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An Agricultural Law Research Article

**I Gave My Employer a Chicken that Had
No Bone: Joint Firm-State Responsibility for
Line-Speed-Related Occupational Injuries**

Part 2

by

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VI. NEW DEMOCRATS ARE ALSO CHICKEN

*"The poultry industry is the greatest example of the free-enterprise system on earth. We should be applauded for our economics."*³⁹⁵

The Clinton administration's policy reveals continuity with that of the Reagan and Bush administrations in that the USDA has continued to promote "deregulation of poultry processing" by deputizing profit-making chicken companies as self-inspectors.³⁹⁶ The Clinton administration FSIS has adopted an ambiguous attitude toward its predecessors' deregulatory programs. On the one hand, it characterized SIS as driven by the agency's belief that "[s]ince an increasing amount of the poultry . . . supply was being produced under brand names, . . . establishments would be motivated to protect the reputation of their products by performing systematic quality control for visible, unpalatable defects."³⁹⁷ On the other hand, the current FSIS concedes that "[c]onsumers often cannot trace a transitory illness to any particular food or even be certain it was caused by food. . . . This lack of marketplace accountability for foodborne illness means that meat and poultry producers and processors have little incentive to incur extra costs for more than minimal pathogen controls."³⁹⁸ Consequently, the FSIS has concluded that this "market failure" and the accompanying hundreds of deaths and millions of cases of illness caused annually by meat and poultry-related pathogens continue to justify government intervention.³⁹⁹

To be sure, the Clinton administration has not insisted on formally debasing standards as did several Reagan-era abortive congressional bills that would have abolished mandatory inspection in the name of economy, efficiency, and flexibility.⁴⁰⁰ Nor has the

395. Behar, *supra* note 160, at 52-54 (quoting James Hudson, Chairman of Hudson Foods).

396. Scott Bronstein, *Chicken: How Safe?*, ATLANTA J. AND CONST., May 26, 1991, at C1.

397. Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774, 6777 (1995).

398. *Id.* at 6831.

399. *Id.* at 6781 tbl. 2, 6831; *Chickens: Ain't Nobody Here But Us*, ECONOMIST, July 27, 1991, at 27.

400. *See, e.g.*, S. 2622, 99th Cong., 2d Sess. § 4 (1986); H.R. 5105, 99th Cong., 2d Sess. § 4 (1986).

USDA yet resurrected its plans—withdrawn in 1989—for discretionary inspection driven by the agency's self-proclaimed but implausible speculation as to whether its traditional inspectional "intensity . . . exceeds that which is necessary."⁴⁰¹ Although the Processed Products Inspection Improvement Act of 1986, which afforded the USDA some inspectional discretion with regard to meat for six years, did not expressly apply to the PPIA, the USDA took the position that the PPIA itself empowered it to exercise the same degree of discretion.⁴⁰²

Nevertheless, the Clinton administration's new proposal foresees an across-the-board replacement of all existing methods of post-mortem inspection with a single system consisting of two USDA officials without mandating a reduction in maximum line-speeds while enabling some plants operating under the traditional inspection system to increase their production rates in the extreme case from 25 to 70 birds per minute.⁴⁰³ Under this new Poultry Enhancement Program, which critics regard as "a corporate honor system,"⁴⁰⁴ the company workers who would sort carcasses for the inspector would assume even greater responsibility than the helpers currently bear because they would play a greater part in detecting disease and abnormality.⁴⁰⁵ The president of the North Central Council of Food Inspection Locals characterizes this proposal as "nothing more than a gift to the poultry industry" precisely because company employees "are not going to condemn meat' if their supervisors tell them not to."⁴⁰⁶ Even the FSIS has

401. Experimentation With Procedures for Determining the Intensity of Inspection Coverage in Processing Establishments; Waivers of Provisions of the Regulations, 52 Fed. Reg. 10,028 (1987).

402. Pub. L. No. 99-641, § 403, 100 Stat. 3567 (1986); USDA's "Discretionary Inspection" Plan for Meat and Poultry Processing Plants: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Government Operations, 101st Cong., 1st Sess. (1989); Implementation of Improved Processing Inspection, 53 Fed. Reg. 44,818, 44,818 (1988); Donald L. Houston, *Meat and Poultry Inspection in the Year 2000*, 43 FOOD DRUG COMM. L.J. 369 (1988); Bruce Ingersoll, *Agriculture Agency Drops Plan to End Daily Inspections at Meat, Poultry Plants*, WALL ST. J., May 22, 1989, at A5. See generally Albert, *supra* note 377, at 1193-224 (providing an in-depth account of this episode).

403. Enhanced Poultry Inspection, 59 Fed. Reg. 35,639, 35,649-51 (1994).

404. Patricia Mitchell, *Can USDA Inspectors Do More With Less?* WASH. POST, Jan. 9, 1991, at E1, E9 (quoting Thomas Devine, legal director of Government Accountability Project).

405. Enhanced Poultry Inspection, 59 Fed. Reg. 35,639, 35,642.

406. Susan Steel, *Proposed Changes Would Hurt Poultry Inspections, Official Says*, COLUMBUS DISPATCH, June 12, 1994, at 2H (quoting Dave Carney).

been constrained to concede that it will have to consider extending "whistleblower" protection to such workers.⁴⁰⁷ USDA inspectors argue that devolution of government responsibility to firms would generate an inescapable conflict between making money and ensuring safety and health. The same inspectors complain publicly that in the two seconds or less which they have at their disposal before the next bird passes by they cannot carry out their mandate.⁴⁰⁸ Thus, it is clear that the USDA long ago implanted that contradiction in the government inspection program.

Under the more recent Hazard Analysis and Critical Control Point systems,⁴⁰⁹ not only would company self-policing be extended further, but the de-emphasis of organoleptic inspection and the heightened importance attached to detection of pathogenic microorganisms may eventually trigger yet another wave of line-speed increases. Sounding more like a lawyer than a veterinarian, the assistant deputy administrator of the FSIS during the Reagan administration insisted that even at 180 birds per minute,⁴¹⁰ the agency would comply with its statutory obligation to inspect each bird: "The inspector will in fact be looking at each bird, but much quicker than ever before."⁴¹¹

Interestingly, whereas the meat oligopolies have opposed the USDA's deregulatory program on the ground that withdrawal of governmental inspection would lower public confidence and sales, chicken firms have strongly supported the Department's march toward deregulation. "[L]ulled by continuing increases in sales," the poultry industry continues to exalt throughput über alles.⁴¹² Rec-

407. Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774, 6830 (1995).

408. Jane Fullerton, *Consumers Have Bone to Pick on Product Safety*, ARK. DEMOCRAT, Apr. 21, 1991, at 1A.

409. 60 Fed. Reg. 6774 (1995). For a somewhat critical view of HACCP, see *Modern Technology and Food Inspection: Hearings Before the Subcomm. on Technology, Environment, and Aviation of the House Comm. on Science, Space, and Technology*, 103rd Cong., 2d Sess. 80-108 (May 5, 1994) [hereinafter *Food Inspection: Hearings*] (statement of Carol Tucker Foreman).

410. *Review of U.S. Department of Agric.'s Meat and Poultry Inspection Programs: Hearings Before the Subcomm. on Livestock, Dairy, and Poultry of the House Comm. on Agric.*, 100th Cong., 1st Sess. 325-26, 517 (1987) (statement of Rep. Neal Smith) (stating that USDA was considering regulations that would allow line-speeds of up to 180 birds per minute); Jane Fullerton, *Risky Business: Arkansas Poultry Empire, Part 2: Risk to Health*, ARK. DEMOCRAT, Apr. 22, 1991, at 1A (stating that USDA was considering regulations that would allow line-speeds of up to 182 birds per minute).

411. Anthan, *supra* note 1, at 10A (quoting Dr. John Prucha).

412. George Anthan, *Untitled*, Gannett News Service, Feb. 5, 1989, available in LEXIS,

ognizing that the enactment of more sweeping, across-the-board deregulatory legislation by a right-wing Republican Congress offers the opportunity for even more favorable treatment under which benefits to firms will programmatically become more important, the industry has supported postponement of the new microbial testing system.⁴¹³

The USDA acknowledges that an alternative method would also achieve its objectives of greater food safety. Under this scenario, existing procedures and techniques would be retained, but an inspector would work at the end of the line after the viscera have been removed from the carcass to identify fecal contamination. What speaks against this alternative, according to the agency, is the possibility that, given the federal government's disinclination to incur additional personnel costs for additional inspectors, "production rates could be reduced by 30 to 50 percent if the inspectors tasks remained identical, but fewer inspectors were used to perform those functions."⁴¹⁴ With fewer inspectors, the production rates would necessarily be reduced "because of limits on the number of birds per minute the final inspector could examine."⁴¹⁵ The cost of lower production or slowed line-speeds "could reach \$5.2 billion per year for chickens and turkeys."⁴¹⁶

In light of the USDA's long history as an agency that has been captured by the firms it is supposed to regulate, it is anticlimactic to hear that it judges these costs to be "unacceptable."⁴¹⁷ After all, the USDA's Poultry Enhancement Project Team that developed the proposal "understands that any option chosen is subject to the . . . constraint: There should be no reduction in production line speeds."⁴¹⁸ The possibility that plants operating under the NELS or SIS systems might "have to operate their lines at less than optimal speeds . . . because the post-viscera-harvest inspector cannot effectively inspect more than 35 birds per minute" meant that

News Library, GNS File.

413. Marian Burros, *Congress Moving to Revamp Rules on Food Safety*, N.Y. TIMES, July 3, 1995, at 1; *Compromise Reached on USDA's HACCP Rule*, BNA WASH. INSIDER, July 20, 1995, at d14; Mike McGraw, *Meat 'Mega Reg' Unlikely to End Debate*, KAN. CITY STAR, July 17, 1995, at A1.

414. Enhanced Poultry Inspection, 59 Fed. Reg. 35,639, 35,650 (1994).

415. Enhanced Poultry Inspection, 59 Fed. Reg. 57,023, 57,024 (1994).

416. *Id.*

417. Enhanced Poultry Inspection, 59 Fed. Reg. 35,639, 35,650.

418. U.S. Food Safety and Inspection Service, Preliminary Impact Assessment: Poultry Enhancement Options 1 (May 1994) [hereinafter Preliminary Impact Assessment] (unpublished memorandum made available by FSIS).

the agency had to reject the alternative procedure under which the NELS lines would have to run at only 70 rather than 90 birds per minute, while the SIS line-speed would decline from 70 to 35 birds per minute.⁴¹⁹ At "such slow rates [sic] . . . there could be a negative effect on productivity of \$5.2 billion . . . during the first year of operation."⁴²⁰ Making such "substantial demands on the regulated industry" is unthinkable to the regulator, which regards as "severe" an impact that might act as "inducement for the industry to install additional poultry slaughter lines" to maintain output.⁴²¹

The agency's entire analysis and cost calculations, which, revealingly, it took the initiative to estimate without any prompting or input from the regulatees,⁴²² underscore the profoundly pro-capital bias that has always defined the USDA's approach. The agency characterizes "optimal" speeds as those that increase firms' profits, whereas speeds as "slow" as 1.2 birds per second, which might reduce somewhat the incidence of repetitive trauma syndrome among the 220,000 very low-paid and largely female and minority⁴²³ workers whose shortened work-lives form the basis of the poultry corporations' profitability and the federal government's cheap food policy, are automatically rejected as "unacceptable." Thus, when USDA food safety officials observe that "[w]e just don't want to be the cap on productivity," the subtext is that "an extra bird-per-minute or two can mean a difference of hundreds of thousands, or even millions (for the largest plants) of dollars in profits."⁴²⁴

419. *Id.* at 10.

420. *Id.* at 12.

421. *Id.*

422. Telephone Interview with Chuck Williams, U.S. FSIS (Jan. 10, 1995).

423. *See, e.g.*, NIOSH: PERDUE, *supra* note 16, at tbl. 4 (listing the large number of female minority employees who are exposed to these working conditions).

424. Kathy Sawyer, *On the Chicken Line: Trying to Catch the Bad Ones, Quickly*, WASH. POST, Sept. 2, 1979, at A1 (quoting Dr. Donald Houston); *see also* William Dubbert, *The New Look of Meat and Poultry Inspection*, J. OF THE AM. VETERINARY MED. ASS'N 266, 268 (1984) ("In order to overcome the justifiable criticism that we were a 'cap' on industry productivity, we chose the one realistic option: more efficient poultry inspection procedures.").

