscuring long-term risks, especially of cancer.


94. In this respect the book continues the tradition of such revealing accounts as S. TEREKEL, WORKING (1974).


96. In Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), the California Supreme Court held that an employee could sue Johns-Manville in tort, even though workers' compensation generally was the exclusive rem-
(pp. 152, 167); and providing safety information that is either too technical and complex or too general and incomplete, when they offer any at all (pp. 59-61, 151, 153, 156).97

Workers confess that their lack of control leads them to deny dangers and minimize risks (pp. 45, 86, 93-96):

There are no options. So we keep our mouth shut. We never talk about the issue with our friends who work for the railroad. . . . And when we do mention it, they say, "Oh, you sound like those Vietnam veterans," or "Shut up, we don't want to hear it." [P. 93.]

I've passed the right-to-know stuff around the shop. Two or three guys looked at it and threw it down. They say, "Hey, you're scaring me. I can't come to work anymore." [P. 95.]

This reluctance to acknowledge risk appears to be associated with a wide variety of personal characteristics. Younger workers believe themselves to be indestructible,98 self-sufficient, and capable of dispensing with union support, yet they, most of all, want to enjoy the endless life they see before them (pp. 40-41, 106, 119).99 Older workers boast of surviving and argue that others should be able to endure similar risks; looking forward to retirement, they do not want to make waves (pp. 40, 106). Discussions among workers are an essential part of the process by which vague personal anxieties are named as concrete risks, but men share their concerns less openly than women, both because they are less sociable and because they fear to admit weakness (pp. 34-36, 46-47).100 Workers who view themselves as professionals and the self-employed are much more willing to trust the judgment of employers and manufacturers (pp. 151, 166-67, 179-80).

Yet if some deference to employers still prevails, workers increasingly demand the right to know the risks to which they are exposed (p. 164). Worker consciousness of risk has been expanded greatly as a result of the activities of the Occupational Safety and Health Adminis-

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97. Residents of Love Canal also found the information supplied by the state health department to be confusing and inadequate. See A. LEVINE, supra note 29, at 75-76.

98. For a social psychological study of belief in invulnerability and of the consequences of victimization for such a person, see Perloff, Perceptions of Vulnerability to Victimization, J. Soc. Issues, No. 2, 1983, at 41.


100. But women also can be silenced by trying to fulfill male expectations; the sole woman industrial painter in a male crew outdid the others in courting risk to prove herself a regular guy. Pp. 62-63.

On the importance of exchange with and support by those who have experienced similar misfortunes, see Coates & Winston, Counteracting the Deviance of Depression: Peer Support Groups for Victims, J. Soc. Issues, No. 2, 1983, at 169. In the Love Canal tragedy, those who lived in the area most severely affected by chemicals found each other indispensable: "We are the only ones who can really understand each other. We can hardly talk to anyone else about how we really feel." A. LEVINE, supra note 29, at 186.
tation. In 1969, a year before OSHA was established, only thirty-eight percent of production workers believed they were exposed to risks; eight years later the proportion had more than doubled (pp. xv-xvi).

But workers do not rely passively on regulatory agencies to alert them to and protect them from risk. Interaction among workers is even more important in identifying and responding to hazards. Unionized workers consistently are more aware of risk than their unorganized counterparts (p. 24). The following account clearly illustrates how discomfort is transformed from a personal failing into a collective grievance:

I started working at the museum about a year ago and immediately got various ailments that I never had before. . . . I thought it was stress because I hadn't worked full time for a few years. I just explained to myself that I wasn't cut out for full-time work and was having a hard time adjusting to it. . . . Then two other people got the same kind of rash and we all worked on the same floor. That made me think that there was something in the air.

. . . I started asking everyone if they had any symptoms and found an incredible number of people on the staff with dizziness and eye problems. . . . Other people who thought they were getting hay fever now began to think that it was this chemical. We were talking one day at coffee and came up with 17 out of 42 people who work here who had mysterious rashes. [P. 36.]

On the other hand, when workers constantly are moved around the plant, the interaction necessary to uncover common problems is disrupted (p. 179). Those who suffer personal illness or injury or the death of a loved one have the strongest possible incentive to pursue the search for causes and to reject easy solutions (pp. 32-33, 176). Some workers engage in library research and even conduct their own epidemiological studies (pp. 32-34, 49). Their findings are strikingly consistent with those of professional scientists, although workers still underestimate the chronic effects of long-term exposures (p. 31).

