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## The Case of the Burnside Foundry\*

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## **Abstract**

In this article we explore the right to refuse an unsafe assignment. We argue that an effective right to refuse is a necessary condition for informed consent to workplace hazards.

**KEYWORDS:** burnside, foundry, case

## The Case of the Burnside Foundry\*

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In this article we explore the right to refuse an unsafe assignment. We argue that an effective right to refuse is a necessary condition for informed consent to workplace hazards. Noting that the right to refuse, as well as any other rights that workers have by virtue of being workers, is empty if one does not have a job, we go on to explore the claim that a person has a right to a job. We conclude by observing that the same considerations which support the claim that they have a right not just to any job, however demeaning, meaningless, routine, or boring, but to useful and challenging work.

The Burnside Foundry in South Chicago:

*February 14:* Six workers are sent home by the company for refusing to work on the furnace floor, where pools of water up to three inches deep have been collecting in tapping pits.

*February 15:* The six men return to work. They know that if any of the 3200 degree molten metal being poured from the furnace into a ladle were to make contact with the water on the floor, a tremendous explosion would rock the foundry. The company says that it will remove the water from the floor.

*February 16:* Molten steel is being poured from the furnace into the ladle. The ladle jams. Two maintenance men, Steve Mihalik and Lawrence Stiff, go to work on the jammed ladle. Neither has any protective clothing, face shield, or flame retardant equipment which the company is required to provide.

Suddenly the ladle unjams. The hot liquid metal spills over the side. In the tapping pit below, the three inches of water there is instantly turned into a mass of steam, expanding in volume more than one thousand times. Massive energy is released, spraying hot metal in all directions, and Mihalik, Stiff, and 18 other workers in

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the area suffer severe burns over their bodies.

*The evening of February 16:* Steve Mihalik dies from . . . burns over 90 percent of his body.

*February 25:* Lawrence Stiff dies, and shortly afterwards fellow steelworkers Albert Chisholm, Jr. and Lewis O'Daniel also die. Stiff, Chisholm and O'Daniel are black.

In the aftermath of the explosion at Burnside, Occupational Safety and Health Administration (OSHA) officials conducted a two-week investigation and then announced their findings. They found that the company had not taken adequate precautions to prevent the explosion of February 16th and levied a fine of \$42,000 and ordered the company not to reopen for production until all violations are corrected.

David Marshall, secretary of the grievance committee of Local 1719, pointed out that the union has filed more than 50 grievances in the past year on safety related problems, and that a year ago two men were badly burned when the ladle overturned due to defective bearings. Two years ago, Marshall added, a worker was decapitated at Burnside when a moving crane whose operator could not see the man, swung it against him.

"The safety Committee has to have more power to deal with the company at the shop level," said Marshall. "We should be able to file charges, levy fines against the company when they violate the safety of the men, and set a time limit of eight hours for the company to correct unsafe working conditions, with the men being paid their regular hourly rate of pay while they wait for the company to make the necessary changes."

James Balanoff, director of District 31, USWA, labeled the deaths at Burnside "murder," and pledged that "if I do nothing else, I am going to bring these companies into the 20th century."

Balanoff said there have been nine deaths in District 31 plants in the past year, with eight of them in the South Chicago area.

Workers in the steel mills, coal mines and other industries are demanding stronger contract clauses on safety and health; especially protection for workers who refuse to work under unsafe conditions. In addition, many workers are asking why management officials who are responsible for overseeing the carrying out of safe working conditions, should not be held liable when workers suffer death or injury due to unsafe jobs. . . . [from an article by Herb Kaye, *Daily World*, March 15, 1979]

## Steel

In addition to burns, explosions, and myriad other accidents, steel foundry workers may be exposed to silica dust, carbon monoxide, resins such as phenol formaldehyde, hydrocarbon, coal tar pitch, lead (for leaded steel), galvanizing chemicals, noise and heat stress (Scott, 1974 41). Let us look briefly at the effects of a few of these hazards.

*Silica dust* causes silicosis, a scarring of the lungs which causes them to become progressively inelastic, making it more and more difficult to breathe, and preventing passage of oxygen to the blood. The scars may join together and form larger scars, which may occupy the entire lung. This process, called progressive massive fibrosis, is often accompanied by increased susceptibility to tuberculosis and other lung infections. The heart, due to the strain of pumping blood through inelastic lungs, becomes enlarged and fails to pump effectively (Stellman and Daum, 1973, 167-69).

According to Rachel Scott, "Three foundries in Muskegon, Michigan, employing thirty-five hundred to four thousand men, have for years produced about four hundred new cases of silicosis annually. Ten percent of the entire workforce, in other words, was disabled every year" (Scott, 1974, 41).

*Carbon monoxide* is a colorless and odorless gas so one can be exposed with no way of knowing it. It attaches and binds itself chemically to hemoglobin, the blood component that normally carries oxygen in the blood. If body tissues do not receive a constant supply of oxygen, they stop functioning and die. The brain is most susceptible, and early symptoms of carbon monoxide poisoning are the results of brain misfunction due to lack of oxygen. Acute symptoms: headache, then throbbing headache, reddening of the skin, dizziness, dimness of vision, nausea, vomiting, and at higher concentrations, coma, suffocation, and death. Long term, low dose effects: headaches, dizziness, decreased hearing, visual disturbances, personality changes seizures, psychosis, palpitations of the heart with abnormal rhythms, loss of appetite, nausea and vomiting (Stellman and Daum, 1973, 164-65).

*Coal tar pitch* causes dermatitis accompanied by pains, swelling, rash, and blisters, skin cancer, including scrotal cancer, lung irritation, and may occasionally cause pulmonary edema (Stellman and Daum, 1973, 193-94).

In the coke ovens powdered coal is converted into coke, a hard, dense fuel that is used to charge the steel furnaces. This is the dirtiest workplace in a foundry. Coke oven workers risk excessive exposure to

coal tars. They develop cancer of the scrotum at a rate five times that of the general population. They also develop cancers of the lung, bladder and kidneys at rates greater than the general population (Scott, 1974, 45). A study begun in 1962 and published by the U.S. Department of Labor in 1974 examined the health records of 100,000 steelworkers at 17 plants. Among its findings were the following: Coke workers as a group are two and one-half times more likely to die of lung cancer than steelworkers who do not work in coke plants; after five years on the job in the coke plant the lung cancer rate rises to three and one-half times the normal rate; for workers on top of the coke batteries with five years on the job, the death rate is ten times higher than normal (Spencer, 1977, 224; Scott, 1974, 45-46).

Considering these facts, it is important to note that while the overall percentage of blacks in the workforce in basic steel is 22 percent, in the coke oven area it is 90 percent. Of all black coke oven workers, 18 percent were in full-time topside jobs, compared to 3.4 percent of white coke workers (*Safer Times*, July/August, 1978, 3).

*Heat stress* takes various forms, depending on the conditions of exposure, degree of activity, and individual body response. There are four types of acute reaction: heat stroke, heat exhaustion, heat shock, and heat fatigue.

*Heat stroke* involves a sharp rise in body temperature accompanied by confusion, angry behavior, delirium, and even convulsions. The skin is warm and dry, and there is no sweating. It can be fatal.

In *heat exhaustion*, or heat fainting, the victim feels tired, giddy, and nauseated, and may feel chilly. There may be rapid, shallow breathing, a weak, slow pulse, and moist, clammy, cold, pale, or even bluish skin. The blood pressure is low because the blood vessels all over the body are dilated, and there is not enough blood to circulate through these enlarged vessels.

*Heat shock* is a form of heat exhaustion common in healthy persons working in a hot environment to which they have not become acclimatized. The body loses excessive amounts of fluid and/or salt due to inefficient sweating. There may be insufficient fluid in the body to maintain circulation to all organs. Lack of salt may result in heat cramps, weakness, nausea, headache, fatigue, and dizziness. The victim becomes irritable and suffers muscular weakness.

*Heat fatigue* is characterized by the lassitude, irritability, and easy fatiguability that are familiar hot weather sensations. "A person with heat fatigue does not work as well, produces less, makes more mistakes, and has more accidents. The feelings get worse if the fatigue

is not relieved by rest. Heat fatigue may affect a person's personal relations on the job and at home as well. Thus in addition to paying a physical price for working in a hot environment, a worker will pay an emotional price" (Stellman and Daum, 1973, 128).

Prolonged exposure to a hot environment results in a process called acclimatization. The process takes from four to six days and is most effective in young people; older people never acclimatize to heat completely. Changes occur in the circulatory system and in the volume and composition of sweat. Dilation of the small blood vessels of the skin allows the heat of the blood to be transferred through the skin back to the environment. This increases the work load for the heart since blood must be pumped through a larger total circulation area. To compensate for this increased work load, the blood vessels to the liver, stomach, and intestines constrict. The liver is sometimes damaged by lack of oxygen resulting from prolonged active work in a hot environment (Stellman and Daum, 1973, 123-28).