VII. PRO-CAPITAL REGULATORY BIAS

*[R]educing cumulative trauma disorders alone would never generate enough savings to pay for the paperwork required by OSHA's proposed regulation. Liberty Mutual Group, the nation's largest workers' compensation insurer, estimates that cumulative trauma disorder claims cost less than \$1 billion a year.*⁴²⁵

The FSIS's biased regulatory approach does have two virtues: openness and consistency. The agency's spokespersons do not have to be coaxed into conceding that the FSIS does not now consider and has never taken into account costs associated with the adverse impact of its authorized increase in line-speeds on the health and safety of "the industry's" workers.⁴²⁶ Yet, even *Time* reports that the incidence of repetitive motion disorders will not be significantly reduced "until the work pace is slowed down."⁴²⁷ This malignant neglect conforms to employers' interests in an industry in which labor is the main cost component, which firms were able to compress from 62% in 1955 to about 50% in the early 1980s (46% in the South).⁴²⁸

The course of the USDA's regulation of chicken processing is the history of an agency's self-identification with the self-valorization requirements of the regulated firms' capital. One of the most spectacular illustrations of the USDA's status as a captured regulator occurred in 1970 when it recruited and shipped strikebreakers to northern Alabama to insure the continued flow of chicken-bearing profit. The strikebreakers replaced inspectors who were honoring a picket line at Pillsbury's and Ralston Purina's processing plants that had been organized by chicken farmers expressing dissatisfaction with their contracts.⁴²⁹ The agency's systemic pro-firm bias was highlighted, albeit in convolutedly embarrassed language,

425. Janet Novack, *Ergopolitics 101*, FORBES, Oct. 24, 1994, at 216, 218.

426. Telephone Interview with Dr. Isabel Arrington, Staff Officer, FSIS, Slaughter Operations Staff (Dec. 15, 1994); Telephone Interview with Judy Riggins, assistant to Michael Taylor, Administrator, FSIS (Dec. 22, 1994).

427. Behar, *supra* note 160, at 53.

428. LASLEY ET AL., *supra* note 112, at 44, 46; VEREL W. BENSON & THOMAS J. WITZIG, THE CHICKEN BROILER INDUSTRY: STRUCTURE, PRACTICES AND COSTS, 24 tbl. 17 (U.S. Dep't of Agric. Economic Research Service Agricultural Economic Report No. 381, 1977) (indicating that labor is the main cost in the broiler industry).

429. WELLFORD, *supra* note 72, at 119, 120.

by the National Research Council, which the FSIS hired in the 1980s to evaluate its inspection program. The Council emphasized "the peer group with which FSIS is most closely associated" as an "obstacle to analysis":

Many federal agencies have strong relationships with their industrial and business constituencies. It is a measure of a democratic government that it be accountable to all the people and groups it affects. For meat and poultry inspection, the relationship to industry is particularly close—of necessity. Honest or dishonest, good compliance record or bad . . . every operator of an establishment is subject to federal oversight every working day. The potential for conflict is always present.

The close relationship with the industry FSIS has had to develop sensitizes program officials to the effects of their program upon the manufacturers. This is not to suggest that FSIS ignores the public interest . . . or that it makes decisions that are inevitably industrially oriented. . . . Nor has the agency sponsored or encouraged active debate on the shape of its program. FSIS seldom describes to a scientific or broader policy audience the underlying rationale for its decisions. In some cases, this low level of communication with communities outside industry can lead to inappropriate decisions that may affect public health.⁴³⁰

Even when the USDA purports to take measures that redound to the benefit of processing plant workers, that outcome is always instrumentally dictated by exactly the same profitability considerations that the regulated firms adopt. It seems never to have occurred to the agency that measures should be taken to reduce injuries without any quid pro quo. In connection with its regulatory duty to approve construction plans for poultry plants, the USDA has issued *Guidelines for Establishing and Operating Broiler Processing Plants*:

Employee Comfort Facilities.—In recent years greater concern has been shown to providing workers with more comfortable personal facilities, with the expectation that worker productivity would increase, workmanship improve, morale

430. MEAT AND POULTRY INSPECTION, *supra* note 45, at 160.

could be maintained at acceptable levels, and lower worker turnover would result. . . . Providing for the safety of plant workers is essential to planning a satisfactory layout. Accidents are costly not only in lost productive time but also in benefits to be paid during the worker's recovery and the possibility of increased insurance premiums.⁴³¹

In the meantime, the USDA has been constrained to acknowledge that its own inspectors are exposed to considerable risk of cumulative trauma disorders as well as lacerations, contusions, and back strains.⁴³² Such a concession is hardly surprising given the fact that inspectors may perform as many as 15,750 highly repetitive motions per day on a thirty-five bird per minute per inspector SIS line⁴³³ while the FSIS's own "Wellness Training Program" labels tasks that yield as few as 840 or more repetitions per 7-hour shift "highly repetitive."⁴³⁴ If ergonomists define "high repetitive jobs" as those with a cycle time of less than 30 seconds,⁴³⁵ then even turkey plant workers, who make 15,120 cuts per shift where the line moves less quickly than in chicken plants, belong to the group of workers most vulnerable to cumulative trauma disorders.⁴³⁶ Chicken processors may repeat motions up to 30,000 times during an 8-hour shift.⁴³⁷

In the abstract, the USDA's authorization of increased line-speeds of seventy or ninety-one birds per minute, while creating, through the forces of competition, nationally uniform rates of throughput for all firms, does not necessarily mean that individual workers' workloads must rise commensurately. Staffing and configuration of the production line and of the work flow are mediating factors that can moderate or exacerbate the effects of general in-

431. BRANT ET AL., *supra* note 23, at 14, 18.

432. *State Panel Examines Hazards Facing Workers in Food Processing Industries*, 19 OCCUPATIONAL SAFETY & HEALTH REP. 2168, 2169 (1990) (according to Ronald Prucha, Associate Administrator, FSIS); Telephone Interview with Joseph Powers, Designated Agency Safety and Health Official, FSIS (Dec. 27, 1994).

433. Letter from David Carney, President, North Central Council of Food Inspection Locals, American Federation of Government Employees, to Terry Medley, Acting Administrator, FSIS (Mar. 13, 1994) (on file with author).

434. U.S. FSIS, WELLNESS TRAINING PROGRAM 13 (n.d.).

435. Barbara Silverstein et al., *Hand Wrist Cumulative Trauma Disorders in Industry*, 43 BRIT. J. OF INDUS. MED. 779, 780 (1986).

436. Thomas Armstrong et al., *Investigation of Cumulative Trauma Disorders in a Poultry Processing Plant*, AM. INDUS. HYGIENE ASS'N J., Feb. 1982, at 103, 103.

437. Cathy Cash, *Perdue Workers Request Assembly Line Slow Down*, UPI, Feb. 25, 1990, available in LEXIS, News Library, UPI File.

creases in line-speed, which become the "outer limit" for firms.⁴³⁸ This relationship is manifest for the unionized USDA inspectors: whereas the three inspectors on the faster ninety-one bird per minute line inspect thirty and one-third birds per minute, the two inspectors on the slower seventy bird per minute line inspect thirty-five birds per minute.⁴³⁹ Similarly, in a plant with a very strong local union—such as the Foster Farms plant in Livingston, California, organized by the UFCW—workers are able to persuade the management to equalize working conditions on the faster and slower lines through increased staffing, reconfiguration, or rotation.⁴⁴⁰ For the seventy-five to eighty percent of poultry workers who have no union, however, firms are much more likely to use the opportunity created by USDA-authorized line-speed increases to intensify individual workers' loads as well. Workers who once sliced every fourth bird soon find themselves cutting every other bird.⁴⁴¹ Indeed, Congress has heard testimony from former poultry line workers that companies frequently use the occasion of a line-speed increase to reduce the number of workers.⁴⁴² Union claims that increased line-speeds are accompanied by reductions in line staffing are made plausible by the view of the OSHA ergonomist during the Bush administration, who confirmed that the repetitive stress syndrome that is caused "by just pushing workers harder and harder and harder" could in large part be eliminated by slowing down production lines.⁴⁴³

Several statistical indicators underscore the key role that the USDA's line-speed policy has played in strengthening poultry management's position vis-à-vis its work force. Once the significant productivity gains stemming from the wave of labor-saving automation—in killing, defeathering, evisceration, and deboning—had been realized by the end of the 1970s,⁴⁴⁴ the trend in the bias away

438. Telephone Interview with David Wylie, Attorney for Perdue Farms (Jan. 26, 1995).

439. Letter from David Carney, President, North Central Carolina of Food Inspection Locals, American Federation of Government Employees, to Terry Medley, Acting Administrator, FSIS (Mar. 13, 1994) (on file with author).

440. Telephone Interviews with Deborah Berkowitz, Director of Health and Safety Department, United Food and Commercial Workers (Dec. 1994 and Jan. 1995).

441. Goldoftas, *supra* note 21, at 26.

442. See *Poultry Safety: Consumers at Risk: Hearings on S. 1324 Before the Senate Comm. on Lab. and Human Resources*, 102d Cong., 1st Sess. 33 (1991) (statement of Donna Bazemore, Center for Women's Economic Alternatives, Ahoskie, North Carolina, and former employee of Perdue Farms, Inc.).

443. Fullerton, *supra* note 160 (quoting Dave Cochran).

444. Ahmed & Sieling, *supra* note 36, at 36-37.

from labor-saving and toward labor-using technological change since 1980 became associated⁴⁴⁵ with productivity increases that “were achieved without extensive investments in technical innovations. In fact, the poultry industry’s capital expenditures on new and used equipment per employee averaged 45% below the per employee average for all manufacturing workers throughout the 1980’s.”⁴⁴⁶ In 1987, for example, the average new capital expenditure for machinery and equipment in poultry slaughtering and processing amounted to \$2,195 per production worker or 41% of the \$5,369 per production worker in all manufacturing industries.⁴⁴⁷ In 1991, poultry firms invested \$2,461 in new machinery and equipment per production worker, but this figure amounted to only 34% of the \$7,299 invested by all industries.⁴⁴⁸ Taking into account all new capital expenditures including buildings and structures, the poultry processing industry’s investment per production worker has, as recorded by the Census of Manufacturers in 1977, 1982, 1987, and 1992, amounted to \$1,650, \$2,176, \$2,942, and \$2,692 respectively; these figures reached only 48%, 36%, 46%, and 30% respectively of the aggregate manufacturing level.⁴⁴⁹ To be sure, the chicken producing oligopolies’ “[i]ncentives to invest in technical innovations are lessened by the comparatively low average hourly earnings in poultry.”⁴⁵⁰

By 1983, the USDA’s Economic Research Service was warning that “productivity gains may come more slowly than in the past . . . in production. . . . [M]achines and energy have become more costly substitutes for labor; major economies of scale have already been realized, as have the economies from coordination of the production-marketing functions.”⁴⁵¹ It was precisely this tem-

445. David Lambert, *Technological Change in Meat and Poultry-Packing and Processing*, 26 J. OF AGRICULTURAL AND APPLIED ECON. 591, 596 (1994).

446. Ron Hetrick, *Why Did Employment Expand in Poultry Processing Plants?*, MONTHLY LAB. REV., June 1994, at 31, 32.

447. Calculated according to U.S. BUREAU OF THE CENSUS, 1988 ANNUAL SURVEY OF MANUFACTURES: STATISTICS FOR INDUSTRY GROUPS AND INDUSTRIES 1-11 tbl. 2, 1-45 to 1-46 tbl. 5 (1990).

448. Calculated according to U.S. BUREAU OF THE CENSUS, 1991 ANNUAL SURVEY OF MANUFACTURES: STATISTICS FOR INDUSTRY GROUPS AND INDUSTRIES 1-10 tbl. 2, 1-45 to 1-46 tbl. 5 (1992).

449. Calculated according to U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF MANUFACTURES: PRELIMINARY REPORT: INDUSTRY SERIES: MEAT PRODUCTS 20A-1 tbl. 1 (1994); U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF MANUFACTURES: PRELIMINARY REP.: SUMMARY SERIES 4 tbl. 2 (1994).