Once workers have named the risks that threaten them they must take the next step of attributing blame. Just as employers hide the
risks from workers, so they also seek to blame the workers for them: 104

They try to make you feel the problem is yours alone, even the chemical problems. If you come down with a rash, even if 10 people come down with a rash, it’s all your individual problem. [P. 57.]

The company has a big safety program, but it’s very superficial — they’d rather put the burden on the employee. Think safety, wear your hard hat, do this, do that. Everything is the employee’s fault. [P. 64.]

Employer safety precautions reflect and reinforce this attribution by focusing on employees rather than on the work environment. They prohibit smoking rather than reducing chemical fumes (p. 55). Most important, they require employees to use personal protective equipment rather than introducing engineering controls (pp. 69-70, 80 n.2). The reasons are not only the relative cost of each and their effects on production but also the fact that subsequent failure to use protective equipment allows the employer to blame the employee. The scientific community strongly reinforced this bias until recently (pp. 50-51).

In light of this, it is not surprising that many workers do blame themselves when they suffer injury or illness. 105

The first thing that occurs to you is that your fear is making you make up things. I have to say to myself over and over, “Seventeen people out of forty have rashes”; I have to repeat these numbers to legitimize my complaints. If I didn’t know other people with those complaints I’m sure that I would have convinced myself that I was causing it by being just nervous or exhausted. People tend to blame themselves. [Pp. 60-61.]

Some become obsessed with their personal lifestyles, hoping to devise a charm against the danger:

The only way I can protect my health is to change my life-style. So, I watch my diet, I have my wheat germ and my apple, my orange and my carrot. My carrot is my cancer stopper. They say carrots are good for you. They contain vitamin A. I don’t drink coffee or eat cake. I eat my apple and my orange. I walk two miles to work. . . . I walk in the rain. The only thing I can do is be in good shape, so maybe my body can fight things off. That’s the only control I have.

I can’t stop what’s happening at the plant. [P. 89.] 106

Although workers do behave in ways that aggravate danger, these behaviors cannot be considered “voluntary”: a hairdresser and an indus-

104. “[T]he designation of human error, or pilot error, is a convenient catch-all for ‘mishaps whose real cause is uncertain, complex, or embarrassing to the system.’ ” C. Perrow, supra note 11, at 133.


106. The speaker, an electrician in a chemical factory, was exposed to PGCH and suffers from asthma and severe allergic reactions. Pp. 188, 194.
trial painter smoked in order to kill the odors of the chemicals that surrounded them; the painter also drank to counteract the effects of lacquer thinner fumes (pp. 27, 29-30). Having incurred risks that society characterizes as voluntary, workers become less concerned about the risks imposed on them. A laboratory technician said:

I understand the nature of risks and know that every cigarette I have totally outweighs whatever I could get making up a few micrograms of this thing that says, “Shown to cause... cancer in animals.” Isn’t that awful? Knowledge breeds contempt. [P. 43.]

Yet workers acquiesce less readily in the attempt by employers to shift responsibility by insisting on personal protective equipment. They find such devices intensely uncomfortable as well as intolerable impediments to the tasks they must perform and the production norms they must meet (pp. 70-72, 76-78). Furthermore, they encounter severe social pressures against using protective equipment: a hair stylist felt she could not wear a mask while exposing her customers to the same fumes; supervisors and even fellow workers ridiculed those who took precautions (pp. 77-80).

Economists and employers often argue that workers must accept responsibility for risk because they choose to incur it by accepting a job. I responded above that this mystification confuses workers with consumers. The latter sometimes do have real choices, as shown by the care that most producers take to protect the patrons of beauty salons but not the workers, or the audience in a theater but not the stage crew (pp. 17-18, 81). Workers occasionally do appear to make meaningful choices. A few accept risk as inherent in work they find intrinsically satisfying because they are relatively autonomous: a sculptor, a physicist, a firefighter, a rosarian, a self-employed furniture restorer, or a deckhand. In addition, at least two women derived satisfaction from having broken gender barriers: the deckhand and an industrial painter (pp. 97-99). And occasionally workers illustrate the economists’ model and accept risk in exchange for higher pay (pp. 85, 165).