### Discussion

Let us begin this discussion by picking up the thread of an issue that links the first three chapters and, less directly, the fourth as well. In the first chapter we raised the question whether the Cyanamid case could be called a case of sterilization without informed consent, due to lack of genuine consent. In the second chapter we raised the same question concerning the Oxy case, this time due to lack of information. We went on to explore the more general right of informed consent to risks and hazards one is exposed to on the job, and its implications for the right to know. In this chapter we shall look at the implications of the right of informed consent to risks or hazards on the job for the issue of the right of workers to refuse an unsafe work assignment.

It is not clear from the report of the Burnside Foundry case whether any of the workers who were sent home on February 14th for refusing their assignments were among those killed or injured on the 16th. It seems likely that some of them were the same, but that is not really important. What is important is whether the workers had a right to refuse to be subjected to a risk of what they believed to be a high probability of serious injury or death, and if so, what the bases of that right are, and what the right entails.

Workers have been dismissed (and told they had *quit*), fired for insubordination, suspended without pay, sent home without pay for the remainder of a shift and told not to return until ready to do the job,

had disciplinary letters placed in their files (which can later be used to justify firing, not promoting, etc., on the grounds that a person is uncooperative or a troublemaker)—all for refusing assignments they believed to be unsafe. The arguments to justify these responses on the part of employers seem to be one or more of the following:

1. The employee accepted the job. This is part of the job. Therefore, the employee should do this or (a) be considered to have quit, or (b) be fired for insubordination for refusing to do the job he or she was hired to do.<sup>1</sup>
2. If workers are permitted to refuse assignments, plant discipline will break down and chaos will ensue. Therefore, workers who refuse must be let go or otherwise disciplined.
3. To pay workers who have refused an assignment on the grounds that they consider it unsafe would be to pay them for not working rather than for working, and surely that no employer is bound to do.
4. If workers had the right to be paid in such circumstances, that would be tantamount to a right to strike with pay, and surely workers do not have *that* right.

In the first argument, the assumption seems to be that in accepting a job a person agrees to carry out any assignment falling within that job, so to refuse an assignment is a breach of the employment contract. There are at least two possible responses to this argument.

The first response is to deny that the unsafe assignment is part of the job. An assignment that poses a serious threat to life, health, or safety cannot be said to fall within the definition of any job except for those where extreme risks are expressly understood in advance. Even so, this is a matter of degree. Coal miners daily face risks most workers do not face simply by entering the mines. But if a tunnel ceiling has not been properly inspected and repaired, the fact that they have agreed to the risk of working underground cannot be used to argue that they breach that agreement if they refuse to enter a shaft that does not meet legally required—or other reasonable—safety standards.<sup>2</sup> A stunt

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1. In either case (a) or (b), if the employer's version is accepted, the worker is precluded from collecting unemployment insurance in many states. One cannot collect in most states if one quits voluntarily or is fired "for cause."

2. It is neither necessary nor sufficient that a legal safety standard be violated before a worker may be justified in refusing an unsafe assignment. A violation may not be serious and may pose no immediate danger, hence, the assignment is not unsafe in

person agrees to accept risks that other actors are not expected, and would rightfully refuse, to face. But if a stunt person regards a particular stunt as poorly designed, or believes crucial safety equipment to be defective, he or she can rightfully say that *those* risks are *not* part of the job. According to this response, a crucial premise of the first argument is denied.

The second response does not deny that the assignment in question is part of the job. It points out that the employer has the legal and moral and often contractual obligation to provide a safe and healthy work environment. So it is the employer, not the employee, who has breached the employment agreement or contract.<sup>3</sup> Still, many collective bargaining agreements contain grievance procedures, and a worker who alleges that the employer is in violation of the contract is normally expected to file a grievance and proceed with his or her assigned work.<sup>4</sup> This approach is obviously inadequate in the case of a serious and immediate threat to life, health, or safety. Thus it is the seriousness and immediacy of the threat that supports the right to refuse. Such refusal is not itself a breach of the employment agreement, however; rather it is a response—the only adequate response available—to a breach by the employer.

Either way, there is no justification for claiming that, by refusing an unsafe assignment an employee either breaches the employment agreement or is insubordinate.<sup>5</sup> It cannot be that, in accepting a job, one consents to all risks and hazards that may be encountered in that job. To be meaningful, the right of informed consent must apply at two

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the requisite sense. So violation is not sufficient for justified refusal. On the other hand, there may be no specific standard covering a particular hazard which nevertheless poses a serious and immediate threat. In such a case, I claim, refusal is justified; so violation is not a necessary condition for justified refusal. So far, I am not talking about the *legal* status of the right to refuse; we shall come to that later.

3. Even if there is no written contract, or no explicit mention of health and safety in an existing contract, presumably fulfilling one's legal obligations as an employer may be understood as implicit in any employment agreement.

4. Unless the union agrees in the contract to give it up, workers do have the right to strike over contract violations. But we are talking now about an individual or several individuals refusing a particular assignment, not about a strike.

5. Insubordination is generally accepted as, and is explicitly recognized in many union contracts, as grounds for dismissal. (In most contracts, management has the right to fire for just cause, and in many 'just cause' is spelled out as including insubordination.) This reflects the traditional view that strict plant discipline is an important employer prerogative. It is revealing that failure to be subordinate should be grounds for voiding what purports to be a voluntary contract among equals.

levels. Before accepting a job and while remaining in it, one has the right to the information needed for informed consent to the risks that the job entails. One must also have the right to refuse a particular assignment one believes to constitute a serious and immediate threat to one's life, health or safety. And note that the right to know is an indispensable part of the right of informed consent at both levels. Both the right of informed consent and the right to a safe job are, in practical terms, empty if the price of refusing an unsafe assignment may be one's job. Indeed, these rights, along with all other rights of workers, are relatively empty in the absence of an effective right to a job. This is so in several ways, as we shall see below.

We have, I believe, disposed of the first of the employer arguments against the right to refuse. But what of the second argument, that if workers are permitted to refuse assignments, plant discipline will break down and chaos will result? We might look at the experience elsewhere, for example in Canada, where legislation passed in seven provinces during the 1970's guarantees the right to refuse:

Fears by management that health and safety issues would be exaggerated out of proportion or used to further other collective bargaining goals have not been borne out. In 1500 cases of work refusal in Saskatchewan, all cases were considered to be legitimate by Saskatchewan authorities. Experience has also shown that the increased worker participation in making actual operational decisions on health and safety has reduced potential for industrial conflict, in addition to raising awareness about safety. [*NJCOSH Newsletter*, May 1979, 1]

In Saskatchewan, the right to refuse is held by individual workers, though groups of individual workers can exercise it together. The worker or any member of the legally mandated union-management health and safety committee can call in an inspector to arbitrate if there is a dispute. (According to provincial officials, that occurs in fewer than five percent of the cases.) The inspector is required to render a decision as soon as possible, usually within twenty-four hours. If an employer feels that the worker did not have "reasonable grounds" to believe the situation was "unusually dangerous," the employer must prove it before disciplinary action can be taken. The employee must receive normal pay and benefits until the issue is settled. Even so, Jennie Smyth of the provincial safety division reports, "The right to refuse has been underused rather than overused. There have been many situations we hear of later in which people should have refused but were

afraid to" (Witt and Early, 1980, 25).

Workers in Sweden also have a strong right to refuse. Individual workers have the right to refuse dangerous work, and the government mandated safety committee (more than half of whose members must be elected by nonsupervisory employees) can shut down unsafe operations.<sup>6</sup> They can be overruled only by a government inspector. Even if overruled, no worker can be punished for exercising the right to refuse unsafe work or stop an unsafe operation unless the action was taken in bad faith. Swedish central labor confederation attorneys report that they know of not a single case in which a worker has been prosecuted for deliberate abuse of these rights. Since the right of safety committees to stop dangerous work went into effect in 1974, use of it has resulted in the intervention of government inspectors only about twenty-five times per year in the country's 160,000 workplaces (Witt and Early, 1980, 25).

Considering that the right to refuse is vital to the effectiveness of the right to a safe job and to the right of informed consent to job hazards, the case against the right to refuse would have to be very strong indeed to justify its denial. That some unjustified refusals might occur would certainly not be sufficient reason. Yet there seems to be no reason to assume that workers would abuse the right to refuse, and experience where the right has been in effect for some years argues against the assumption. Thus the second employer argument fails.

The third argument is not directed against the right to refuse itself, but against the obligation of employers to pay workers who have refused an assignment on the grounds that it is unsafe. One potential buttress for this argument, that paying workers who have refused would lead to massive abuse of the right to refuse, is not plausible in light of the Canadian and Swedish experiences. Thus the argument must rest on the claim that it would be an injustice to the employer to require that a worker be paid after refusing an assignment, for this would require the employer to pay the worker for not working.