450. Hetrick, *supra* note 446, at 32.

451. FLOYD LASKEY, U.S. DEP’T OF AGRICULTURE, THE U.S. POULTRY INDUSTRY:

porary lag in labor-saving mechanization and automation—interrupted, for example, by the introduction of a mechanical system for handling live poultry that enabled five rather than six or seven live hangers to shackle 7,200 chickens per hour⁴⁵²—that presumably prompted the oligopolies to pressure the USDA during the 1980s to devise methods for further increasing line-speeds. Thus, productivity in the industry, aided, abetted, and enforced by the USDA's "streamlined" inspection procedures, could, for the time being at least, continue to rise merely by making workers with few alternatives work faster within a minute division of labor requiring an above-average proportion of unskilled labor⁴⁵³—until they are disabled and replaced by fresh recruits in an industry that repels its workers so quickly that annual turnover rates as high as 500%⁴⁵⁴ cause managers to give precedence to recruitment over retention.⁴⁵⁵ "To keep pace on poultry production lines moving twice as fast as a decade ago, the human components of the highly automated poultry processing machinery . . . must move their arms in quick staccato fashion to slice, wrap, cut, and . . . rip apart raw chicken with their hands."⁴⁵⁶

It is this link between productivity, profits, and wages on the one hand and the USDA's compliant inspection and line-speed policies on the other that has enabled the large firms to record phenomenal growth rates while crippling thousands of impoverished workers. Chicken capital "can be most proud of this track record,"⁴⁵⁷ which includes a 38% increase in broilers processed (through the chiller line) per worker hour alone between 1985 and

CHANGING ECONOMICS AND STRUCTURE 23 (Agricultural Economic Report No. 502, 1983).

452. A.D. SHACKELFORD & V. WILSON LEE, A MECHANICAL SYSTEM FOR HANDLING LIVE POULTRY 19 (USDA Science & Education Administration, AAT-S-15, 1980); see also A.D. SHACKELFORD & V. WILSON LEE, U.S. DEP'T OF AGRIC. LOADING LIVE POULTRY: A TIME AND MOTION STUDY OF LOADING BROILER CHICKENS BY HAND, FORKLIFT TRUCK, AND SQUEEZE-LIFT TRUCK (Science & Education Administration AAT-S-22, 1981) (discussing mechanical means for handling poultry).

453. Ahmed & Sieling, *supra* note 36, at 35-36 (describing the poultry-processing labor force as comprised mostly of "manual and semi-skilled occupations").

454. Horwitz, *supra* note 23, at A8; *Expert Cites Successful Programs to Curb Injuries in Poultry Plants*, 20 OCCUPATIONAL SAFETY & HEALTH REP. 1716, 1716 (1991) [hereinafter *Programs to Curb Injuries*] (according to Travis Arterbury, Ergonomics Consultant to Tyson Foods, Inc.).

455. PRESIDENT'S TRIENNIAL REPORT ON IMMIGRATION, *supra* note 47, at 131.

456. Bronstein, *Chicken*, *supra* note 23, at C1.

457. G. Thomas Martin, Jr., *Specialization Continues Net Yield Improvements*, in WATT POULTRY YEARBOOK 1993, at 24, 24-26 (1993).

1992 to an industry-wide average of 182.⁴⁵⁸ “The high rate of occupational injury in poultry processing derives most directly from the constant pressures to increase or maintain high line speeds. . . . This pressure underlies not only high injury rates but also creates an environment in which control over workers’ time and movement is central to production.”⁴⁵⁹ What is particularly ironic about the nationally uniform line-speeds imposed by the USDA is that, given the negligible levels of imports,⁴⁶⁰ the state could just as easily set lower speeds without exposing the firms to disruptive competition from low-wage countries.

This pattern of inverted regulation does not accord with Theodore Lowi’s influential theory of regulatory liberalism. According to Lowi, a “loan of governmental sovereignty” was necessary in the agricultural sector because it “was so decentralized and dispersed that private, voluntary agreements to manipulate markets were obviously too difficult to reach and impossible to sustain.” To this end, “[a]dministrative agencies were created to facilitate agreements.”⁴⁶¹ In poultry processing, as in meat packing, industrial-strength concentration should make the kind of “self-government” Lowi has in mind superfluous for the oligopolists. Lowi also views the DOL as a “clientele department . . . legally obliged to develop and maintain an orientation toward the interests that comprise this sector.”⁴⁶² Unlike the USDA, however, the DOL as a mere “feedback” agency is “simply not to be entrusted by anyone with significant direct powers over persons and property.”⁴⁶³ Although this agentlessly formulated dictum may correctly reflect the position of the owners of the property to be regulated, bizarrely, Lowi characterizes the “national consensus standards” that Congress authorized OSHA to adopt⁴⁶⁴ “as almost pristine examples of interest-group-liberal resolutions of the problem of balancing power and interest against policy choice.”⁴⁶⁵ Yet these standards were generated al-

458. G. Thomas Martin, Jr., *The Squeeze Is On*, in WATT POULTRY YEARBOOK 1994-95, at 10 & tbl. Labor Efficiency (1994).

459. GRIFFITH, *supra* note 323, at 176-77.

460. See Ahmed & Sieling, *supra* note 36, at 35; see also INT’L TRADE ADMIN., U.S. DEP’T OF COM., 1990 U.S. INDUSTRIAL OUTLOOK 34 (1990) (noting that U.S. imports of poultry and related products accounted for a mere .2% of domestic production).

461. THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 71 (2d ed. 1979).

462. *Id.* at 77.

463. *Id.* at 78, 80.

464. 29 U.S.C. §§ 652(9), 655(a) (1988).

465. LOWI, *supra* note 461, at 117.

most exclusively by trade associations without any worker or union input.⁴⁶⁶ If labor is the client, OSHA has never been a captured agency.

VIII. A LATTER-DAY IMMACULATE CONCEPTION

*[N]o one ever died of ergonomics.*⁴⁶⁷

In a news article that resembled free advertising for Tyson Foods, *U.S. News & World Report* recently gave the firm's chairman of the board a stage from which to proclaim his solidarity with his employees (except that "[a]nyone who refers to their 54,000 co-workers as 'employees' instead of 'people' is fined a quarter"⁴⁶⁸):

Don Tyson has never forgotten his humble origins. "This has always been tough work. I remember back in the '60s how hard it was taking out that chicken's [innards]," he says, twisting his fingers into an imaginary bird. "By the end of the day, you couldn't move your hands anymore."

Of course, the modern chicken processing plant is now almost fully automated, with 210 live birds a minute going in one end and fully cooked fried chicken pieces coming out the other.⁴⁶⁹

The magazine's characterization of today's plant is about as realistic as "the myth that the wealthy Mr. Tyson lives simply."⁴⁷⁰

The worst and most grueling job is held by live-hangers. These workers shackle by the legs twenty-five birds per minute, while the chickens, which "eat one another's germ-laden excrement and spread it on their feathers and skin" while stuffed in cages en route to the plant,⁴⁷¹ in turn "scratch, peck and defecate all over them."⁴⁷² While workers back up malfunctioning machines on automated lines, workers on less modern lines continue to slit birds

466. NOBLE, *supra* note 29, at 43-47.

467. 141 CONG. REC. H3252 (daily ed. Mar. 15, 1995) (statement of Rep. Cass Ballenger, chairman of the Subcommittee on Work Force Protection of the House Committee on Economic and Educational Opportunities).

468. Frantz, *supra* note 143, at 1.

469. McGraw, *supra* note 98, at 42.

470. Frantz, *supra* note 143, at 6.

471. David Bjerklie, *The Dangers of Foul Fowl: As Poultry's Popularity Grows, the Scourge of Salmonella Spreads*, TIME, Nov. 26, 1990, at 136, 136.

472. Horwitz, *supra* note 23, at A8.

open and remove innards manually.⁴⁷³ On the eviscerating line at the ConAgra plant in Athens, Alabama, for example, an automatic venting machine was introduced in 1978, but it was not until 1991 that the firm even alleged that its “associates only back up the machine”; the automatic drawing machines introduced in 1975 did not permit a merely back-up role for “associates” until 1993.⁴⁷⁴ Although automation has reduced many of the workers on the eviscerating line to feeding or positioning the carcasses for the machine and to back-up positions monitoring and correcting errors of ever faster machine operations, those errors are so frequent that two workers backing up a 70 bird per minute eviscerating machine may be working at a furious pace; when, as not uncommonly occurs, the machine breaks down altogether, management expects the workers to maintain the machine-forced rate of throughput.⁴⁷⁵ Even those who work as a “back up killer” whacking the necks of the chickens the 300 bird per minute circular saw misses suffer from repetitive stress syndrome.⁴⁷⁶ Those managerial expectations are reinforced, according to the USDA’s *Guidelines for Establishing and Operating Broiler Processing Plants*, by the deployment of “a chief supervisor and two or three line supervisors . . . to assure a constant flow of product at a maximum line speed.”⁴⁷⁷

By around 1990, new technology for automating broiler production became available or at least began to be introduced by the larger firms. One reason adduced for the renewed onset of automation is an increase in competition as the industry moved toward more expensive specialties such as boneless chicken breast, the retail price of which is much closer to sale-priced steak than is the case for standard processed chicken. From 1962 to the mid-1990s whole birds as a share of total processed broilers declined from around 87% to 12%.⁴⁷⁸ Tyson, for example, which owns 18 of

473. Taft Wireback, *Chicken Industry Under Fire for Sanitation, Worker Complaints*, GREENSBORO NEWS & REC., Dec. 17, 1989, at A1; Interview with Kelly Otto, Attorney with Clark & Scott, P.C., in Iowa City, IA (Feb. 24, 1995) (the firm defending Gold Kist, Inc. in workers’ compensation claims in Alabama).

474. ERGONOMICS JOURNAL AND ACTION PLAN FORM: CONAGRA ATHENS 14-16 (n.d.).

475. Telephone Interview with Margo Michaels, UFCW Safety & Health Department (Feb. 15, 1995) (describing conditions in ConAgra plant in Athens, Alabama); Telephone Interview with Deborah Berkowitz, Safety and Health Director, UFCW (Mar. 6, 1995); see also BRANT ET AL., *supra* note 23, at 26.

476. Behar, *supra* note 160, at 54 (quoting Chris Turic, a Tyson poultry worker).

477. BRANT ET AL., *supra* note 23, at 26.

478. PERDUE & CHICKEN, *supra* note 62, at 15 (discussing the 12% figure); Perez et al., *supra* note 117, at 28 tbl. A-1 (providing figures through 1989).

the 73 further processing plants in the United States, sold almost 95% of its broiler output in cut-up form by 1995,⁴⁷⁹ and reputedly held 55% of the processed chicken market share in 1987.⁴⁸⁰ This specialization, which Tyson initiated in the 1970s when it became clear that profit margins were triple those associated with the sale of whole broilers,⁴⁸¹ is, to be sure, linked to the success of the firms' strategy to export the parts such as feet, drumsticks, and dark meat that "yuppies" do not buy, to Asia and Europe.⁴⁸²

Whereas ten to fifteen years ago the eviscerating line was uniformly crowded with workers performing one or two motions, today on the most highly automated lines fewer purely manual operations remain. These operations are performed by inspection helpers or mirror trimmers, but are primarily performed by rehangers, who rehang birds that are unhung as a buffer measure to coordinate the kill line, which may run as fast as 300 birds per minute, with the evisceration line, which is not supposed to operate at more than 91 birds per minute.⁴⁸³

Despite automation on the slaughter and evisceration lines, overall poultry processing employment has continued to rise as a result of the expansion of the so-called further processing line, which has been less intensely mechanized. A 1989 NIOSH study of a large Perdue plant in North Carolina, for example, revealed that whereas 182 day-shift workers were employed on the slaughter and evisceration lines, 470 worked in cut-up and deboning; at a smaller Perdue plant, the predominance of the latter group was somewhat less marked.⁴⁸⁴ The shift of workers from evisceration

479. Thornton, *supra* note 145, at 29-30; *U.S. Broiler Companies*, *supra* note 149, at 58 tbl. 5.

480. *C. Itoh Plans to Import Mexican Chicken Products*, JAPAN ECON. J., Oct. 15, 1988, at 18, 18.

481. *Tyson Foods: Putting Its Brand on High-Margin Poultry Products*, BUS. WK., Aug. 20, 1979, at 48, 48.

482. INTERNATIONAL TRADE ADMIN., U.S. DEPARTMENT OF COMMERCE, U.S. INDUSTRIAL OUTLOOK '92, at 32-6 tbl. 9 (1992); VERHEIJEN & KOK, *supra* note 153, at 51; George Anthan, *Ag Officials See 'Golden Era' in Export Trade*, DES MOINES REG., Feb. 19, 1995, at 1A; John Hall, *Got It Down Cold*, NEW ORLEANS TIMES-PICAYUNE, Mar. 20, 1994, at F1; *Poultry Exports Expected to Rise*, DES MOINES REG., Feb. 4, 1990, at 3W.