But most workers incur risk because they see no alternative: all

107. Workers tend to underestimate routine risks. P. 83. See Hale & Pérusse, supra note 76, at 78.

108. Like many others, I can attest to the intense discomfort and inconvenience of protective devices even when production norms are self-imposed — as in home improvement. Anyone who has tried to operate a pneumatic drill with earmuffs, or a sandblaster while wearing a hood, or applied fiberglass insulation or adhesive for floor tiles while wearing a mask will be horrified by Bardach and Kagan’s suggestion that these are adequate and acceptable protections.

109. See note 15 supra and accompanying text.

110. One reason for this difference is that workers are less likely to complain (because of their subordination) and can claim only workers’ compensation, which pays a fraction of tort damages. Thus, an employer may be willing to expose a worker to the risk of sterilization (which causes no wage loss and therefore does not expose the employer even to liability for workers’ compensation) but not to a mutagen or teratogen, which might produce a deformed child who could sue in tort. P. 146.
jobs have risks, and workers see little choice among jobs. They are lucky to have even one.

I guess, I probably figure, everybody's going to get it one way or another. . . . I'm not ready to quit my job and go through all the bullshit I'd have to go through to get another job when I'm not sure whether it's killing me. . . . My field is art and whatever other job I'm gonna get it's gonna be the same. [P. 88.]

. . . Jesus, it's a chemical plant and the lime's there and part of the process and no one is going to get rid of the lime. You've got to keep that plant running. So what can you do about it except make sure that everyday you put your cream on. [Pp. 31-32.]

Workers stay on the job in order to qualify for pensions, and the longer they stay the harder it is to quit (pp. 88, 91). They rationalize the decision: “seeing that I had worked with [a potentially mutagenic chemical] for maybe five or six years before I knew, the damage that could be done was probably already done . . .” (p. 40). They feel powerless to reduce risk: “if you refuse to do something the guy in back of you will go ahead and do it instead” (p. 92). One worker put it succinctly:

You never balance the wage against the risk; you balance the wage against the alternative. And the alternative is starving when you're put in this situation. That's what's so phony about this cost/benefit analysis. [P. 91.]

Given the proportion of workers who do not name the risks they incur and the proportion of those who name the risk but fail to blame their employers, it is not surprising that the claim rate is so low. Half of all workers confronting danger fail to take any action whatever (p. 113). Of those who do, almost all (eighty-five percent) go directly to management; only seven percent appeal to a regulatory agency, and only six percent report to their unions (p. 113).

A number of factors contribute to this passivity. The first, and perhaps most important, is employer opposition. Workers see little to be gained by complaining when employers stall for years in making repairs (pp. 51-52, 54), wait until someone gets hurt (pp. 53, 115), disregard worker warnings (p. 59), display contempt for governmental

111. This feeling of impotence must have been aggravated during the recent recession. A Bureau of Labor Statistics report found that 5.1 million workers who had occupied their jobs for at least three years lost those positions because of plant shutdowns or staff cuts between 1979 and 1984. Two million never were reemployed, of whom 1.3 million still are looking for jobs and 700,000 have given up. Another 900,000 who found new jobs were earning less money — 60% of them at least 20% less. A further 6.4 million people lost jobs they had held less than three years. Report Depicts Human Toll of 2 Recessions, N.Y. Times, Dec. 2, 1984, at 36, col. 1.

112. The proportion of those who take some action after suffering injury or illness is equally low. See D. HARRIS, supra note 43, at 62.

113. Thus, workers already do what Bardach and Kagan urge. See text accompanying note 56 supra.

114. See text accompanying note 79 supra.
safety regulations (p. 56), and seek to cover up dangers (p. 114). Some workers even internalize the employer’s perspective: arguing that the latter has to make a profit, worrying that insistence on safety might close down the plant, and hoping that employer-employee cooperation will enhance safety (pp. 65, 169-70). But many more refrain from complaining out of fear of retaliation:

If you refuse to use it [a toxic chemical], you might get laid off, fired, or suspended, or at least the boss will remember who you are. So most guys don't want to rock the boat. [P. 62.]

I wouldn't ever call OSHA. I mean, it's a good way to make your job impossible. . . . You wouldn't be able to work here after you did a thing like that. [Pp. 130-31.]

OSHA wouldn't even deal with it, because they said I had to lodge a formal grievance against my employer for them even to come out to inspect. I didn't want to do that. [P. 131.]