Many union contracts in the United States actually provide for the

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6. These committees also have the following rights: to veto any plans for new machines, materials, or work processes for health and safety reasons; to decide how to spend the company health and safety budget; to approve the selection and direct the work of the company doctor, nurse, safety engineer, or industrial hygienist; to review all corporate medical records, monitoring results, and other information on hazards; and to decide how much time they need to do their safety committee work, all of which must be paid for by the company (Witt and Early, 1980, 22).

right of a worker to refuse an unsafe assignment, but do not guarantee that the worker will not sacrifice his or her earnings by doing so.<sup>7</sup> The result is that the right is seldom invoked. In the course of discussing one case in which it was successfully invoked at a Republic steel plant, Charles Spencer writes:

Article Twelve reads: "If an employee shall believe there exists an unsafe condition. . .so that the Employee is in danger of injury. . .the Employee shall have the right. . .to be relieved from duty on the job in respect to which he has complained and to return to such job when the unsafe condition shall be remedied." It's not as simple as it reads. It's a bewildering and uncoordinated procedure that can be disastrous to any worker who invokes it. In the thirty years it has been a part of the union contract, it has never [until this occasion] been successful in correcting a single unsafe working condition—which accounts for the shift towards dependence on federal government intervention. Almost identical provisions are written into all union contracts, and the experience has been much the same.

Requesting to be relieved from duty until an unsafe condition shall be remedied runs into such hurdles as (a) Is there *really* an unsafe condition? who says so? (2) What's to happen to the workers "relieved from duty" if there's no other work available? They can't be paid for staying home. (3) Who shall decide if the unsafe condition has actually been remedied? (4) What happens to the other workers who aren't complaining and are willing to continue on the job?

There had been numerous instances at this plant where workers who invoked Article Twelve and requested to be relieved from duty on the job until an unsafe condition is remedied were "furloughed" for several weeks, during which they were not paid a penny and in the meantime other workers were assigned to and performed the same job. If the newly assigned workers had refused, they, too, could have been disciplined, even discharged. Although Article Twelve provides for the Company to reassign workers to another job when they invoke Article Twelve, it is the usual contention of the Company that no other job is available. (Spencer, 1977, 213-14).

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7. This is true for large international unions such as the Steelworkers (U.S.W.A.), but many smaller unions have only recently begun to get any safety provisions at all into their contracts. (Even if all union contracts did have such provisions, that would cover only about 20 percent of the U.S. workforce.)

Another more subtle way in which workers are discouraged from exercising the right to refuse is explained in Rachel Scott's report of an interview with Ken Bellett, a steelworker at Bethlehem's Lackawanna plant:

The men themselves sometimes "forsake safety," he said, to make production. "Most workers are on some kind of incentive program. Every department has a different kind of incentive. Foremen are also on incentive and top management have a bonus system. Under contract terms, a man can refuse to do the job because it's unsafe. The guy will holler but then go ahead and do it. Otherwise, he's going to lose money that day. It's going to affect his earnings. If it means shutting down a whole department, the other guys will shoot you." The result is that often rather than shutting machinery down for repairs, maintenance workers have to work while it is operating. [Scott, 1974, 57-58]

Recall that two days prior to the fatal explosion at the Burnside foundry six workers were sent home for refusing to work near the pools of water in the tapping pits. Six workers lost their pay for the remainder of a shift, the unsafe condition was not corrected, and four workers lost their lives. Workers generally cannot afford to continue to refuse until a job is made safe. In part this is because, as long as it is the worker who is bearing the cost, if the employer can keep the operation going without the worker in question, the employer need be in no hurry at all to correct the unsafe situation. And a worker whose refusal would result in the shutting down of an operation faces not only his or her loss of earnings, but that of his or her co-workers as well. So the employer can rest assured that this will rarely happen.

In view of these considerations, it seems clear that the right to refuse an unsafe assignment cannot be effective unless (a) the worker's normal pay is continued after the refusal, (b) some person or group representing the workers, such as a safety steward or safety committee has the power to shut down an unsafe operation with no loss of pay to the affected workers, and (c) incentive programs such as those described by Bellett are eliminated or somehow revised so that workers are not constantly forced to make a trade-off between safety and earnings. Condition (c) appears to be necessary both directly, and as a necessary condition for (a) and (b).

A worker can, of course, complain to OSHA to get an unsafe situation corrected, but there are several reasons why this is no substitute for a strong and effective right to refuse. First, although OSHA at-

tempts to inspect within twenty-four hours situations in which the area director determines that there is a reasonable basis for the claim of "imminent danger," there is always some delay. The potential length of delay has been greatly increased by the Supreme Court's 1978 *Barlow* decision ruling that an employer may require an OSHA inspector to obtain a search warrant before entering the premises. If the worker stands to lose pay during that time, he or she is still in the position of choosing between economic loss which the worker may not be able to afford and doing the unsafe job for some period of time until an inspector arrives. If the inspector finds an imminent danger, he or she asks the employer voluntarily to abate the hazard and remove endangered employees from the area. If the employer refuses, OSHA, through the regional solicitor, applies to the nearest Federal District Court for appropriate legal action. Thus the potential for substantial delay is clearly present.

In addition, OSHA gives top priority only to inspecting situations where the area director determines that there is reasonable basis for the claim of "imminent danger." An "imminent danger" is defined in Section 13(a) of the OSH Act as "any condition where there is reasonable certainty that a danger exists that can be expected to cause death or serious physical harm immediately or before the danger can be eliminated through normal enforcement procedures" (Nothstein, 1981, 295-96). A "serious violation," which is not top, but third priority for inspection, exists under Section 17(k) "if there is a substantial probability that death or serious physical harm could result. . ." (Nothstein, 1981, 347). There are obvious difficulties in distinguishing in practice between an imminent danger and serious violation, so defined. A boiler about to explode is an imminent danger, but a boiler dangerously in need of repair could explode now or could rumble along for another six months or more. That it was about to explode is, I would guess, in the vast majority of cases, known only after the fact. Moreover, there are other problems about what constitutes an imminent danger. Health hazards, for example, are imminent dangers under the Act if there is a reasonable expectation that toxic substances or dangerous fumes, dusts, or gases are present and that exposure to them will cause irreversible harm to such a degree as to shorten life or cause reduction in physical or mental efficiency, even though the resulting harm is not immediately apparent (Nothstein, 1981, 296). Yet when the Oil, Chemical and Atomic Workers International Union claimed that pools of mercury on the floor of an Allied Chemical factory represented an imminent danger, and showed that at least twenty-five work-

ers in the area had symptoms (tingling in hands and feet, tremors, irritability, drowsiness, loss of memory, and sore gums) or chemical evidence of mercury poisoning, the Department of Labor ruled that "imminent danger" applied only when there was a "risk of sudden great physical harm. . .like a boiler explosion" (Stellman and Daum, 1973, 12).<sup>8</sup>

For these reasons, and because it seems to me that "substantial probability that death or serious physical harm could result" can be sufficient to warrant refusal, I believe that a worker's right to refuse cannot be limited to imminent danger situations. It must apply also to serious violations and to serious hazards that are not violations of specific OSHA (or other relevant) standards. But in the case of a serious violation, not only will there be a longer delay before an inspection, the employer will normally be given some period of time (possibly days, possibly months) in which to correct the violation while continuing in operation. An employer can then appeal any aspect of the citation, arguing, for example, that the situation is not a violation at all, or that it cannot be corrected in the time allotted. This can drag the process out still further. Or an employer can simply fail to correct the violation, the fine that may result usually being much less than the cost of correction.

Now one response to all this is that OSHA's enforcement system should be strengthened. There should be more compliance officers, and

8. Stellman and Daum report on the effects of mercury as follows:

. . .Whenever it is left open to the atmosphere, mercury vapor will be present.

Mercury is stored mainly in the kidneys, but its most striking effects are on the nervous system. A person with mercury poisoning can develop a slight tremor of the hands and no longer be able to write properly. Before that, there may be emotional problems such as anxiety, indecision, embarrassment, and depression, and also excessive blushing and sweating. Mercury poisoning can lead to speech disorders and loss of coordination. The victim may develop a staggering gait. Serious changes in mental ability and personality may occur. The expression 'mad as a hatter' refers to the fact that most hatters used to become crazy after practicing their profession over the years. The mercury they used to soften the felt in the hats poisoned them and eventually drove them mad.

Mercury also affects the vision and the eye reflexes. It particularly affects the mouth and teeth, causing loose teeth and sore gums. The kidneys may also be damaged.