483. W. DALEY ET AL., *Robotics and the Poultry Processing Industry*, in ROBOTICS IN MEAT, FISH AND POULTRY PROCESSING 48, 50 (K. Khodabandehloo ed., 1993); Telephone Interview with Jim McCauley, Health and Safety Director, Perdue Farms, Maryland (Jan. 27, 1995); Telephone Interview with Jackie Nowell, Safety and Health Department, UFCW (Jan. 27, 1995); Telephone Interview with William Roenigk, Vice-President, National Boiler Council (Feb 3, 1995).

484. NIOSH: PERDUE, *supra* note 16, at 27 tbl. 1, 29 tbl. 7.

to such operations as cut-up and deboning, which also exist in more and less labor-intensive and automated versions,⁴⁸⁵ reflects the shift in output to premium-priced and higher-profit products, which as early as 1985 accounted for more than 55% of Tyson's products.⁴⁸⁶ When Don Tyson asserts that with such products his firm is "really selling time,"⁴⁸⁷ he means that he is selling (with the "mark-up" that makes his firm so profitable) the labor time that his oligopsonistic labor market provides at very low cost. Higher profits are driven by the lower level of competition, which is enforced by the higher costs of establishing such further processing facilities.⁴⁸⁸

IX. CHEAP FOOD AND CHEAP EMPLOYERS: CLASS-BIASED COST-BENEFIT ANALYSIS AND ADMINISTRATIVE LAW

*It is possible to establish performance based standards to prevent repetitive motion traumas. I will establish one right now: Don't work, don't type, don't do any heavy lifting, never strain yourself, and try to avoid breaking out in a sweat. The solution is somewhere between having a work place where no one works and a work place where something gets done. Unfortunately, neither Barbara nor anyone else knows where that point lies.*⁴⁸⁹

The USDA steadfastly denies that it has any legal responsibility for the safety and health of poultry production workers.⁴⁹⁰ Although the legislative history of the PPIA shows that Congress regarded worker safety as a subsidiary objective of the Act, the USDA argued in the aftermath of the 1991 fire that killed twenty-

485. NIOSH: PERDUE, *supra* note 16, at 2; Bill Saporito, *ConAgra's Profits Aren't Chicken Feed*, FORTUNE, Oct. 27, 1986, at 70, 71, 74, 80; cf. Neil Murray, *Automaton: Plukon's Chicken Plant Is the Most Modern in Europe, Neil Murray Discovers*, FROZEN AND CHILLED FOODS, Aug. 1991, at 18, 18-19 (describing an almost completely automated chicken processing plant).

486. Arthur Buckler, *Tyson Foods Isn't Chicken-Hearted About Expansion*, WALL ST. J., Jan. 18, 1994, at B4; Jim Hurlock, *Profits Are Plump for Chicken Farmers*, BUS. WK., Oct. 28, 1985, at 40.

487. Frantz, *supra* note 143, at 1.

488. BAKER & BRUCE, *supra* note 59, at 252.

489. 141 CONG. REC. H3252 (statement of Rep. Hefley, referring to Barbara Silverstein, chief drafter of OSHA's ergonomics standard).

490. Telephone Interview with Dr. Isabel Arrington, Staff Officer, FSIS, Slaughter Operations Staff (Dec. 15, 1994); Telephone Interview with Judy Riggins, assistant to Michael Taylor, FSIS Administrator (Dec. 22, 1994).

five workers at the Imperial Food Product's poultry plant in Hamlet, North Carolina, that the inspectors, as quasi-guests on private property, lacked the authority even to override management's decision to lock exit doors in order to prevent theft of chickens.⁴⁹¹ Yet the FSIS requires firms, when seeking agency approval of their construction plans, to provide numerous "welfare facilities for plant employees" including some as mundane as lockers with sloping tops.⁴⁹² As Foreman, the former Assistant Secretary of Agriculture, explained to Congress,

[T]he USDA imposes a large number of requirements on plants, many of them complex and many of them not directly related to safe food. . . .

For example, FSIS requires that stairs in plants be "of impervious material and have solid treads, closed risers and side curbs 6 inches high measured at the front of the steps;" . . . drinking fountains must be provided and, "if placed adjoining a lavatory must be located high enough to avoid splash from the lavatory." Those all seem like good ideas and seem to evidence primarily a concern for the safety of plant and inspection personnel, rather than an obvious and direct impact on the wholesomeness of the product produced in the plant. Yet they have been on the books and vigorously enforced for years.

FSIS has even found the time and energy to fret about and take on responsibility for improving the "poor public image of the packing industry." Inspection instructions for "Outside Premises" state, "The public as well as visitors and workers commonly prejudge the inside of a plant by its exterior appearance. This often neglected area of plant sanitation is an important reason for the poor public image of the packing industry. . . . The image of the packing plant as a food processing establishment certainly is not enhanced if the outsider sees it as a junk yard or public dump. . . ."

Perhaps FSIS should give some thought to the public's opinion of a government agency that cares more about

491. *Fire Victims Died Trying Shut Exits*, N.Y. TIMES, Sept. 7, 1991 at A9.

492. FOOD SAFETY INSPECTION SERV., U.S. DEP'T OF AGRIC., AGRICULTURE HANDBOOK 570, U.S. INSPECTED MEAT AND POULTRY PACKING PLANTS: A GUIDE TO CONSTRUCTION AND LAYOUT 32 (1986).

clutter than the lives of its inspectors and plant employees.⁴⁹³

Just as the USDA disclaims all responsibility for worker safety, with alacrity firms avail themselves of the USDA's norm-setting as a defense in litigation. When employees—or, rather, “associates,” since the firm “dropped the term ‘employee’ years ago”⁴⁹⁴—at Perdue Farms plants in North Carolina, where as many as 36% of workers suffered from cumulative trauma disorders, requested that the state OSHA, to which federal OSHA has devolved its authority, order the company to slow down the production lines, Perdue's lawyer defended on the ground that, “[o]ur approach is as long as the USDA allows these speeds, we'll stick to that.”⁴⁹⁵

A federal government that seems to find it so difficult to protect poultry workers has, however, found ways to classify such billion-dollar enterprises as Tyson or Perdue as family farms (namely, as agriculture-related firms at least half of whose stock is controlled by 3 or fewer family members) eligible for tax deferments.⁴⁹⁶ That the Clinton administration has continued pro-capital (and in particular pro-Tyson) policies is hardly surprising in light of the fact that Clinton, as governor of the largest broiler-producing state, “shower[ed] the largest chicken producer, Tyson Foods, with millions of dollars in tax breaks.”⁴⁹⁷ Similarly unsurprising is that the person he chose as Secretary of Agriculture, a department that boasts of the \$50 million that it and state agencies contribute annually to poultry research,⁴⁹⁸ was not only from Mississippi, another leading broiler producing state,⁴⁹⁹ but also was forced to resign

493. *Food Inspection: Hearings*, *supra* note 409, at 44, 79 (statement of Carol Foreman).

494. PERDUE FARMS INC., BIOGRAPHY OF JIM PERDUE CHAIRMAN OF THE BOARD 2 (1994).

495. Cash, *supra* note 437 (quoting David Wylie).

496. Jane Fullerton, *Risky Business: Arkansas' Poultry Empire: Day 5: Risk to Taxpayers*, ARK. DEMOCRAT, Apr. 25, 1991, at 1A, 9A; see also TYSON FOODS, INC., 1994 ANNUAL REPORT 37 (1994) (relating how the tax laws affect revenue).

497. Behar, *supra* note 160, at 52; see also John T. Holleman, *In Arkansas Which Comes First, the Chicken or the Environment?*, 6 TUL. ENVTL. L.J. 21, 22-27 (1992) (arguing that while the Arkansas poultry industry has been a boon to the state's economy, it has gradually destroyed Arkansas's natural environment).

498. U.S. DEP'T OF AGRIC., PROGRAM AID NO. 1348, U.S. POULTRY INDUSTRY: BUILDING A BETTER BIRD 1 (1984).

499. Robert Greene, *Poultry Standards Have Special Clout, Espy Critics Say*, WIS. ST. J., Mar. 21, 1994, at 3A.

under allegations of having accepted bribes from the self-same Tyson.⁵⁰⁰

The foregoing evidence demonstrates that the USDA, in setting production line-speeds, has, in addition to pursuing—albeit with questionable success—its statutory goal of insuring that poultry products will not make consumers sick, devoted itself exclusively to the financial health of the poultry oligopolies. At the same time, the USDA's practice of neglecting the costs that its regulations impose on workers in the form of increased incidence of injuries and shortened work lives has contributed a new chapter to the federal government's cheap food policy by reinforcing a chicken pricing strategy that fails to reflect this major component of the cost of production. Yet, Congress did not authorize the USDA, in the course of carrying out the USDA's food safety mandate, to seek to enrich poultry companies at the expense of poultry workers' health. This skew is, even from the standpoint of the agency's own statutory mandate, dysfunctional since "excessive line speeds often cause workers to accidentally rupture the intestinal sacks and other internal organs of birds, increasing the rate of salmonella contamination."⁵⁰¹ A question therefore arises as to the lawfulness of the USDA's regulatory actions.

To be sure, the House Agriculture Committee report accompanying H.R. 6814, which eventually became the PPIA, stated that, in connection with the requirement that the USDA examine each carcass, as was the procedure in the then voluntary inspection program, it was directing that the Secretary of Agriculture "shall at all times provide sufficient inspectors and employ such procedures as will not slow down processing operations in the plants being inspected."⁵⁰² The conference report reiterated this interpretation.⁵⁰³ This injunction should, however, be interpreted to mean both that processing operations were not to be slowed down for lack of inspectors and that Congress itself was signaling its commitment to fund inspections at the appropriate levels—not that Congress intended to deprive the USDA of the power to reduce

500. Bruce Ingersoll & Jeffrey H. Birnbaum, *Agriculture Secretary Espy Resigns Under Pressure from the White House*, WALL ST. J., Oct. 4, 1994, at A3.

501. *State Panel Examines Hazards Facing Workers in Food Processing Industry*, supra note 432, at 2169 (quoting testimony of Keith R. Mestrich, Director of Special Services, AFL-CIO Food and Allied Service Trades, before New York State Assembly).

502. H.R. REP. NO. 465, 85th Cong., 1st Sess. 3 (1957).

503. H.R. REP. NO. 1170, 85th Cong., 1st Sess. 11-12 (1957).

line-speeds for any reason. Indeed, the FSIS's own regulations prescribe that "[a]ll eviscerating of poultry and further processing shall be done with reasonable speed, considering the official establishment's facilities."⁵⁰⁴

During the 1980s, the period when the USDA was most intensively concerned with maximizing rates of throughput, the agency, like all other federal agencies, was subject to President Reagan's Executive Order 12,291 of February 17, 1981, which was designed, *inter alia*, "to reduce the burdens of existing and future regulations."⁵⁰⁵ In pursuance of the Reagan administration's deregulatory program, the Executive Order required that,

In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies . . . shall adhere to the following requirements:

. . . .

(b) Regulatory action shall not be taken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy. . . .⁵⁰⁶

That even market-knows-besters intended the scope of the Executive Order's mandatory cost-benefit analysis to encompass costs and benefits to affected workers was made unambiguously, albeit maliciously, clear by a remarkable step taken by the Office of Management and Budget (OMB) during the Bush administration. The Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs, wrote a letter to the DOL in 1992, informing it that a proposed OSHA air contaminants standard

504. Schedule of Operations, 9 C.F.R. § 381.37(a) (1994).

505. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1989).