Others are embarrassed about their disabilities or concerned that these will disqualify them from work (pp. 24-25, 142). Workers with family responsibilities are particularly apprehensive about employer reprisals (pp. 92, 94). Disabled workers refrain from claiming compensation for the same reason. They find the company physicians who

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115. This does not inspire much confidence in Bardach and Kagan’s proposal to trust employer self-regulation. See notes 67-72 supra and accompanying text.


117. See also p. 88. It is clear that workers find wholly inadequate the protections against employer retaliation that Bardach and Kagan deplore. See note 30 supra and accompanying text.

118. While misfortune sometimes evokes sympathy from others, it often stimulates uglier reactions. The residents of Love Canal were sometimes ridiculed, told that they had been fools to buy homes at Love Canal, suspected of trying to “make a bundle” from the government, accused of giving the city a bad name, sneered at for seeking publicity for its own sake, and feared as contaminated carriers of mysterious diseases. The comments and reactions stemmed not only from strangers and fellow workers but often from friends and even from relatives.

A. LEVINE, supra note 29, at 185 (footnote omitted).

The victims of the thalidomide tragedy were similarly embarrassed. See generally THE IN-SIGHT TEAM OF THE SUNDAY TIMES OF LONDON, SUFFER THE CHILDREN: THE STORY OF THALIDOMIDE (1979); E. ROSKIES, ABNORMALITY AND NORMALITY: THE MOTHERING OF THALIDOMIDE CHILDREN (1972). Parents resisted the characterization of their children as handicapped, disabled, or mentally retarded, and this inhibited the formation of groups. But the children themselves recognized each other as similar. E. ROSKIES, supra, at 144-46. On self-blame for illness generally, see S. SONTAG, ILLNESS AS METAPHOR (1978).

119. By contrast, one elderly male worker felt he could afford to lose his job. P. 129.
examine them biased and unsympathetic (pp. 136, 139-42). And they know that employers successfully resist compensation claims: only about forty percent of worker injuries are compensated and only two to three percent of worker illnesses; in 1975 only 1.7 percent of the 1.8 million worker compensation awards were for illness (p. 137). Families may be too distraught by the death of a loved one to pursue a claim (p. 144), and employers may persuade a worker not to claim by offering an easy job during convalescence (p. 143).

If workers feel it is hopeless to seek safer conditions or compensation from their employers, they have even less faith in regulatory agencies. We have seen already that only seven percent of those who complain, and only 3.5 percent of those who encounter risk, voice their complaints to a regulator. One reason, again, is fear of employer reprisals (p. 130). But workers also perceive OSHA — the only meaningful regulatory agency — to be weak, slow, inefficacious, and a captive of the industry.

OSHA is so underfunded and understaffed that, if you waited for them to get around to you, you’d be waiting a good long time. [P. 132.]

It was obvious that they [NIOSH] had no intentions of stepping on any feet in the government. . . . We’re talking about Dioxin and therefore about the Agent Orange problem. If NIOSH came up with any disturbing statements about its effect on us, that would be like one small weak branch of the federal government sticking a dagger in the heart of the Pentagon, which is not a small weak branch of the government. 121

We had an OSHA inspector come. I couldn’t talk to him. The vice-president of the company followed him around everywhere. [P. 133.] 122

OSHA inspectors come in and they look at something specific. . . . [They] never look next door. . . . The firm can make it look good when they have to. . . . If they know it’s time for an inspector to come around, they treat their people like kings. [P. 134.] 123

Although workers support government regulation and would like to see OSHA strengthened (p. 128), they know that ultimately they themselves must control risk.

We have a responsibility to teach our children that, just because someone told you something is safe, it’s not. Just because the federal government says something is okay, doesn’t make it great. I don’t think they have our best interests at heart. I don’t trust them. The responsibility has to

120. See D. Berman, supra note 72, at 95-98.
121. P. 132 (emphasis in original). Compare the competition between the HSE and the PED as described by Carson, text following note 83 supra.
122. Thus, OSHA already appears to be following Bardach and Kagan’s advice to talk to management, not workers. See note 58 supra and accompanying text.
123. In nineteenth-century Britain, inspectors believed that mill owners paid employees at railway stations and inns to tell them when the inspector was approaching. Bartrip & Fenn, supra note 65, at 211.
Workers resist paternalism from both their employers and the government. They reject Bardach and Kagan's proposal that a "trusteeship stratum" should have "responsibility" for their lives. They demand the right to know, confident that they possess the necessary expertise to evaluate and use such knowledge, and they insist on nothing less than autonomy — the right to control the dangers they confront.