These serious and often irreversible effects make it imperative to prevent all exposure to mercury vapor and other forms of mercury. . . [pp. 255-56]

they should have, and use, greater enforcement powers, especially in the case of imminent dangers and serious violations. This is certainly true.<sup>9</sup> But such enforcement should be a complement to an effective right to refuse.

It is worth noting in this connection that there had been an OSHA inspection several months before the fatal explosion at the Burnside foundry. Workers had pointed out to the inspector the pools of water in the tapping pit. The water was not cited as a violation in the inspection report (*CACOSH Health & Safety News*, Vol. 6, no. 8, 1). Yet, after the explosion, OSHA officials conducted a two-week investigation and among the violations cited were these:

—Workers were required to work with and transfer molten steel and slag from furnaces to ladles where the material could contact water and wet surfaces.

—Water was allowed to seep into the tapping pits by improper maintenance of ground water draining systems and ineffective sealing of pit sides and bottom.

—During the weeks preceding February 16th, the furnace tapping pits were not cleaned, thus allowing water pockets to occur and increase the amount of water which would not be pumped out.

—The company did not provide adequate personal protective equipment to prevent exposure of maintenance workers to the hazards of burns.

—Repairs to a defective ladle tilting mechanism were attempted while the ladle was suspended over the tapping pit. [Kaye, 1979, 22]

The company was ordered not to reopen until all the violations were corrected.

One point this illustrates is that in many ways the workers themselves are the real experts concerning health and safety problems and hazards in their workplaces. They are there all day, day after day, year

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9. In 1980, OSHA had enough inspectors to inspect each workplace once every eighty years; average fines were less than \$60 per violation, and standards to control the tens of thousands of toxic substances were being issued at the average rate of fewer than three per year (Witt and Early, 1980, 21). These figures can be expected to drop drastically during the Reagan administration.

after year. They see, hear about, and experience directly the accidents, near misses, headaches, sore throats, difficulty breathing, and the rest. Providing workers with whatever technical training is necessary, and empowering them to enforce their right to a safe and healthy workplace by means of an effective right to refuse an unsafe assignment, and to shut down an unsafe operation, is thus an eminently sensible approach to workplace health and safety. It cannot work, however, if it is not backed up by government intervention and enforcement in disputed cases. A strengthened OSHA enforcement system is needed as a complement. This would be a primarily *preventive* approach in two senses. It would be more likely to prevent injuries, deaths, and illnesses than a system which can only respond more slowly and often after the fact. In addition, the more effective the power to shut down an unsafe operation, the less likely workers would be to have to use it in order to get hazards corrected.

To illustrate, let us look again at the Swedish experience:

The degree of incentive for managers to reach agreement with workers on health and safety issues depends, of course, on the remedies available to workers. . . .

Since the right of safety committees to stop dangerous work was established in Sweden in 1974, use of it has required the intervention of government inspectors only about twenty-five times per year in the country's 160,000 workplaces. All parties interviewed agreed that this low figure was mainly a reflection of the effectiveness of the threat of using that power, and not a reflection of workers' reluctance to use it or of ignorance of their rights.

According to Bo Feldt, chief union safety committee member at the 12,000-worker Volvo plant at Goteborg:

We have over 200 safety stewards in the plant and their strength is in their ability to go to the foremen and say, "Do that or I stop the job." The foremen usually do it—whatever it is. If the men stop work, even if the government comes in and says work should continue, they can't be punished. But our experience has been that most of the stops have been correct stops. [Witt and Early, 1980, 25]

As we have seen, all of the incentives presently at work in our system seem to weigh against the employee exercising the right to refuse, and against the employer responding by correcting the condition promptly when the right is exercised. The requirement that employees be paid in the event of a refusal or a shutdown of unsafe work should

help to shift that balance, removing a strong disincentive to workers' exercising the right to refuse, and providing an incentive for the employer to act promptly to correct the condition so as to prevent or end a shutdown.

But, it may be objected, if there really is no other available work to assign the workers, would it not be unjust to require the employer to pay them? If it is unjust, then even if it would probably have desirable consequences, it may not be justifiable. The objection has not been satisfied.

My response is that it is not unjust. A worker is hired to do a job and shows up prepared to do it. He or she has a right to a safe environment in which to do the job. If that is not provided, the employer has failed to fulfill the employment agreement, as I argued in response to the first employer argument. What would be unjust would be for the worker, who has fulfilled his or her side of the agreement, to be forced to bear the financial loss resulting from the employer's failure to do the same.

Now it will be objected that I am assuming that the worker's claim that the assignment is unsafe is true, but often that is just what is at issue.

It seems to me that the worker must be given the benefit of the doubt in this situation. For one thing, it is his or her life that is at stake if the condition really is unsafe. The right of self-determination requires that a decision so importantly affecting his or her life be made by the individual. Moreover, the right to refuse could not be effective if the worker stood the chance of losing pay, or even his or her job, because the situation is later found not to have been unsafe. The worker might, of course, be right and still be "found" wrong. Or the worker may be wrong but have had good reason to believe the situation unsafe. So long as a worker believes in good faith that doing the work assigned would seriously threaten his or her life, health, or safety, the worker has, I claim, the right to refuse until the assignment is shown to be safe.

There may, of course, be occasions where a worker sincerely believes an assignment to be unsafe but does not have what other informed persons would regard as good reasons for that belief. I want to claim that the right to refuse without punishment or loss of earnings applies in such a case through an inspection and appeal process such as that outlined below. The distinction between good faith belief and good reason for the belief is implicitly recognized by not claiming for every individual worker the right to shut down an operation he or she believes

to be unsafe. The individual worker has the right to refuse for him or herself, and to have a trained safety steward or committee with the power to shut the operation down. Obviously, there may be difficulties in determining that an individual's belief is sincere in the absence of what informed and reasonable others regard as good reason for the belief. Nevertheless, I am sure that there could be cases in which the belief was obviously sincere, though ill founded. Partly because of this indeterminacy, the burden should be on the employer to show that a refusal or stoppage was not in good faith.

None of this would be an undue burden on the employer if the issues could be resolved quickly. The Canadian and Swedish laws provide a model for how this can be accomplished. We need (a) prompt inspection and resolution of any disputed refusal or shutdown situation (within twenty-four hours, say); (b) an accelerated appeals process available to both employer and workers (another twenty-four hours); (c) workers' pay and benefits continue as usual; (d) workers not subject to penalty for being wrong, but only for acting in bad faith; and (e) any penalty to be imposed only after the employer has demonstrated to the satisfaction of the appropriate reviewing body that the refusal or shutdown was not in good faith.

That such a system is not unworkable seems amply demonstrated by the fact that some like it are in operation elsewhere. That it would require the commitment of additional resources to health and safety administration is probably true. But again, the experiences in Canada and Sweden do not suggest that such a system would result in an unmanageable flood of refusals. Some such system seems a necessary condition for an effective right to refuse an unsafe assignment, which in turn is a necessary condition for satisfaction of the right to a safe job and the right of informed consent to job hazards.

What of the employer argument that the right to be paid after refusing an assignment would be tantamount to a right to strike with pay?

The right to strike is the right to engage, with one's co-workers, in the concerted action of withholding one's labor in an attempt to achieve some common goal. The withholding of labor here is an economic tool or weapon used in an attempt to wring some concession from the employer, or force the employer to honor some right of the employees on pain of loss of income resulting from halted operations. This right is guaranteed by Section 7 of the National Labor Relations Act of 1935, commonly called the Wagner Act.

Section 502 of the Wagner Act states: "Nor shall the quitting of

labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike." This distinction seems to me well-founded. In the case of refusing an unsafe assignment or shutting down an unsafe operation, workers are not using their refusal in an attempt to get the employer to honor their right to a safe job (though one may hope that it will have this effect). They are simply *exercising* their right to a safe job, which they cannot do, under the circumstances, without withholding their labor. The right to a safe and healthful workplace includes the right not to be exposed to unreasonable risks to life or health. So, in the same way that one exercises one's right not to incriminate oneself by refusing to answer questions one would otherwise be obliged to answer, one can exercise one's right to a safe and healthful workplace by refusing work assignments that involve unreasonable risks to life or health—assignments one would otherwise be obliged, under the employment contract, to accept. The withholding of labor is not used as an instrument or weapon at all in such a case. The purpose of such a refusal is not to bring economic pressure to bear on the employer; it is simply to avoid exposure to unreasonable risk.