506. Exec. Order No. 12,291, 3 C.F.R. 128 (1982), *reprinted in* 5 U.S.C. § 601 (1989).

rule that OMB had recently received was not ripe for review under Executive Order 12,291.⁵⁰⁷ OSHA's regulatory impact analysis was deficient because it "omit[ted] consideration of the rule's compliance costs on workers. The analysis [was] limited to a description of the effects of compliance on firms' sales and profits."⁵⁰⁸ In this particular case, OMB was seeking to make the extraordinary claim that OSHA had failed to take into account that the absence of health and safety measures makes it possible for employers to pay workers higher wages, which in turn enable the latter to live longer (if they are not killed at work). However, the interpretive principle entailed that what is regulatory sauce for the OSHA goose is regulatory sauce for the USDA gander.⁵⁰⁹

At the end of the Bush administration, the Director of OMB, Richard Darman, hardened the point by issuing guidelines that agencies were required to follow in providing estimates to OMB in compliance with Executive Order 12,291. In defining the scope of "[s]ocial benefits and costs," Darman emphasized that they

can differ from private benefits and costs as measured in the marketplace because of imperfections arising from:

- (i) External economies or diseconomies where actions by one party impose benefits or costs on other groups that are not compensated in the marketplace;
- (ii) Monopoly power that distorts the relationship between marginal costs and market prices. . . .

Both intangible and tangible benefits and costs should be recognized.⁵¹⁰

Significantly, even the anti-regulatory Risk Assessment and Cost-Benefit Act of 1995, proposed by the market-knows-best 104th Congress, expressly defined "costs" to include "the direct and indirect costs to . . . wage earners."⁵¹¹

The USDA line-speed regulations impose precisely the kind of social costs on chicken processing workers in the form of an increased incidence of injuries, that the Executive Order and OMB

507. *Letter from OMB to Lab. Dep't Suspending Review of OSHA's Proposed Standard on Air Contaminants [Dated March 10, 1995]*, 21 OCCUPATIONAL SAFETY & HEALTH REP. 1408, 1408-1410 (1992).

508. *Id.*

509. *Id.* at 1408-10.

510. *Benefit-Cost Analysis of Federal Programs; Guidelines and Discounts*, 57 Fed. Reg. 53,519, 53,521 (1992).

511. H.R. 1022, 104th Cong., 1st Sess. § 5(1) (1995).

guidelines require regulators to take into account. These external diseconomies, including the "pain and suffering due to . . . work-related musculoskeletal disorders of the lower back, upper extremity and lower extremity,"⁵¹² are frequently or perhaps even typically not captured or recorded by the marketplace. These costs are not reflected in wages or passed onto consumers because the poultry oligopolies, which are simultaneously labor market labor oligopsonists confronting a seemingly inexhaustible rural reservoir of atomized unskilled workers with few alternatives, are well-positioned to extract labor without having to indemnify their employees for impairments of the value of their labor power. As the United States International Trade Commission's chief analyst of the poultry industry observed, firms have in large part been able to sustain their competitiveness by means of locating their plants in low-wage southern "one-horse towns."⁵¹³

Although an agency's failure to conduct a proper cost-benefit analysis may not in itself be privately actionable,⁵¹⁴ the systemically and blatantly discriminatory manner in which the USDA regulated line-speed is so arbitrary and capricious that it undermines the validity of the FSIS regulations under the Administrative Procedure Act (APA).⁵¹⁵ Moreover, if broiler firms have standing under the APA to sue the Federal Labor Relations Council for failing to consider the increased overtime costs to them in its decision that shift starting times are subject to negotiation between the USDA and the inspectors' union,⁵¹⁶ then surely chicken processing workers have standing to challenge the USDA's line-speed regulations.

512. Ergonomics Protection Standard, 59 Fed. Reg. 57,141 (1994) (asserting that implementing an Ergonomic Protection Standard would result in fewer of these disorders).

513. Telephone Interview with Douglas Newman, Animal and Forest Products Branch, U.S. International Trade Commission (Jan. 27, 1995).

514. Executive Order 12,291 "is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit . . . enforceable at law by a party against the United States, its agencies, its officers or any other person." Exec. Order No. 12,291, 3 C.F.R. 133 (1982), *reprinted in* 5 U.S.C. § 601 (1994).

515. 5 U.S.C. § 706(2)(A) (1994).

516. *See* National Broiler Council, Inc. v. Federal Lab. Relations Council, 382 F. Supp. 322 (E.D. Va. 1974).

X. OSHA'S BELATED AND FECKLESS EFFORTS TO REGULATE LINE-SPEEDS

*"It is true that we do not know for every tissue, for every human being, under what circumstances that tissue is going to blow out But that doesn't mean we don't know enough to take some sort of a performance-based approach to reducing exposure to those things that we know increase your risk of musculoskeletal disorders."*⁵¹⁷

It is now clear how and with what disastrous consequences the USDA has come to regulate line-speeds for human beings in the chicken processing industry. The question still remains, however, as to why OSHA has not also intervened into this crucial determinant of workplace health and safety, which would seem singularly to belong to its jurisdiction. In a very few instances, OSHA has sought to regulate line-speed by issuing citations⁵¹⁸ to employers for violations of the so-called general duty clause of the Occupational Safety and Health Act, which provides that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."⁵¹⁹ Thus far, the Secretary of Labor has failed to secure any adjudicator's authority for an order to slow down production lines as a means of abating a hazard.

In a rare, if not unique, case involving agricultural employment, for example, OSHA inspected a California spinach farm in 1988, and cited the owner for requiring workers to pull weeds by hand. Evidence showed that working from a bent position exerts extraordinary pressure on the lumbar discs, which can eventually cause disc degeneration and arthritis. More interesting than the basis for the decision dismissing the citation was the road not taken by OSHA. The administrative law judge (ALJ) found that the use of a long-handled hoe was not a feasible means of abatement because the DOL had failed to show that its use would materially reduce stooped work, which would continue to be required for

517. Novack, *supra* note 425, at 220 (quoting Barbara Silverstein, OSHA ergonomist in charge of writing ergonomics standards).

518. 29 U.S.C. § 658(a) (1988) (providing the statutory authority to OSHA to issue citations).

519. 29 U.S.C. § 654(a)(1) (1988).

removing the weeds from the field by hand. As one of the DOL's witnesses had testified, however, weeds could also be removed after the harvest as the crop is transported on a conveyor belt in the field or cannery. Testifying for the farmer, a field manager employed by the company for which the farmer grew the spinach testified that because "the product moves so quickly, 20 to 30 miles per hour on the harvesting conveyor and 20 tons per hour in the processing plant . . . it is virtually impossible to remove any significant amounts of weeds."⁵²⁰ Although it may well be impossible to weed objects hurtling by at those speeds, the DOL apparently did not even suggest that the line-speed be reduced to a level at which weeding would have been feasible. That this particular method of abatement might have increased costs somewhat—some or all of which may be passed on to consumers—would not invalidate it, if it is calculated to abate the potentially crippling injuries caused by stoop labor.⁵²¹

If insufficient familiarity with ergonomic issues explains the inadequate handling of this farm worker case,⁵²² other obstacles emerged in a case involving citations for ergonomic hazards brought against Perdue Farms by the North Carolina agency, to which OSHA devolved its powers.⁵²³ While the fines that the agency had imposed against the company were under review by the state review board, workers at the plants intervened⁵²⁴ and requested interim relief in the form of a reduction in line-speeds. The ALJ and the North Carolina Safety and Health Review Board both ultimately ruled that they lacked a legal basis to order an interim reduction in line-speed until a court determined that the company was violating work safety standards.⁵²⁵ This outcome,

520. John Gill Ranch, OSHRC Docket No. 88-2679, 1989 OSAHRC LEXIS 193, at *5-6 (Oct. 24, 1989).

521. Six years later, in its unofficial and then abandoned draft ergonomics standard, OSHA still failed to address the issue of hand-weeding, merely prohibiting the use of any tool with a handle less than four inches long where the employer has reduced employee exposure to workplace risk factors to the lowest feasible level, which nevertheless remains above a checklist score of five. *OSHA's Draft Ergonomics Standard*, DAILY LAB. REP., Mar. 13, 1995, at § (f)(vii), available in LEXIS, Labor Library, Daily Labor Report File.

522. Telephone Interview with Ann Glenn, Solicitor's Office, Dep't of Lab., Philadelphia (Jan. 23, 1995).

523. See 29 U.S.C. § 667 (1988).

524. In order to participate in proceedings before the Occupational Safety and Health Review Commission (OSHRC), affected workers must file a notice that "the period of time fixed in the citation for the abatement of the violation is unreasonable." 29 U.S.C. § 659(c) (1988).

525. *Judge Rejects Workers' Request for Slower Lines at Perdue*, UPI, Mar. 16, 1990,

foreshadowing the legal strategy that employers would soon pursue, was at least in part generated by the plaintiffs' inability to specify a line-speed at which the ergonomic hazards would be abated.⁵²⁶

Although NIOSH, based on its health hazard evaluation of the Perdue plants at Lewiston and Robersonville, recommended slowing down the main conveyor to reduce highly repetitive movements, or "diverging conveyors off the main one so that tasks can be performed at slower rates,"⁵²⁷ the final settlement of the case did not involve such measures.⁵²⁸ Nevertheless, the initial costliness of resolution of the matter induced Perdue to break ranks with the other chicken oligopolists and to embark upon an ergonomic program. Under the "Ergonomic Agreement," into which Perdue entered with the North Carolina Commissioner of Labor in 1991, the company was obligated within thirty days

to adopt a comprehensive policy . . . concerning ergonomics and to provide each employee with a statement from top management setting forth such policy and commitment to ergonomically sound work environment and practices including . . . [a]n expressed and implemented policy which places safety and health at a level of importance equal to that of production and which requires management to integrate production processes with safety and health protection. . . ."⁵²⁹

Within 180 days, Perdue became obligated to "institute feasible engineering controls in an effort to make the job fit the person." The company agreed "to explore . . . engineering solutions" such as automated processes "to eliminate excessive exertion and awkward postures and to reduce repetitive motion." Perdue also agreed to investigate "feasible" administrative controls designed "to reduce the duration, frequency and severity of exposures to ergonomics stressors." The North Carolina OSHA entrusted to Perdue's discretion the choice of such controls including rest pauses, increasing the number of workers assigned to a task, job rotation, and job

available in LEXIS, News Library, UPI File.

526. Telephone Interview with David Wylie, Attorney for Perdue Farms (Jan. 26, 1995).

527. NIOSH: PERDUE, *supra* note 16, at 18.

528. See Michael Burns, *Perdue Settles N.C. Injury Case: Motion Disorders Will Be Monitored*, BALT. SUN, Feb. 8, 1991, at 11C.

529. Brooks v. Perdue Farms, Inc., OSHANC No. 89-1659, slip op. at 2 (Safety and Health Review Board of North Carolina, 1991) (setting forth Ergonomic Agreement between the parties).

“enlargement.”⁵³⁰ Despite outsiders’ positive comments about the program, Perdue workers still insist that “the most effective way to reduce repetitive motion injuries would be to slow down the lines or add more people.”⁵³¹

Perdue has not only become the industry’s ergonomic leader, but also supports issuance of some kind of ergonomic standard. The firm’s safety and health director has stated that Perdue has been able to finance the costs of the program through reduced costs incurred in workers’ compensation claims, which amounted to 70%,⁵³² reduced turnover and enhanced productivity of healthier employees represent additional savings. The director believes that other firms have failed to join the ergonomics movement because they have been misadvised by short-sighted production-oriented managers to seek to extract the most from their employees for the least. Perdue advocates an ergonomic standard because it wants its competitors to be required to undertake the same expensive changes that it has. Why Perdue would want them to introduce reforms that will soon enough increase their profitability is, to be sure, puzzling.⁵³³

One reason why firms may not be impelled to reduce their workers’ compensation costs is that they may have intimidated workers, perhaps unaware of their rights in nonunion plants, so that their fear of reprisal and loss of income induces them not to file or pursue claims.⁵³⁴ Far from striving to eliminate the conditions that cause repetitive trauma syndrome, some firms appear to focus on frustrating employees’ efforts even to secure workers’ compensation benefits for injuries already sustained. Thus, Bo Pilgrim, the owner of Pilgrim’s Pride, the fifth largest poultry processor in the United States, who complains that “[w]orkers’ comp eats up half of our company’s profits,”⁵³⁵ was more partial to non-workplace-related

530. *Id.* at 6-8.

531. Martha Quillin, *Coping with Pain*, GREENSBORO NEWS & OBSERVER, Sept. 26, 1993, at Bus..

532. *Official Attributes Decreased Costs at Perdue Plants to Ergonomics Program*, 23 OCCUPATIONAL SAFETY & HEALTH REP. 1426, 1426 (1994) (statement by Angela Waldorf, Assistant Deputy Commissioner, Occupational Safety and Health Administration, North Carolina).

533. Telephone Interview with Deborah Berkowitz, Director of Health and Safety Department, United Food and Commercial Workers (Jan. 1995); Telephone Interview with Jim McCauley, Health and Safety Director, Perdue Farms (Jan. 27, 1995).