It's not a privilege to work. It's my right to be able to work. . . . I also have a right to know if I'm working with anything that's harmful. I should have the choice of whether or not to work with it.

124. Disturbing evidence for this skepticism can be found in the federal government's heavy reliance on private laboratories to test chemicals. In 1976, the Food and Drug Administration discovered errors in the tests performed for it by the largest such enterprise, Industrial Bio-Test Laboratories. Investigations by government and the press over the next four years revealed the invalidity of most of the thousands of tests that had led to licensing hundreds of chemicals. See C. Van Strum, supra note 102, at 179-98; see also Curry, FDA Knew Drug Tied to Deaths Was Being Used, L.A. Times, May 1, 1984, § 1, at 1, col. 1 (failure to recall E-Ferol Aqueous Solution until after the deaths of 38 neonates); Drug Maker Pleads Guilty Over Lethal Side Effects, N.Y. Times, Dec. 14, 1984, at A23, col. 1 (thirty-six deaths and at least 500 severe cases of liver and kidney damage linked to Selacryn, approved by the FDA after insufficient clinical tests).

There is a real danger that government action will induce a false sense of confidence in citizens. Residents of the Love Canal area disregarded noxious fumes and skin rashes because the government's decision to build a school on the site and to grant mortgages to homebuyers indicated there was no danger. A. Levine, supra note 29, at 14. See also Hale & Pérusse, supra note 76, at 83:

Reliance on false safeguards may indicate a basic problem of allocation of responsibility for safety; because thinking about our own safety is such a dissonance-producing activity it is more comfortable to take any reassurance, however falsely based, that someone else is thinking about it for us.

125. The public values information to the extent that it is involved in collecting the information and controlling its production and distribution. See Gricar & Baratta, Bridging the Information Gap at Three Mile Island: Radiation Monitoring by Citizens, 19 J. Applied Behav. Sci. 35 (1983).

126. For a persuasive argument that workers should have the right to refuse dangerous working conditions, see M. Gibson, supra note 39, at 57-86. See also Abel, supra note 15, at 702-10. Workers invoking a right-to-know law may be subject to employer reprisals. A pregnant woman employed in making optics asked her boss for a list of the chemicals to which she was exposed. When she received no response she asked to be transferred out of the laboratory and into an office job until she received the information (as she was entitled to do under a four-year-old state law). Instead she was dismissed. Her employer claimed he did not know of his legal obligation. The woman has since won a court ruling that she was illegally dismissed. Ousted Worker Wins a Suit Under Toxic Chemical Law, N.Y. Times, Aug. 19, 1984, at 42, col. 5. But laws like this in 16 states and several municipalities may be preempted by a much weaker federal regulation that applies to only half as many workers (and no nonworkers) and to many fewer substances. 3 States Say OSHA Rule on Chemicals Weakens Their Laws, N.Y. Times, Jan. 1, 1984, at 26, col. 3.

Those exposed to herbicides also insist on the right to control that exposure. In rural Oregon, residents used force against persistent spraying of their homes, farms, and families by trucks and helicopters of the U.S. Forest Department. See C. Van Strum, supra note 102, at 218-30. A small town in northern Illinois, like others in some northern and eastern states, has passed an ordinance requiring commercial pesticide applicators to post a sign 72 hours after applying chemicals to lawns, stating, "This lawn chemically treated. Keep children and pets off for 72 hours." The law has been challenged on equal protection grounds in a lawsuit by the Pesticide Public Foundation. Lawn-Care Concerns Fight Pesticide Sign Rule in Illinois City, N.Y. Times, Dec. 2, 1984, at 73, col. 1.
When you do a job day in and day out, you're the expert on the job. You know how it runs. Management can design the machine, but the man that runs it for 10 years is going to know more about that machine than management. [P. 170.]

What we need is a system of government that says you can do whatever you need to do to protect yourself on your job. [P. 127.]

Nor are workers interested simply in maximizing their own safety at the expense of others, as the economists' view of human nature presupposes.

My wife is very upset about my working with all these chemicals. She would like me to quit. But if I were to do that and obtain another job, I would be just throwing in the towel, giving up that commitment to a safe and healthy workplace. I'd be reducing my own risk of occupational disease or accidents, but doing nothing for the workers who remain. [Pp. 105-06.]