Thus we must distinguish between refusing an unsafe assignment and shutting down an unsafe operation on the one hand, and striking (including striking over health and safety issues) on the other. A strike over health and safety issues might occur in an effort to get strong health and safety provisions in a contract, or to enforce existing legal or contractual health or safety provisions that are being violated, where the violation does not present a serious and immediate threat to life, safety, or health. Workers might strike to obtain access to information needed for a research or educational project on health and safety. Finally, workers may have shut down an operation they deemed unsafe, and gone through a process such as that outlined above, with inspection, ruling, appeal and final ruling. This much, I claim, they have the right to do without loss of pay, and this much does not constitute a strike. If now, they are dissatisfied with the final ruling and want to try to get the employer to make the repairs or changes they deem necessary for a safe operation, they may strike in an effort to achieve this.

I have argued that workers have a moral right to refuse an unsafe assignment and to have an individual or committee representing workers empowered to shut down an unsafe operation, and they have a right to these things without loss of pay. I have attempted to counter employer arguments against the right to refuse and against the right to be paid after refusing. I shall now report, briefly and without comment,

the current legal status in the United States of the right to refuse.

In 1973, the Department of Labor issued Interpretive Rule 1977.12(b)(2) which states that under the OSH Act an employee may refuse an assignment if the employee's apprehension is

of such nature that a reasonable person, under the circumstances then confronting the employee, would have concluded that there is a real danger of death or serious injury and there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

The regulation prohibits employer discrimination against workers who exercise this right.

Employers continued to take action against workers who refused assignments on safety grounds, and challenged the regulation in resulting court cases. They argued that when Congress passed the OSH Act it rejected a provision which would have authorized workers to refuse unsafe assignments without loss of pay, and that the regulation would grant workers the right to strike with pay. They warned that the right to refuse would foster disharmony in the workplace, invite continuous labor unrest, and even industrial combat. Lower courts had ruled in conflicting ways on various cases involving the right to refuse, so the legal status of the right was in limbo until February 26, 1980.

On that day the Supreme Court ruled on a case stemming from a July 10, 1974 refusal of two maintenance workers employed by Whirlpool to climb onto a guard screen suspended twenty feet above the work area. Several workers had been injured in falls through the screen, and two weeks before the refusal another worker had fallen to his death. OSHA had ordered the screen repaired, but no repairs had been made. When the men refused, they were sent home for the remaining six hours of their shift and letters of reprimand were placed in their files.

The Supreme Court unanimously upheld the interpretive regulation, saying that it "clearly conforms to the fundamental objective of the Act—to prevent occupational death and serious injuries." "It would seem anomalous," wrote Associate Justice Potter Stewart, "to construe an act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous." The letters of reprimand were ordered withdrawn as they violated the prohibition against discriminatory action. The Court declined to rule on the issue of the six hours' pay the two men lost, saying that issue was

“not before the court.” The pay issue was sent back to district court to be reheard in the light of the Supreme Court’s ruling.<sup>10</sup>

There is, as far as I know, no legal provision for workers, whether individual workers, safety stewards, or committees, to shut down an unsafe operation, though some union contracts may contain such provisions. The original version of the “imminent danger” clause of the OSH Act allowed compliance officers to close down an operation in which an imminent danger was found. But the final version requires that, if the employer will not shut down voluntarily, OSHA must go to federal court.

Let me close this part of the discussion by trying to pull together what we now can say about the notion of informed consent. It probably is not possible to specify *sufficient* conditions for informed consent either in general or in relation to specific sorts of risks or activities such as workplace hazards, participation in scientific experiments, undergoing surgery, and so on. There are too many different kinds of factors which could be present in individual circumstances and which could undermine the adequacy of information or the genuineness of consent. One could not hope to think of all such possible factors and deal with them in advance. But, if what has been said on the subject in this and the preceding chapters is correct, we can say what several *necessary* conditions are for informed consent to job-related hazards or risks:

1. The offer to the potential or actual employee that he or she may accept or keep the job must not be a coercive offer. (There may be different accounts of what constitutes a coercive offer, as we noted in Chapter One, but that the offer must not be coercive for consent to be genuine should not be controversial.)
2. The employee must not be unnecessarily unfree to a high degree, as that notion is sketched out in Chapter One, with respect to the choice of whether or not to accept or keep the job. (This claim is more likely to be controversial.)
3. The right to know must be satisfied in at least all four of the aspects discussed in Chapter Two. (Another aspect of the right to know will be proposed below.)
4. The right to refuse an assignment believed by the worker to present a serious and immediate threat to life or health must be effective.

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10. This account of the case and ruling is compiled from the following sources: *In These Times*, March 12-25, 1980; *Home News*, February 27, 1980; *LOHP Monitor*, Vol. 8, No. 2, March-April 1980; *Daily World*, February 28, 1980.

This requires that the workers not be subject to discipline, loss of job or earnings, and that a person or group in the workplace, representing workers, be empowered to shut down an unsafe operation without loss of pay to the affected workers.

Two additional candidates for inclusion are the right to advance notice of, and the right to veto or require changes in proposed new machinery, materials and work procedures for health and safety reasons. These rights are held by the Swedish joint safety committees mentioned above, which must have a majority of their members elected by the non-supervisory employees. These rights are clearly related to informed consent, but it might be argued that they go somewhat beyond the notion of informed consent into the more general area of self-determination, that is, participation in decisions which importantly affect one's life. In defense of the claim that they do come under informed consent, it might be pointed out that, without these rights, new machinery, materials, and processes often are introduced into the workplace with little or no prior notice, so that workers have no opportunity to explore, in advance of using them, what the risks and hazards might be. Hence, they cannot be said to have been accorded the right of informed consent with respect to these new factors introduced into the work environment. Moreover, once the new equipment or process is in place it may be impossible—it will certainly be more difficult and expensive—to make appropriate changes or choose a safer alternative. I would, therefore, claim that the right to advance notice is clearly a necessary condition of informed consent. The right to veto or require changes in plans might go beyond informed consent, but only on the assumption, or to the degree, that conditions (1) and (2) on the above list are satisfied. Indeed, I would add that the worker must not be unfree to a high degree, *whether or not* that lack of freedom was necessary.

Remaining in a job after a new hazard has been introduced can be said to constitute consent to that hazard only if a worker is free to quit. The fewer alternatives available to a worker, for whatever reasons, the less free that worker is to quit. The less free the worker is to quit, the more is the right to veto or require modifications in proposed new processes or materials a necessary condition for consent.

I said above that the right of informed consent and the right to a safe job, along with all other rights of workers, are relatively empty in the absence of an effective right to a job. Let us now explore some of the ways in which this is so.

First, the rights to informed consent and to a safe job have no

application in the case of a worker who cannot get a job at all.

Second, the right to a safe job, or any other right, is empty in the absence of effective guarantees against reprisals resulting from the exercise or attempted enforcement of the right. Employers are prohibited from discriminating against employees for exercising the rights guaranteed them under the Occupational Safety and Health Act and under the National Labor Relations Act. But workers know that employers can and often do cite other reasons for a dismissal or other disciplinary action, and there is no way to be sure one will get a favorable ruling if one contests the action. Most important, the employer's position prevails unless and until it is overturned by the relevant authority. And such a process will take months at a minimum, more likely years. The employer has every incentive for dragging the case out in the hopes that the worker will become discouraged and drop it. Meanwhile the worker is without any means of support, and all benefits such as health insurance are cut off. The prospect of back pay in the event of a favorable ruling, especially since one cannot count on it, is no help in paying rent and buying food. Thus the threat of dismissal is an extremely powerful deterrent to a worker's exercising *any* rights against the employer's wishes, despite legal "safeguards." Reversing the burden of proof, so to speak, in dismissal and other discipline cases could go a long way toward alleviating this problem (and would, in effect, acknowledge that workers have a right to due process in disciplinary matters generally, and property rights in their jobs which may not be set aside without due process).<sup>11</sup>

In general, a strong union is much more effective at ensuring that workers may exercise their legal, as well as their contractual, rights than the courts or government agencies. The latter are useful, even essential, to a union's efforts in many cases, but they often are not very useful to the individual without union representation. This is so in part because of the problems of burden of proof and delay mentioned above, in part because, if the individual still has his or her job, filing a complaint is likely to bring further reprisals, including possible dismissal, in

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11. In West Germany, the Protection Against Dismissals Act, passed in 1969, bars the "socially unjustified" dismissal of any worker after a probationary period of six months. The law is enforced by labor courts whose effectiveness originally was undermined by long administrative delays (up to five and six years in some cases). Now the unions can veto any individual discharge for "cause," and the worker stays on the job until the labor court decides. Cases are settled much more promptly now (*Economic Dislocation*, 23-24).

part because the individual is unlikely to have access to the kind of experienced legal advice and assistance needed to see the effort through successfully, and finally because the personal, emotional, as well as financial, cost of pursuing such a matter on one's own can be unendurable. Thus, effective rights relating to unionization are frequently necessary conditions in practice for the enforcement and exercise of even those rights provided by law for all workers whether or not they are union members. It is no wonder, therefore, that rights relating to unionization are among those rights the exercise of which is most likely to result in reprisals, as we shall see in the next chapter.