534. Joe Fahy, *All Pain, No Gain*, 17 S. EXPOSURE 35, 37 (1989).

535. Gary Cartwright, *The Baron of Texas Agriculture: Bo Pilgrim*, TEX. MONTHLY, Sept. 1994, at 161, 161.

methods of lowering such costs. On the one hand, he brazenly handed out \$10,000 checks on the floor of the Texas Senate to induce (successfully) members to vote in favor of a pro-employer reform of the state workers' compensation system; on the other hand, his company has been charged with intimidating employees into not filing compensation claims.⁵³⁶ In 1994, Don Tyson could boast that his workers' compensation costs in Arkansas, his firm's principal location, are only one-third of the level elsewhere,⁵³⁷ in part because his state legislature had just rewritten its workers' compensation statute to favor employers. Two changes in particular helped reduce costs for chicken processing firms. Under a new rule, compensation is denied to any worker who fails to establish that work was the "major cause" of her repetitive motion disability.⁵³⁸ Thus, a poultry processing worker who is an "avid fisherman or gardener" may be unable to satisfy the statutory requirement of proof.⁵³⁹ Perhaps even more beneficial to Tyson and other broiler oligopolists in Arkansas is that the amended law excludes complaints of pain from repetitive trauma disorders from being considered in evaluating the extent of workers' impairment.⁵⁴⁰

Punishment of workers who complain about work-related injuries also has been rife at Tyson and Perdue where preventive medicine and rehabilitation have consisted of daily dispensing of bandages, Bengay, and aspirin by company nurses.⁵⁴¹ Whereas the profit-driven need to avoid the adverse impact on meat quality associated with stresses on chickens induces firms to implement elaborate engineering and behavioral controls to calm the birds—such as having "[c]aretakers . . . announce their arrival by gently knocking on the door or whistling before entering the broil-

536. *Id.*; see also Carol Countryman, *Bo Pilgrim's Hands*, TEX. OBSERVER, Aug. 5, 1994, at 6, 6.

537. Mark Lee, *Oklahoma Officials Eye New Tyson Plant*, TULSA WORLD, June 19, 1994, at B1.

538. ARK. CODE ANN. § 11-9-102(5)(E)(ii) (Michie Supp. 1993).

539. John Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?*, 47 ARK. L. REV. 1, 14 (1994).

540. See ARK. CODE ANN., § 11-9-102(16) (Michie Supp. 1993) (establishing that pain is not an objectively determinable indicator of compensable injury).

541. *Alberty v. Tyson Foods, Inc.*, No. 92-7047, 1992 U.S. App. LEXIS 34723, at *2 (10th Cir. Dec. 30, 1992); Behar, *supra* note 160, at 54; Judy Mann, *Hard Times at Perdue's Plant*, WASH. POST, Mar. 10, 1989, at B3; see also *Brantley v. Tyson Foods, Inc.*, 887 S.W.2d 543, 544 (Ark. Ct. App. 1994) (describing Tyson's therapy program for employees experiencing pain).

er house"⁵⁴²—ibuprofen is Perdue's intervention of choice for "new hires" during their probationary period.⁵⁴³

Despite this tradition of malignant neglect, the National Broiler Council, the companies' advocacy association, touchingly asserts that firms "are not going to abuse employees because they need them. They're part of the family."⁵⁴⁴ That "family" at Tyson, which boasts of having spent "literally thousands of dollars to improve working conditions," apparently includes more and less privileged members. Because the company purports not to be able to afford to let all 43,000 employees participate in the ten hour ergonomics education program reserved for managers, the workers learn about it through an "osmotic approach . . . one bite at a time."⁵⁴⁵ The paternalistic contempt that oozes from such an approach illustrates how unbridgeably wide the gap is between current employer health and safety practices and even the beginnings of a democratization process in which workers at the very least have a say in determining their working conditions.

OSHA's most prominent attempt to lower line-speed, however, was directed at the now defunct Downingtown, Pennsylvania cookie factory of Pepperidge Farm, a subsidiary of the huge food producer, Campbell Soup Corporation. Some of the women at the plant slapped the tops onto the bottoms of cookies as they came out of the oven and along a conveyor belt at 1,500 per minute;⁵⁴⁶ others picked up the finished cookies and put them into little paper cups. Among these cappers and cuppers, "an epidemic of carpal tunnel syndrome" raged: of the sixty-nine who suffered cumulative trauma disorders, thirty-three required surgery. The incidence of carpal tunnel syndrome, 7% of full-time cookie-line workers, was forty-one times higher than among the general population. Despite the relatively high wages, the working conditions bore a certain resemblance to those prevailing in the broiler plants. The \$11 per hour wage level exceeded the average in the locality for unskilled work because the workers felt "the work was so bad high pay was

542. BRANT ET AL., *supra* note 23, at 30.

543. NIOSH: PERDUE, *supra* note 16, at 17.

544. Fullerton, *supra* note 23, at 8A (quoting Dr. Ken May, former head of Holly Farms' chicken division and consultant to the National Broiler Council).

545. *Programs to Curb Injuries*, *supra* note 455, at 1716 (quoting Travis Arterbury, Ergonomics Consultant to Tyson Foods, Inc.).

546. B.J. Phillips, *The Judge Rules, The Pain Persists*, PHILA. INQUIRER, Apr. 2, 1993, at B1.

the only way they could get anybody to do it.”⁵⁴⁷ Most of the women on the production line were single parents, who worked the night owl shift in order to be at home when their children go to school in the morning and when they return in the afternoon.⁵⁴⁸ “Among working women who cannot afford to hire illegal aliens as nannies, this is called child care. It’s paid for with numbing work at awful hours on little sleep.”⁵⁴⁹ Interestingly, the University of Arkansas Cooperative Extension Service includes, among the characteristics of the representative modern broiler processing plant, two shifts operating from 10 p.m. to 7 a.m. and 7 a.m. to 4 p.m., allowing “working mothers to be home when school children are home.”⁵⁵⁰

*Pepperidge Farm*⁵⁵¹ illustrates how defendant-employers’ use of the multiple possibilities of due process can delay state intervention so inordinately that the original cohort of workers exposed to the hazard may long since have left the place of employment. In this case, seven years after the first worker complaint about carpal tunnel syndrome triggered an OSHA investigation in 1988,⁵⁵² the OSHRC still has not reviewed the ALJ’s decision handed down after the longest trial in the history of OSHA. Whichever side loses will definitely appeal the Review Commission’s ruling to the circuit court of appeal. Since the case is one of first impression with vast implications for much of U.S. industry, the losing party in that appeal may well request the U.S. Supreme Court to grant review of the case. In that event, a decade or more may have elapsed until final legal disposition of the issue. If OSHA were then the prevailing party, still more time would pass before ultimate implementation of OSHA’s abatement order.

The nub of the ALJ’s decision was that the DOL had failed to demonstrate that a reduction in line-speed was a feasible means of abating the hazard of carpal tunnel syndrome and other repetitive trauma disorders. The ALJ ruled that OSHA had carried its burden of showing the other three elements of a general duty clause case—that (1) Pepperidge had failed to free the workplace of a

547. *Id.* (quoting Irene Anderson, a former Pepperidge Farm worker).

548. *Id.*

549. *Id.*

550. WESTERLUND, *supra* note 63, at 4.

551. *Pepperidge Farm, Inc.*, OSHRC No. 89-0265, OSAHRC LEXIS 220 (Mar. 25, 1993).

552. *Id.* at *1.

hazard; (2) the hazard was recognized by the employer or the industry; and (3) that the hazard was causing or likely to cause serious physical harm.⁵⁵³ The fourth element, feasibility, though not stated expressly by Congress, was first enunciated by the D.C. Circuit of Appeals soon after the statute had gone into effect.⁵⁵⁴ Judge Skelly Wright derived the feasibility standard from the notion that Congress intended to require employers to eliminate only preventable hazards.⁵⁵⁵ In the context of preventing misconduct by employees, the court characterized unpreventable conduct as that which would require methods “so expensive that safety experts would substantially concur in thinking the methods infeasible.”⁵⁵⁶ The OSHRC then adopted the feasibility element,⁵⁵⁷ which was merely used by the D.C. Circuit to clarify the meaning of the statutory phrase, “free from . . . hazards,” but the DOL has never contested its use.⁵⁵⁸

The ALJ was impressed that Barbara Silverstein, one of the government’s chief expert witnesses and a “renowned epidemiologist”—who, as Special Assistant for Ergonomic Programs in OSHA, later became the official responsible for writing an ergonomics standard under the Clinton administration—could not quantify the amount of repetition that would cause carpal tunnel syndrome or the threshold below which the disease would not occur. Apparently, the ALJ was distinctly less impressed by Silverstein’s testimony that the incidence of carpal syndrome among the workers on the cookie line was forty-one times greater than that among women in the general population.⁵⁵⁹ More significant, in the ALJ’s view, was that “not one expert could testify at what speed the problem would be abated nor how many employees would have to be added to a line in order to abate or materially reduce the hazard.”⁵⁶⁰

553. *Id.* at *449-50.

554. *National Realty & Constr. Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973).

555. *Id.* at 1266.

556. *Id.*

557. *See, e.g.*, *John Gill Ranch*, OSHRC No. 88-2679, 1989 OSAHRC LEXIS 193, at *5-6 (Oct. 24, 1989) (requiring proof that a workplace hazard can be avoided by feasible means).

558. *OCCUPATIONAL SAFETY AND HEALTH LAW 116-17* (Stephen Bokart & Horace Thompson, eds., 1988).

559. *Pepperidge Farm, Inc.*, OSHRC No. 89-0265 at *417, *422.

560. *Id.* at *450.

The ALJ held, without being able to cite any supporting precedent, that, “[t]o force an employer to experiment in order to bring about abatement requires a standard. Under 5(a)(1) [the general duty clause], an employer cannot be forced to experiment.”⁵⁶¹ Not wholly obtuse to the irony of the employer’s intensive use of due process to delay implementation of any abatement, the ALJ recognized “of course that the very employers who are bitterly attacking 5(a)(1) and are arguing for the promulgation of a standard are the very industries that will come in and fight the creation of the standard and promulgation thereof, to the utmost. At least that has been the usual course.”⁵⁶² Again, ironically, the ALJ faulted the DOL’s proposal to rotate workers between more and less stressful jobs for overlooking that “there do not appear to be sufficient jobs with less stress.”⁵⁶³ Similarly, with regard to increasing the number of workers on the cookie line, the ALJ stated, “[i]f the Secretary could prove to my satisfaction that certain jobs took a definite number of movements and that a definite increase in workers was economically feasible, and physically feasible, then . . . the Secretary may have met her burden.” But in the absence of proof on these points, all the ALJ could offer the Secretary of Labor was advice to issue a standard, under which she could order the employer to experiment without having “to prove definitively and exactly what the feasible means of abatement had to be.”⁵⁶⁴ The ALJ also characterized as “purely speculative” the DOL’s argument that employees could be questioned as to their level of discomfort at reduced line-speeds: “I agree with the Secretary of Labor that a more compassionate employer would have experimented along the lines the Secretary discusses, but I also find that a standard could force a less compassionate employer such as this to experiment.”⁵⁶⁵

As a federal appeals court promptly glossed the ALJ’s decision, the case does not prohibit OSHA from seeking to enforce ergonomics under the general duty clause; rather, it merely held that OSHA had failed to provide sufficient evidence of the feasibility of abatement.⁵⁶⁶ Soon thereafter, however, another ALJ granted

561. *Id.* at *451.

562. *Id.* at *453-54.

563. *Id.* at *456.

564. *Id.* at *456-57.

565. *Id.* at *455.