I have a responsibility to see that it's a safe place to work. I don't want to leave it the same way I found it. [P. 109.]

In order to take control of their lives, help all workers, and withstand employer reprisals, workers must act collectively. The traditional mechanism has been the union and, more recently, the Committees on Occupational Safety and Health that unite rank and file workers, union officials, health professionals, and social activists (pp. 104-06, 129, 161-62). Yet unions have disappointed many. Fewer than one in every five American workers belongs to a union. Only three international unions have had the interest and resources to employ staff with technical expertise in health and safety issues (pp. 116-17). And, with some notable exceptions, American unionism has been preoccupied with bread-and-butter issues rather than safety — a bias intensified by the recession of the 1970's and the Reagan administration's attack on organized labor. The workers in this book repeatedly voice disillusionment: union officials are invisible and inaccessible, unions are undemocratic, officials are too quick to use grievance procedures that inevitably result in compromise, and unions sometimes even discourage workers from claiming compensation (pp. 117, 119-20, 145). Unions rarely wield their ultimate power: only

127. Although astronauts originally were intended to be little more than guinea pigs, passively exhibiting the effects of space travel upon humans and symbolizing man's conquest of space without having any responsibility for directing the mission, the intervention of the astronauts in the Apollo 13 mission was all that saved them from death and the mission from disaster. See C. Perrow, supra note 11, at 258-81.


129. One reason why unions may be unenthusiastic about bargaining over health and safety is the threat of being sued for striking bad bargains or failing to enforce the agreements they reach. See Drapkin & Davis, Health and Safety Provisions in Union Contracts: Power or Liability?, 65 Minn. L. Rev. 635 (1981).
0.7% of the 3885 strikes in 1980 were sparked by health and safety issues (p. 121 n.3). Workers are reluctant to strike for fear of losing wages and suffering retaliation (p. 122). Yet they realize that their only hope for autonomy is their right to withhold labor. [If you don't have the right to strike, that is, the right to walk off the job and withhold your labor, then your boss is an absolute dictator who has the right to kill you because you don't have any choice. [P. 166.]

The portraits of risk presented by Nelkin and Brown and by Carson are diametrically opposed to the image that Bardach and Kagan seek to construct. It is no exaggeration to say that the former speak for workers and the latter for capital. Workers encounter extraordinary obstacles in naming the risks they experience, blaming their employers, and claiming enhanced safety or compensation for damage done. Yet capitalists believe it is far too easy to name, blame, and claim. Workers feel they voice too few grievances, capitalists that they assert too many. Workers claim the right, as victims, to speak out. Capitalists denounce such complaints as artifacts of overzealous regulation. Workers claim the expertise that comes from experience, while capitalists dismiss such lay pretensions, insisting on formal credentials and the scientism of cost-benefit analysis. Workers value collective action, through which they share knowledge, overcome fear, and acquire power; capitalists extol individualism (for others). Workers perceive risk as involuntary and blame those who control their lives; capitalists exaggerate individual freedom and blame the victim. Workers fear retaliation and experience the workplace as a locus of struggle; capitalists proclaim labor-management harmony and promise solicitude if workers only abandon their demands. Workers see regulatory agencies as weak and captive; capitalists see them as overbearing and unreasonable. Workers demand autonomy; capitalists believe that they alone should be autonomous, while workers should defer to the authority of capital and have faith in the paternalism of the “trusteeship stratum.” Not for the first time do the conclusions of scholars reflect which side they are on.

IV. OLD SLOGANS, NEW STRUGGLES

The arguments in these three books are depressingly familiar. The message of Bardach and Kagan was put more succinctly thirty years ago by Charles Wilson, President Eisenhower's Secretary of Defense: What's good for General Motors is good for the country. Their solicitude for corporations who must stop inflicting risk on workers, consumers, and citizens evokes another memory of the fifties — how painful it was said to be for racists to stop discriminating. In opposition, both Carson's book and that of Nelkin and Brown document

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130. For an example of a successful “work to rule” action (whereby employees adhere to the letter of company rules, slowing production), see pp. 120-21.
once again how little worker health and safety weighs in the capitalist
calculus of profit. Yet if the lessons are old, the battles always are
new. People will not surrender their insistence on autonomy and
equality in the confrontation with risk.