A third way in which the right to a job can be a necessary condition for the enforcement and exercise of other rights is that, in addition to individual workers facing the threat of dismissal or other disciplinary action, an entire workforce may face the threat of a shutdown or runaway shop. Getting OSHA, or other agencies at local, state, or federal levels, to set and enforce strong standards for the protection of the health and safety, or other rights, of workers is no victory for those workers whose employers' response is to pick up and move to a city, state, or country with weaker regulations, or none at all. Just like the individual worker who faces the threat of dismissal for refusing an unsafe assignment, workers who face the implicit or explicit threat of a shutdown or runaway shop in response to health and safety demands confront the choice: risk your life and health or your job.<sup>12</sup> This is not an idle threat. Between 1969 and 1976, fifteen million jobs were lost as a result of plant shutdowns. (DeCarvalho, *et. al.*, 1981, 1). And, of course, the difficulties of an individual worker who loses his or her job are multiplied by much more than just the number of workers affected by a whole plant closing. The prospects of finding another job in the area are far worse. An entire community can be devastated by the closing of a major plant.

I do not deny, by the way, that small and economically marginal businesses may sometimes be forced to close by even relatively small increases in costs. The Small Business Administration does make low interest loans to help small businesses finance costs of compliance with health and safety regulations. More should be done along these lines. It should not fall on the workers to sacrifice their health and safety to

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12. Employers are prohibited from *threatening* to shut down or move in order to discourage unionization or to influence contract negotiations. They are not prohibited from *warning* of or *predicting* a potential shutdown or move. For employees, the prospect is threatening either way.

save their jobs. These small and marginal businesses are not the main problem in the current wave of shutdowns and runaways, however. According to MIT economist Bennett Harrison, "Globetrotting corporations will close profit-making plants if they aren't profitable enough, and if they can make more elsewhere." He notes that Sperry Rand closed a plant in Herkimer, New York because it wasn't making a 22 percent return-on-investment. Large conglomerates make money by buying out an independent company, "milking" the profits out of it, and then shutting it down. Then they get federal and state tax breaks for investing in new equipment and relocating. A study of the New England economy by Harrison and a colleague revealed that 100,000 businesses closed in New England between 1969 and 1976, costing a million jobs. Big corporations account directly for 15 percent of the shutdowns and over half of the job losses. But, in addition, many of the small independent businesses that close down do so in the wake of corporate shutdowns rippling through their communities (Dreier, 1980, 18).

Even a strong and militant union is largely defenseless against this threat, given the current legal situation in the United States. Our laws generally protect a company's right unilaterally to make all "investment" decisions. Yet this right is increasingly being questioned in view of the effects of such decisions on the lives of so many others. When the United Steelworkers of America filed suit to block a plant closing in Youngstown, Ohio, the court said:

This Court has spent many hours searching for a way to cut to the heart of the economic reality—that obsolescence and market forces demand the close of the Mahoning Valley plants, and yet the lives of 3500 workers and their families and the supporting Youngstown community cannot be dismissed as inconsequential. United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years.

Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation. At this moment, proposals for legislative redress of economic relocation like the situation before us are pending on Capitol Hill. Perhaps labor unions, now more aware of the importance of this problem, will begin to bargain for relocation adjustment funds and mechanisms and will make such measures part of the written labor contract. However, this Court is not a legislative body and cannot make laws where none exist—only those remedies prescribed in the statutes or by virtue of precedent of prior

case law can be given cognizance. In these terms this Court can determine no legal basis for the finding of a property right.<sup>13</sup>

The court here clearly recognizes the existence of a moral right of workers to their jobs. The right referred to here is a kind of property right, acquired, presumably, by working at a particular job. Legal recognition and protection of this right is a necessary condition for the protection of other worker rights. As the existence of this right becomes more widely recognized, there will no doubt be much controversy over precisely what it amounts to. I shall not attempt to resolve that question here. It may be useful, however, in thinking about the question, to see how some other countries are handling it, and what some proposed legislation in the United States looks like.

Sweden, West Germany, and the United Kingdom all have national legislation regulating plant closings and reductions in force (lay-offs). Typically, corporations are legally required to give advance notice to the national employment service, the union or works council, and the individual employees likely to be affected before closing a plant or dismissing workers for economic reasons. The amount of notice varies among the countries, and depending on the number of workers affected and the body being notified. Before implementing such a decision (and in some cases, before finalizing it), the company must negotiate with the employees' union or the plant's works council concerning possible alternative plans as well as the timing, distribution, and compensation above the statutory minimum for any layoffs that do take place. If no agreement can be reached, the matter goes to arbitration. Workers are entitled to time off with pay to look for new jobs, and for retraining in addition to severance pay, the minimum amount of which is established by statute and is pegged to the amount of time the worker has been employed by the company. In some cases the combination of notice and negotiation results in an alternative to the proposed closing or cutback being found. Often, the process is stretched out sufficiently so that a planned reduction is handled by attrition and no dismissals are necessary. When workers do lose their jobs, the proportion of income replacement provided by statutory unemployment benefits in the three countries is far higher than in the United States, payments to their Social Security accounts are continued on their behalf, and medical coverage, provided by the national health care system, continues. Inter-

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13. *Steelworkers, Local 1130 v. U.S. Steel Corp.*, 492 F. Supp. 1, 103 LRMM 2925, 2931 (N.D. Ohio 1980). Quoted in DeCarvalho, *et al.* 1981, 1-2.

estingly, the United States is the only industrialized country besides South Africa without national health insurance.<sup>14</sup>

The National Employment Priorities Act was introduced in the United States Congress in 1979. If enacted it would require advance notification by companies planning to close or relocate plants. The amount of notice varies from six months to two years, depending on the number of employees to be affected. A National Employment Priorities Administration would be created within the Department of Labor. The Administration would investigate any proposed closing or transfer and recommend ways to avoid the closing or to minimize its impact on employees and the community. Employees would have the right to transfer to another facility of the same company at the same rate of pay. All relocation and retraining costs would be paid by the company or the federal government. If transfers were not available, the employer would be required to pay affected workers severance pay amounting to 85 percent of their average wage minus unemployment compensation for up to 52 weeks. Retraining programs would be provided for affected workers. Workers over the age of fifty would have the right to retire on reduced benefits. Pension and health insurance payments for all affected workers would be guaranteed for one year. The affected community would receive a mandatory one-time payment of 85 percent of the resulting annual tax loss.

Less comprehensive bills have been introduced in several state legislatures, including those of Ohio, Massachusetts, Pennsylvania, and Illinois. Clearly, federal legislation would be preferable, as states and municipalities often end up competing with each other, to the detriment of all of them, by offering concessions to businesses, such as tax abatement schemes, lax environmental standards, anti-union "right to work" laws, and a generally "favorable climate for business," in order to attract companies (and hence jobs) or persuade them not to leave.<sup>15</sup>

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14. Information in this paragraph is from *Economic Dislocation*, Joint Report of Study Tour Participants, 1979, UAW, USWA, IAM.

15. Under section 14(b) of the Taft-Hartley Act, states may enact laws prohibiting the negotiation of union security clauses in union contracts. A union security clause provides that all employees within the bargaining unit must join the union after the probationary period for newly hired workers, usually thirty to ninety days. This makes it much easier for employers to break a union by hiring anti-union employees who, by both example and argument convince others to become "free-riders." Many southern states have such laws, resulting in the lowest percentages of unionized workers in the country and the lowest wages in the country—promoting opponents of these laws to call them "right-to-work-for-less" laws. (See Chapter Four for further discussion.)

The textile industry, for example, has virtually deserted New England, relocating either in the "Sunbelt," where few workers are unionized and wages are the lowest in the country, or in "developing" countries such as South Korea, Taiwan, and the Philipines. In these countries, repressive regimes friendly to U.S. business guarantee low wages, a well-disciplined workforce, and few or no health and safety or environment regulations. Indeed, the lure of these countries, where daily wages correspond to hourly wages in the United States, is so great that even the "Sunbelt" is losing some eighty jobs due to plant closings for every one hundred jobs created there (*Economic Notes*, Vol. 48, No. 5). Thus it is necessary that workers' rights be nationally and indeed internationally, guaranteed and protected if workers are not to be faced constantly with the threat that enforcing and exercising their rights as workers may cost them their very jobs.

Another approach to the protection of workers' rights to their jobs in the face of plant closings is to guarantee them and/or their community the right to buy out or take over the closed plant and run it themselves. This often would not be feasible, however, even if corporate cooperation and access to initial capital were available. One reason for this is that, as we saw above, corporations, especially conglomerates, often run a plant into the ground, failing to reinvest profits in necessary maintenance and modernization, siphoning them off into more profitable investments instead. So the doctrine that the owners of a business concern have the sole right to make decisions concerning the investment of profits from that business permits a company to let a plant deteriorate, while extracting profits from its operation, and then to abandon the plant—along with the employees and the community that have sustained the business—when it is no longer profitable. Clearly, if the right of workers to their jobs is to be protected, some restrictions on such investment decisions are needed.