566. *In re* the Establishment Inspection of the Kelly-Springfield Tire Co., 13 F.3d 1160,

(without opinion) a motion for partial summary judgment that OSHA lacked the authority to use the general duty clause to protect workers from ergonomic hazards.⁵⁶⁷ Perhaps more trenchant than any learned jurisprudential critique of the ALJ's decision was the reaction by one of the affected workers: "He seemed to say we had (the injuries), but that there was no means to prevent them. . . . Well, they could've slowed down the lines or hired more girls. But that costs money, so that's not a means."⁵⁶⁸

In his petition appealing the ALJ's decision to the OSHRC, Secretary of Labor Reich argued that DOL had the power, under the general duty clause and even without having promulgated specific ergonomic standards, to issue citations to employers who failed to implement proposed feasible abatement measures to reduce ergonomic hazards.⁵⁶⁹ If the ALJ's ruling, that the DOL had to prove the extent to which the measures would be successful, was upheld, he stated, the agency's efforts to combat ergonomic hazards would face "an insurmountable barrier."⁵⁷⁰ Reich asserted that typically tribunals have permitted OSHA to meet the feasibility requirement by showing that health and safety experts familiar with the particular industry recognize the proposed abatement measure as feasible.⁵⁷¹ No adjudicator, on the other hand, has ever held OSHA to the much higher standard of demonstrating precisely how many injuries would be prevented by a proposed abatement method.⁵⁷²

Even where OSHA is subjectively willed to achieve its statutory objectives, it is severely hampered by the realities of work in a non-union plant managed in a manner hostile to unions.⁵⁷³ Securing workers' cooperation is often difficult when they justifiably fear discrimination and retaliation for filing complaints,⁵⁷⁴ espe-

1167 n.3 (7th Cir. 1994).

567. *Secretary of Lab. v. Dayton Tire*, OSHRC No. 93-3327, 1995 OSAHRC LEXIS (Jan. 5, 1995).

568. Phillips, *supra* note 546, at B1.

569. *Labor Department Appeals ALJ Decision Dismissing 175 Violations at Pepperidge Farm*, DAILY LAB. REP., Sept. 13, 1993, at d16.

570. *Id.*

571. *Id.*

572. *Id.*

573. See Cromer, *supra* note 23, at 18-23 (discussing attempt by Cargill workers to unionize); Ken Lawrence & Anne Braden, *The Long Struggle*, S. EXPOSURE, Nov.-Dec. 1983, at 85.

574. *Industry Attorney Cites Risks, Burdens; Union Official Says Law As Is Does Not Work*, 21 OCCUPATIONAL SAFETY & HEALTH REP. 1088, 1088 (1992) (according to

cially since the National Labor Relations Board began undermining the protections that the National Labor Relations Act affords individual nonunion workers protesting working conditions that are governed by other statutes.⁵⁷⁵ Although the Occupational Safety and Health Act prohibits such discrimination,⁵⁷⁶ years of blacklisting and unemployment might elapse before the Secretary of Labor, shielded by a grant of prosecutorial discretion, succeeds in persuading a series of federal courts to vindicate a worker's right to complain in the form of reinstatement with back pay.

In many instances where firms have settled with OSHA rather than risk expensive litigation contesting citations for violations,⁵⁷⁷ OSHA has diluted the agreed-upon ergonomics plan by permitting firms to begin with job rotation instead of proceeding to the more effective measure of engineering controls that directly restructure the work itself. Instead of providing a rest for workers' hands, job rotation may actually lead to a greater incidence of cumulative trauma disorders in poultry plants in which all jobs are similar and require 10,000 to 20,000 cuts per day.⁵⁷⁸

Federal OSHA has, for example, entered into settlement agreements with other poultry processors similar to that in the *Perdue* case. Based on the aforementioned Health Hazard Evaluation carried out at Cargill's plant in Buena Vista, Georgia, OSHA in 1991 fined the firm \$400,000 and required it to "acknowledge that cumulative trauma disorders . . . are an occupational illness in the poultry processing industry. . . ."⁵⁷⁹ The agreement was notable

Deborah Berkowitz, Director, United Food and Commercial Workers (UFCW).

575. *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984).

576. 29 U.S.C. § 660(c) (1988).

577. See Roger Freeman, *Standards Are Largely Undefined for Repetitive-Motion Injuries*, NAT'L L.J., July 29, 1991, at 28, 28 (expressing that uncertainty regarding the extent of OSHA's authority to impose fines and abatement measures has led employers to settle with OSHA, usually agreeing to undergo ergonomic assessments, to provide CTD training to employees, and to develop medical management programs).

578. *ConAgra to Pay \$425,000, Implement Program at 21 Facilities Under Settlement with OSHA*, 21 O.S.H. Rep. (BNA) 1208, 1208 (Feb. 5, 1992); C. Stuart-Buttle, *A Discomfort Study in a Poultry Processing Plant*, APPLIED ERGONOMICS, Feb. 1994, at 47; *UFCW Calls for 'Concerted Effort' by OSHA to Train Inspectors to Recognize 'Gimmicks'*, DAILY LAB. REP., July 15, 1991, at A-3.

579. *Secretary of Lab. v. Cargill, Inc.*, OSHRC No. 89-3426 & No. 90-1257 (citing *Cargill, Inc. Ergonomic and Recordkeeping Agreement I*, at 1); see also *OSHA Proposes \$242,000 in Penalties Against Cargill Inc.'s Buena Vista, Ga. Poultry Processing Plant*, PR Newswire, Oct. 23, 1989, available in LEXIS, News Library, Wires File (describing OSHA's response to Cargill's alleged violations of safety and health standards); *Secretary of Lab. v. Marshall Durbin Cos.*, OSHRC Docket No. 94-1195 (Occupational Safety and

for the candor with which it faced the proposed solutions of job rotation and job “enlargement”: “Caution shall be used in deciding which jobs are used because different jobs may appear to have different stressors, but actually pose the same physical demands as the previous job.”⁵⁸⁰ In other words, assigning workers seriatim to a number of body-numbing and mind-rotting operations rather than just to one may not contribute to alleviation of any ergonomic problems. A model of rotational variety in this industry is illustrated by the strategy of the strong union of *schochtim*, the Jewish ritual slaughterers in New York City in the 1930s. Finishing their work at noon, and thus having

much time on their hands, . . . they in turn joined up with Jewish hospitals for the purpose of performing a Jewish rite on males. They had such luck in forming their schochtem union for killing chickens that they formed a union known as mohels [circumcisers]. [T]hey were finally invited to become a local of the International Association of Meat Cutters.⁵⁸¹

In 1991, while *Pepperidge Farm* was pending, a coalition of thirty-one labor unions led by the United Food and Commercial Workers, which organizes poultry processing workers, petitioned the Secretary of Labor to issue an emergency temporary standard on ergonomic hazards to protect workers from cumulative trauma disorders.⁵⁸² Although the Secretary of Labor has statutory authority to issue such regulations “if he determines (A) that employees are exposed to grave danger from . . . new hazards, and (B) that such emergency standard is necessary to protect employees from such danger,”⁵⁸³ Secretary of Labor Martin denied the petition on the ground that the epidemic of crippling cumulative trauma disorders did not meet OSHA’s traditional guideline that “only conditions that pose life-threatening, incurable, or fatal injury or

Health Review Commission, Jan. 9, 1995).

580. *Martin v. Cargill, Inc.*, OSHRC Docket No. 89-3426 ¶ I & III (Occupational Safety and Health Review Commission, July 23, 1991).

581. *Investigation of Concentration of Economic Power: Hearings Before the Temporary National Economic Committee, Part 7: Milk Industry—Poultry Industry*, 76th Cong., 1st Sess. 2870 (1939).

582. *Unions Petition OSHA for Emergency Rule to Prevent Cumulative Trauma Disorders*, DAILY LAB. REP., Aug. 1, 1991, at A4.

583. 29 U.S.C. § 655(c)(1) (1988).

illnesses'—such as cancer or irreversible kidney damage—'are grave dangers warranting'" an emergency temporary standard.⁵⁸⁴

After placing the item on its semi-annual regulatory agenda in 1991,⁵⁸⁵ the DOL in August 1992 finally published an Advance Notice of Proposed Rulemaking requesting comments and information. Spurred by United States Bureau of Labor Statistics (BLS) data showing that repetitive trauma disorders had tripled during the previous eight years, the DOL announced that it was "considering" a standard to address ergonomic hazards. Whereas in 1981 and 1984, repetitive trauma disorders accounted for 18% and 28%, respectively, of all recordable occupational illnesses reported to OSHA, by 1989 the 147,000 new cases represented 52% of the total. Studies of individual industries conducted by NIOSH suggest that the BLS data are underestimates. NIOSH found the following high incidence rates of ergonomic disorders: 50% among supermarket cashiers; 41% for meatpackers; 30% for specialty glass workers; and 20% among poultry workers.⁵⁸⁶ Especially pertinent is OSHA's recognition that "[m]ost ergonomic hazards and related disorders . . . appear to be due to changes in production processes and technologies, resulting in more specialized tasks with increased repetitions and *higher assembly line speeds*. In many cases these changes have not concomitantly included integration of ergonomic technologies."⁵⁸⁷ The absence of a standard means that employers are in the first instance effectively free to inflict pace-based repetitive trauma injuries on their employees. Only after the fact, then, is OSHA even theoretically in a position to cite employers for violating the general duty clause—until now, to be sure, without success.

Progress toward state intervention may be blocked for the time being by the advent of a Republican majority in the 104th Congress. Senator Nancy Kassebaum, the Chair of the Senate Labor and Human Resources Committee, unabashedly promoting a pro-business agenda, stated unequivocally that she would oppose any effort by OSHA to promulgate an ergonomics standard because the financial imposition on employers would be too great.⁵⁸⁸ Never-

584. *Secretary of Labor Denies Petition from Unions for Emergency Temporary Standard*, 21 OCCUPATIONAL SAFETY & HEALTH REP. 1529, 1529 (1992) (quoting Lynn Martin, Secretary of Lab.).

585. See Ergonomic Safety and Health Standards, 56 Fed. Reg. 53,592 (1991) (detailing the semi-annual agenda of regulations selected for review or development).

586. Ergonomic Safety and Health Management, 57 Fed. Reg. 34,192, 34,193 (1992).

587. *Id.* at 34,192 (emphasis added).

588. Court Gifford, *Labor Law: Sen. Kassebaum: A Moderator Reformer Charts New*

theless, the DOL, noting that by 1991 the number of reported repetitive trauma disorders had risen to 224,000 cases, accounting for 60% of all new workplace illnesses, continued to include an Ergonomic Protection Standard on its semi-annual regulatory agenda, even after the Democratic party had lost its congressional majority.⁵⁸⁹ When Silverstein, the OSHA official, stated that the agency would issue a proposal after a congressionally imposed moratorium expired, the House of Representatives, eager to “force OSHA to cease its activities on the promulgation of an ergonomics standard that is paternalistic in concept,”⁵⁹⁰ voted to punish the agency by allowing more of its current fiscal year budget to be subject to rescission.⁵⁹¹ In response, apparently, OSHA released an unofficial draft standard, not for citation or quotation,⁵⁹² which was “far less demanding on employers” than a previous outline.⁵⁹³

Ultimately, the Clinton administration, bowing to pressure from Congress and powerful business groups like the National Federation of Independent Business and National Association of Manufacturers, decided that it “will not spend scarce political capital on the OSHA rules.”⁵⁹⁴ If, in the absence of an ergonomics standard, the OSHRC and the courts uphold the ALJ’s ruling in *Pepperidge Farm* that OSHA must prove that slower line-speeds will reduce the incidence of repetitive trauma syndrome rather than impose experiments on employers, then poultry plant workers may be left without legal protection against further overreaching by employers in collusion with the USDA.

Increasing line-speed may not be the only factor that increases the number of repetitions performed by workers, but it has a three-fold crucial impact on the incidence of cumulative trauma disorder. The faster pace “almost inevitably” creates more repetitions.⁵⁹⁵ Speed can also affect muscular tension in two ways. The more rapid motions associated with higher speed can require greater

Course for Labor Committee, DAILY LAB. REP., Jan. 10, 1995, at 6; Frank Swoboda, *Kassebaum Hits Labor Initiatives*, WASH. POST, Dec. 1, 1994, at A36.

589. Ergonomic Protection Standard, 59 Fed. Reg. 57,141 (1994).

590. 141 CONG. REC. H3250 (daily ed. Mar. 15, 1995) (statement of Rep. DeLay).

591. *Id.* at H3254-55.

592. OSHA, *Draft: Proposed Ergonomic Protection Standard*, 24 O.S.H. Rep. (BNA) 42 (Mar. 22, 1995).

593. *Labor Dept. Relents on Repetitive Strain*, N.Y. TIMES, Mar. 21, 1995, at D19.