Where feasible, however, this approach could be an important complement to legislation such as the National Employment Priorities Act. There are several possible variations of this approach, which could be applied individually or in various combinations.<sup>16</sup> One variation would involve additional legislation requiring a corporation that has decided to close a plant to sell the plant to the workers or worker-community coalition if they choose to buy it, and providing for feasibility studies and grants or no-interest loans in cases where a feasible plan exists.

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16. These variations are set forth in DeCalvalho, *et al.*, 1981, § VI.

Another variation would be nationalization. While this has been fairly common in other countries, in the United States government financial support, while increasingly accepted, has generally allowed for the continuation of prior corporate management. Under this proposal, the workers or worker-community coalition would manage the plant.

A third variation would be an expanded use of the eminent domain doctrine, whereby a city could condemn a property and take it over for the public good, including specifically to insure job opportunities. According to the doctrine of eminent domain, the former owners must be compensated, but the proper value may be determined by a jury of community residents.

A fourth variation is where workers facing a shutdown seize a plant and continue operating it on their own—either permanently or until some other way is found to keep it open. This variation might well be a necessary step, in practice, toward getting any legal recognition of workers' rights to their jobs. Historically, workers have had to exercise their rights independently of, and frequently in defiance of, the law in order to gain legal recognition and protection of those rights. As we shall see in the next chapter, this was true of both the right to organize and the right to strike—and many government employees must still defy the law to exercise their right to strike.

These approaches to protection of a property right of workers in their jobs, though only partial, would be an important step toward establishing recognition of such a right, and recognition of a corresponding limitation on the right of a corporation to make investment decisions without regard for their impact on the lives of workers, their families and communities.

But there are several reasons why I want to say that the right to a job is more than a property right. Or, to put it another way, in addition to the property right of a particular worker in a particular job, there is a more general right of a person to a job. One reason I want to say this is that the property right in a job does not apply to a person who is unable to get a job in the first place. But I believe that person has a right to a job.

Also, it seems plausible that the property right in one's job is vested, so to speak, over time—becoming stronger the longer one works at the job. This idea appears to be reflected in the standard union contract provision that distribution of layoffs be by inverse seniority, and in severance pay scales that are pegged to both rate of pay and number

of years on the job.<sup>17</sup> This seems appropriate when weighing the claims of particular workers to particular jobs. But the worker with low seniority who keeps getting bumped off one job after another may put in many years of work without ever acquiring a strong property right of this sort in any job. Like the worker unable to get a job in the first place, the right of this worker to a job is not adequately represented as a property right in a particular job.

Moreover, it is, I think, commonly believed that if a property right is (legitimately) overridden, that right is adequately recognized, and its holder adequately compensated, if the full monetary value of the property is paid him or her. If this is correct, then if a (legitimate) plant shutdown results in a given worker becoming permanently unemployed (because unable to get another job) his or her property right in the lost job would be fully compensated if the appropriate proportion of projected earnings (up to 100 percent with sufficient years on the job) were replaced. This might be done by some combination of unemployment insurance, severance pay and early pension, adjusted over time to reflect as far as possible cost of living and wage increases that would have been received on the job.

There are at least two ways in which this wage replacement would not satisfy the worker's right to a job, even though it may well satisfy—or compensate for—the property right in the lost job. First, if the worker had been on the job only a short time, his or her property right (assuming that it is vested over time) would not amount to much. And if he or she is unable to find another job, this small amount does not compensate him or her for the opportunity to earn a living that the lost job represented. But if that amount is supplemented, say by welfare payments (justified by subsistence rights rather than job rights), so that the person has an adequate living, would there be any reason to say that his or her rights were not fully satisfied? I think there would, and this is the second way in which wage replacement would not satisfy the right to a job. Even a worker who receives 100 percent of projected income based on his or her property right in the lost job has a right to a

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17. There are, of course, consequentialist considerations in favor of these practices, too, and these may be part of what gives rise to the property right and gives it this particular shape. A worker who has worked at a job for many years is likely to be older and have more difficulty finding another comparable job. One who has worked at a job for several years is likely to be settled and have heavy home and family responsibilities. But if these considerations were directly responsible for the practices mentioned, age and family responsibilities rather than seniority would be the appropriate pegs.

job, a right which is not satisfied by wage replacement. Persons have a right to subsistence even if they cannot make a positive contribution to society. But they also have a right to make a positive contribution if they can.<sup>18</sup> The sense that one is making a contribution is a necessary condition of self-respect.

People need to feel that they are useful, productive members of society. This is not only a necessary condition of self-esteem and self-respect, but of mental and physical health generally.<sup>19</sup> Thomas Cottle, a sociologist and psychologist at Harvard Medical School, has studied the emotional impact of unemployment for fifteen years. He calls unemployment "a killer disease." "In our culture, working is close to the center of life. Our culture teaches that if you don't work in an acceptable way, then you're supposed to be depressed. And when job loss lasts. . . a million symptoms show—tooth decay, kidney failure, alcoholism, sexual infertility." Moreover, he says, the unemployed suffering mental health problems often do not seek help. "A lot of people want to go for help, but they don't want to bear the extra burden of feeling that along with being out of work, they're also crazy."<sup>20</sup>

Research by Dr. Henry Brenner of Johns Hopkins University for the Joint Economic Committee of Congress showed that every long-term one percent increase in unemployment means: a 4.1 percent increase in suicides; a 3.4 percent increase in admissions to state mental hospitals; a 5.7 percent increase in homicides; a 4 percent increase in admissions to state prisons; and a 1.9 percent increase in deaths from cirrhosis of the liver resulting from alcoholism (Brenner, 1976, V). A recent study of workers affected by a plant shutdown revealed a suicide rate thirty times that of the general population (Cobb and Kasl, 1977).

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18. The Swedish approach to job loss places highest priority on finding the affected worker another job, rejecting the notion that early retirement, even with full pension, is an adequate substitute for a job. This shows a commitment to the idea that persons have a right to make a productive contribution to society. As a result, unemployment in Sweden is just over 2 percent (*Economic Dislocation*, 10, 12, 15). Even this is too high.

19. As I am using the terms, "self-esteem" and "self-respect," these attitudes toward oneself are distinct but related. To esteem someone is to hold that person in high regard, to have a favorable opinion of him or her. To respect someone is to acknowledge his or her dignity as a human being. According to the standard view, all persons are owed respect, even if one holds some of them in low esteem. I suspect that it is psychologically impossible fully to respect someone whom one holds in very low esteem. In any case, I am sure that very low self-esteem undermines self-respect.

20. Quoted in an Associated Press article by Jane See White, the *Home News*, New Brunswick, NJ, October 4, 1980.

Other studies have shown that unemployment is not only a source of psychological stress in itself, but also a cause of other stresses, such as having to move, becoming separated or divorced, all of which are correlated with higher rates of mental illness. Losing a job can set in motion a vicious cycle of other personal catastrophes that are much more difficult to handle for people who lack both the material and the emotional resources that a decent, stable job provides. Increased infant mortality and increased child abuse have also been linked to unemployment.<sup>21</sup>

It is, of course, likely that these effects would be ameliorated somewhat if loss of income did not accompany loss of one's job. But income, or other means of providing for subsistence (even at a fairly high level of material well-being) would not satisfy the need for a sense of oneself as a productive, contributing member of society. For most people in our society, that sense is inextricably tied to holding a job.<sup>22</sup> That is what it means to most of us to "pull our own weight." And it is this sense of oneself as a productive, contributing member of society that I claim is necessary for self-respect, self-esteem, and mental and physical health generally.

It may be objected that people do not have a right to self-respect or self-esteem, or to mental and physical health generally. So how can the fact that a job is a necessary condition for these lead to a right to a job?

We do not have rights to these things because, important as they are, they are not things that other people, or society as a whole, can provide or guarantee. But society can provide or guarantee some of the necessary conditions for them, such as adequate shelter and nutrition, a safe and healthy home and work environment, access to adequate health care (both preventive and interventionist), educational and other opportunities to develop knowledge and skills and undertake challenging tasks. To these, I claim, we do have rights. And, in our society at least, the right to a job is one of these rights.

These same considerations, moreover, lead to the conclusion that the right to a job must be understood, not as the right to just some job

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21. Annual report of the National Advisory Council on Economic Opportunity, 1979, excerpted in the *America Federationist*, October 1979.

22. This need not be so in all societies. There could be and there have been societies where there is nothing like a job, as we know them, to be had. Persons would, I suppose, still have the need for a sense of themselves as productive, contributing members, but it would take different forms in different kinds of society.

or other, however pointless, demeaning, and unchallenging, but the right to a job involving useful and challenging work.

In a paper discussing several studies of the mental health of workers in various kinds of jobs, psychologist Charles Hampden-Turner says:

Perhaps the most detailed and perceptive study ever made of the condition of American workers was that of Arthur Kornhauser (1964) who studied Detroit automobile plants along with other smaller factories in the area. He used a measuring index of "Mental Health." Those with "Low" Mental Health typically suffered at least two psychosomatic symptoms. They had low self-esteem, periodic feelings of depression, poor social relationships, uncontrollable anxiety reactions, strong hostilities, chronic distrust, and poor life satisfaction. The absence of such symptoms, plus a positive feeling of self-worth and strong friendships, constituted "High" Mental Health [Hampden-Turner, 1973, 33].

Only 34 percent of workers in large factories had high mental health (compared to 51 percent in small factories, 69 percent in nonfactory and 76 percent in white collar jobs). Moreover, the 34 percent with high mental health were mostly *skilled* workers, all with more than six years of steady employment and relatively secure seniority rights. The percentage of workers with high mental health correlated with job skill levels as follows: Skilled 58 percent; Semiskilled 35 percent; Repetitive semiskilled 10 percent; Repetitive, machine-paced, semi-skilled 7 percent. Only those with very similar pre-job characteristics were used in making this comparison, so these differences cannot be attributed to social background or education.

Hampden-Turner also reports the conclusion of a paper reviewing seven studies of worker satisfaction and dissatisfaction: "Karsh concluded that satisfaction is bound up with the degree to which the worker can exercise his own judgment on his job and the extent to which he can control the conditions affecting his work" (Hampden-Turner, 1973, 39).

A special task force appointed in 1971 by the then Secretary of Health, Education and Welfare, Elliot Richardson, said in its report:

We have sufficient evidence about the relationship between work and heart disease, longevity, mental illness and other health problems to warrant governmental action. That jobs can be made more satisfying and that this will lead to healthier and more productive workers and citizens is no longer in doubt. [*Work in*

*America*, 1973, 114]

In a paper entitled "Meaningful Work" (1982), philosopher Adina Schwartz argues that commitment to an ideal of autonomy for all persons leads to the claim that no one should be employed in routine, repetitive jobs in which workers decide neither the overall goals of the enterprise nor how to perform their own jobs. She says that an individual achieves autonomy "to the extent that he/she rationally forms and acts on some overall conception of what he/she wants in life," and she argues that the empirical literature strongly supports the claim that autonomy, so understood, is undermined by such jobs. To achieve autonomy, people need to have opportunities to frame their own goals and decide how best to pursue them. Not having such opportunities at work undermines people's motivation and ability to be autonomous in the rest of their lives. She quotes Arthur Kornhauser in support of this claim:

Factory employment, especially in routine production tasks, does give evidence of extinguishing workers' ambition, initiative, and purposeful direction towards life goals. . . . [Kornhauser; 1965, 252]

The unsatisfactory mental health of working people consists in no small measure of their dwarfed desires and deadened initiative, reduction of their goals and restriction of their efforts to a point where life is relatively empty and only half meaningful. [Kornhauser, 1965, 270]

It is, I think, significant that the same conclusion emerges from a commitment to the idea of autonomy on the one hand, and from the more mundane-sounding commitment to guaranteeing, as far as possible, the necessary conditions for mental and physical health on the other. Schwarz's conception of autonomy includes, and goes beyond, self-determination, as I have been using the latter idea. As we have seen in this discussion and in earlier chapters, the right of self-determination both supports and is supported by health and safety rights. If, in addition, we are, or should be, committed to promoting autonomy, then we have another argument for the self-determination of workers in their work. It may not be an *independent* argument, however, for I suspect that something like Schwarz's conception will turn out to be the only plausible and coherent account of autonomy, and I further suspect that autonomy, so understood, is an important, perhaps the most

important, aspect of mental health.

To sum up this part of the discussion, there are several ways in which health and safety rights and the right to a job are connected. The right to a safe job is empty if the cost of refusing an unsafe assignment is one's job. It is also empty if the cost of strong legal and/or contractual health and safety provisions is a shutdown or runaway shop. The right to a job arises as a necessary condition for self-respect, self-esteem, and mental and physical health generally. The right to a useful and challenging job arises both as a necessary condition for mental and physical health and from the right to a safe and healthy job. Finally, a commitment to promoting autonomy also provides support for the right to useful and challenging work.

An exploration of the implications of the right to *useful* work would involve us in assessing *what* gets produced in our society and *why*. (Why are steelworkers and autoworkers, out of work as a result of plant closings or cutbacks, not employed in production to meet urgent human and social needs such as mass transit? Why are construction workers out of work when there is an urgent need for housing—both the renovation of existing stock and the building of new?) Exploring the right to *challenging* work would require us to look at *how* the work that is done is carried out, as we have begun to do here.

## REFERENCES

*American Federationist*, October 1979.

Brenner, M.H., 1976. *Estimating the Social Costs of National Economic Policy: Implications for Mental and Physical Health and Clinical Aggression*. Report for the Joint Economic Committee of Congress. Washington, DC: U.S. Government Printing Office.

*CACOSH Health & Safety News*. 1979. Vol. 6, no. 8. Chicago: The Chicago Area Committee on Occupational Safety & Health (CACOSH).

Cobb, S. and S. Kasl. 1977. *Termination: The Consequences of Job Loss*. DHEW (NIOSH) Publication No. 77-224. Washington, D.C.: U.S. Government Printing Office (Cited in *Economic Dislocation*).

*Daily World*. February 28, 1980.

- DeCarvalho, P., A. Heitzer, J. Meyer, B. Zack Quindel, M. Goldstein Robbins, M. Robbins, and J. Williamson. 1981. *Plant Closings and Runaway Industries: Strategies for Labor*. Washington D.C. National Labor Law Center.
- Dreier, P. 1980. "Plant Closings are Good Business, but Bad News." *In These Times*, Feb. 13-19, p. 18.
- Economic Dislocation: Plant Closings, Plant Relocations and Plant Conversions*. 1979. Joint Report of Labor Union Study Tour Participants (UAW, USWA, IAM).
- Economic Notes*. 1979. Vol. 47, nos. 4-5, New York: Labor Research Association.
- \_\_\_\_\_. 1980. Vol. 48, no. 5.
- \_\_\_\_\_. 1982. Vol. 50, nos. 7-8.
- Hampden-Turner, C. 1973. "The Factory as an Oppressive and Non-Emancipatory Environment." In Hunnius, Garson, and Case, eds. 1973.
- The Home News*. 1979. New Brunswick, NJ January 3.
- \_\_\_\_\_. 1980. New Brunswick, NJ February 27.
- \_\_\_\_\_. 1980. New Brunswick, NJ October 4.
- In These Times*. March 12-25, 1980.
- Kaye, H. 1979. "Deaths on the Job—A Nationwide Crisis." *Daily World*. March 15, pp. 1, 22.
- Kornhauser, A. 1965. *Mental Health of the Industrial Worker: A Detroit Study*. New York: John Wiley & Sons.
- LOHP Monitor*. 1979. Vol. 7, no. 3 Berkeley: Labor Occupational Health Program (LOHP), University of California Center for Labor Research and Education.
- \_\_\_\_\_. 1980. Vol. 8, no. 2.

—. 1981. Vol. 9, no. 2.

*NJCOSH Newsletter*. May 1979. Clark, NJ: New Jersey Committee for Occupational Safety and Health (NJCOSH).

Nothstein, G.Z. 1981. *The Law of Occupational Safety and Health*. New York: The Free Press.

*Safer Times*. 1978. Philadelphia: Philadelphia Area Committee on Occupational Safety & Health (PHILAPOSH). July/August.

Schwartz, A. 1982. "Meaningful Work." *Ethics* 92, no. 4, (July): 634-46.

—. 1981. "Against Universality." *The Journal of Philosophy* 78, no. 3 (March): 127-43.

—. "The Possibility of Autonomy" (unpublished).

Scott, R. 1974. *Muscle and Blood*. New York: E.P. Dutton.

Spencer, C. 1977. *Blue Collar: An Internal Examination of the Workplace*. Chicago: Lakeside Charter Books.

Stellman, J.M., and S. Daum. 1973. *Work is Dangerous to Your Health*. New York: Random House.

Witt, M., and S. Early. "The Worker as Safety Inspector." *Working Papers* 7, no. 5 (Sept.-Oct. 1980): 21-29.

*Work in America*. 1973. Report of a Special Task Force to the Secretary of Health, Education, and Welfare. Cambridge, MA: M.I.T. Press.