594. Steve Lohr, *Administration Balks at New Job Standards on Repetitive Strain*, N.Y. TIMES, June 12, 1995, at D1.

595. Willis Goldsmith, *Workplace Ergonomics: A Safety and Health Issue for the '90s*, 15 EMPLOYEE REL. L.J. 291, 291 (1989).

accelerations and decelerations, thus producing larger peaks of muscular activity. Also, increased pace can contribute to the "resting level of muscular tension" and thus to "higher overall levels of muscular activity."⁵⁹⁶ In one study, a 10% increase in speed produced a 38% increase in the worker's pinch force; a 17% increase almost doubled it.⁵⁹⁷ The fact that ruthlessly fast disassembly lines undermine workers' mental and physical health and safety in ways also unrelated to repetitive stress disorders explains why groups such as Poultry Workers in Action have demanded slower line-speeds as a central element of their struggle against exploitation.⁵⁹⁸

Although the complexities of the interaction of the various factors that bring about the onset of repetitive trauma syndrome in an individual worker may render it impossible to quantify precisely the threshold of repetitions below which no worker will be injured, ergonomists can state emphatically that fewer rather than more repetitions, less rather than more forceful motions, and less rather than more uncomfortable postures will reduce the incidence of cumulative trauma disorders. The ALJ's decision in *Pepperidge Farm*, penalizing the DOL and affected workers for the agency's failure to issue a standard, neglected the fact that Congress intended the general duty clause to enable the DOL to protect employees who are working under circumstances for which the DOL has not yet promulgated a standard. Since employers are not subject to any penalties for violating the general duty clause until OSHA has investigated and cited them, and they have refused to correct the violation,⁵⁹⁹ firms cannot complain of unfair surprise. Moreover, formulation of usefully precise standards for line-speeds in industries in which heterogeneous commodities are produced in widely varying processes and configurations may be very difficult.⁶⁰⁰ Other industries may lend themselves more readily to such standardization, but the diminishing resources at OSHA's disposal ren-

596. Robert Arndt, *Work Pace, Stress, and Cumulative Trauma Disorders*, 12 J. OF HAND SURGERY 866, 868 (1987).

597. Åsa Kilbom, *Repetitive Work of the Upper Extremity: Part I—Guidelines for the Practitioner*, 14 INT'L J. OF INDUS. ERGONOMICS 51, 53 (1994).

598. POULTRY WORKERS IN ACTION, NC ERGONOMICS CENTER PREDICTED A FLOP 1 (n.d.) (on file with author).

599. S. REP. NO. 1282, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 5177, 5185-86.

600. Telephone Interview with Barbara Silverstein, Special Assistant for Ergonomic Programs, OSHA (Jan. 25, 1995).

ders it infeasible for the agency to promulgate hundreds of such standards⁶⁰¹—especially when firms and industries further exhaust those resources by challenging the validity of the standards.

The chicken processing industry may, to be sure, be an exception because the USDA has already set the line-speed at a rate that clearly contributes to the repetitive traumatization of the workforce. After all, reflecting the received ergonomic wisdom, OSHA's unofficial Draft Ergonomic Protection Standard singles out as a signal risk factor the "[p]erformance of the same motions or motion pattern every few seconds for more than two hours at a time."⁶⁰² Guidelines based on the most recent overview of the international ergonomic literature go even further in characterizing work cycles of less than thirty seconds repeated for more than an hour as "strongly related to disorders of the forearm and wrist."⁶⁰³ The combination of uniform line-speed, extreme division of labor that reduces workers to the performance of one motion in less than a second, and the absence of breaks, stamps chicken processing as an industry deserving of special and prompt attention. This conclusion is hardened by the fact that NIOSH has carried out Health Hazard Evaluations in several chicken plants that have underscored how rife repetitive trauma disorders are.⁶⁰⁴ Unsurprisingly, legal counsel for Perdue and other affected firms characterizes NIOSH as "a bunch of nuts."⁶⁰⁵

The chicken oligopolies' probable objection to the use of the general duty clause (and of a standard) to regulate line-speed on the ground that it is economically infeasible would not conform to judicial interpretation of the Occupational Safety and Health Act. To be sure, the D.C. Circuit stated in a footnote that although expense alone did not render a safety measure infeasible, "if adoption of the precaution would clearly threaten the economic viability of the employer, the Secretary should propose the precaution by way of promul[g]ated regulations, subject to advance industry comment, rather than through adventurous enforcement of the general

601. Telephone Interview with Ann Glenn, Attorney, U.S. Dep't of Lab., Solicitor's Office (Jan. 23, 1995).

602. Memorandum from the Occupational Safety and Health Administration Ergonomics Team, Summary of Key Provisions Draft Ergonomic Protection Standard (Sept. 22, 1994) (on file with author).

603. Kilbom, *supra* note 20, at 52.

604. See, e.g., NIOSH: PERDUE, *supra* note 16; NIOSH: CARGILL, *supra* note 313.

605. Telephone Interview with David Wylie, Attorney for Perdue Farms, Inc. (Jan. 26, 1995).

duty clause."⁶⁰⁶ Yet the next year the court offered a much more precise and expansive conceptualization of the economic burdens that Congress contemplated imposing on employers:

There can be no question that OSHA represents a decision to require safeguards for the health of employees even if such measures substantially increase production costs. . . .

. . . Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.

This qualification is not intended to provide a route by which recalcitrant employers or industries may avoid the reforms contemplated by the Act. Standards may be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers. As the effect becomes more widespread within an industry, the problem of economic feasibility becomes more pressing. . . . [I]f the competitive structure or posture of the industry would be otherwise adversely affected—perhaps rendered unable to compete with imports or with substitute products—the Secretary could properly consider that factor.⁶⁰⁷

In determining whether the cost of compliance with the general duty clause would jeopardize a firm's long-term profitability and competitiveness, the OSHRC has adduced as a relevant consideration "whether the employer can pass the costs on to the customer."⁶⁰⁸ Because chicken imports are negligible and the gap be-

606. *National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1266 n.37 (D.C. Cir. 1973).

607. *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 477-78 (D.C. Cir. 1974) (footnote omitted).

608. *Secretary of Lab. v. Waldon Healthcare Center*, 16 O.S.H. Cas. (BNA) 1052, 1067

tween the price of chicken and its principal substitute, red meat, is so large, the costs of doing business associated with preventing injuries can be passed on to consumers by profitable firms in a "recalcitrant" industry that has thus far avoided the reforms Congress intended to impose on employers. The only logically consistent refutation of this position would argue that the federal government's longstanding "cheap food policy" is designed to vindicate Engel's law—that food as a proportion of a family's budget (or macroeconomically: of a society's income) declines as income rises—in large part by having racial and ethnic minority workers such as migrant farm workers and, more recently, female chicken processors⁶⁰⁹ subsidize the food expenditures of consumers at large in the form of low wages and uncompensated injuries. As one of the members of the Commission on Agricultural Workers explained,

[A] vital point that has been inherent in the agricultural industry in this country for the last 50 years . . . is a clear congressional intent in the subsidy programs and other means that food prices in this country will be kept as low as they can so that food is affordable. When you compare the food costs in this country to other countries throughout the world, it is clear that our food costs are substantially lower.⁶¹⁰

Rather than hiding behind what they laud as the advances in productivity achieved by the poultry industry and redounding to the benefit of the country as a whole, the USDA, OSHA, the judiciary, Congress, and the President would at least create clear lines for struggle if they admitted that a group of workers has been singled out to bear these costs.

However, if employers' "relentless opposition" results in the suppression of an ergonomics standard,⁶¹¹ and OSHA's efforts to

(1993) (citing *Secretary of Lab. v. Walker Towing Corp.*, 14 O.S.H. Cas. (BNA) 2072, 2077 n.9 (1991)).

609. Many of these workers cut up chickens in a factory as an extension of their traditional roles at home. J. Matthew Kessler, *The Reproduction of Sexism in a Peripheral Industry*, 3 SOCIOLOGICAL VIEWPOINTS 23, 34 (1987).

610. APPENDIX II: HEARINGS AND WORKSHOPS BEFORE THE COMMISSION ON AGRICULTURAL WORKERS 1989-1993 TO ACCOMPANY THE REPORT OF THE COMMISSION 884 (1994) (statement of Commissioner Clarence Martin).

611. Ergonomics Standard, [149 Analysis, News & Background Information] Lab. Rel. Rep. (BNA) 286 (June 26, 1995) (quoting speech by Secretary of Lab., Robert Reich, on June 15, 1995).

abate ergonomic hazards through the general duty clause are stymied by administrative tribunals and the circuit courts, the lack of pressure from a strong labor movement for significant improvements in occupational safety and health will relegate workers to the vagaries of market forces. The United States International Trade Commission's poultry expert also believes that workers' compensation costs may eventually come to haunt an industry that would have automated even faster had it felt the spur of high wages.⁶¹² Although Perdue's Safety and Health Director does not share the hope of some technocrats that further automation will eliminate the source of repetitive trauma syndrome⁶¹³ and thus abate the need for ergonomics programs, he admits that, absent vigorous enforcement by OSHA, other firms will continue to perceive little financial incentive to adopt such programs.⁶¹⁴

XI. POWER AND THE DIVISION OF LABOR: I GAVE MY LOVE A
CHERRY THAT HAD NO STONE, I GAVE MY LOVE A CHICKEN
THAT HAD NO BONE

*[D]istribute the earth as you will, the principal question remains inexorable—Who is to dig it? Which of us . . . is to do the hard and dirty work for the rest, and for what pay? Who is to do the pleasant and clean work, and for what pay? Who is to do no work, and for what pay? . . . How far is it lawful to suck a portion of the soul out of a great many persons, in order to put the abstracted psychological quantities together and make one very beautiful or ideal soul?*⁶¹⁵

An important albeit positivistic truth inheres in the claim that “[t]he prevalence of repetitive tasks in the modern workplace is the natural consequence of advanced industrial technology. Increasing specialization in the production process requires that each worker perform an ever-decreasing range of tasks more and more often.”⁶¹⁶ But this claim also obscures the possibility that produc-

612. Telephone Interview with Douglas Newman, Animal and Forest Products Branch, U.S. Industry & Trade Comm'n (Jan. 27, 1995).

613. DALEY ET AL., *supra* note 483, at 50.

614. Telephone Interview with Jim McCauley, Health and Safety Director, Perdue Farms, Maryland (Jan. 27, 1995).

615. JOHN RUSKIN, *Sesame and Lillies*, in 18 THE WORKS OF JOHN RUSKIN 53, 107 (E.T. Cook & Alexander Wedderburn eds., 1905) (1865).

616. David J. Kolesar, *Cumulative Trauma Disorders: OSHA's General Duty Clause and*

tion and consumption can be organized and coordinated differently to make work life less hazardous and tedious. Even apart from claims that cast doubt on the superiority of “[m]ass [p]roduction as [d]estiny” and propose a resurgence of craft-based flexible specialization,⁶¹⁷ plant managers and pro-capitalist sociologists of work have reported for decades that “a law of diminishing returns applies to the subdivision of jobs and that a recombination of certain fractured parts has increased efficiency.”⁶¹⁸

Chicken processing plants display the chief characteristics of mass production: mechanical pacing of work, repetitiveness, minimum skill requirement, predetermined use of tools and techniques, minute subdivision of labor, and surface mental attention. Indeed, the tiny shards and slivers of autonomy that the classical mass production workers, such as those in automobile manufacturing, can carve out by building “banks” of product and thus varying work place within limits,⁶¹⁹ are largely precluded for chicken processors. The owner of one of the large integrated broiler firms has defended these extreme conditions by reference to an even worse fate. Responding to a description of one of his processing plants that had appeared in *The Wall Street Journal*, the President and CEO of B.C. Rogers Poultry argued that,

processing chickens is an inherently unpleasant task. . . . Chicken is not grown pre-cut in the plastic bags found at the local grocer. Short of total plant automation, the technology for which does not presently exist, and implementation of which would result in displacement of thousands of employees, we know of no alternate method of providing the world with a steady supply of clean, healthy, low fat chicken.⁶²⁰

Even assuming that chicken has been a low-fat, protein-rich, positive contribution to nutritional standards of broad strata of the population,⁶²¹ this industry apologia leaves two questions unex-

the Need for an Ergonomics Standard, 90 MICH. L. REV. 2079, 2079 (1992).

617. See, e.g., MICHAEL PIORE & CHARLES SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 19-48 (1984).

618. CHARLES R. WALKER & ROBERT H. GUEST, *THE MAN ON THE ASSEMBLY LINE* 151 (1952).

619. *Id.* at 12, 146.

620. Letter from John M. Rogers, Sr., President and CEO, B.C. Rogers Poultry, Inc., to Editor, *Wall Street Journal* 2 (Dec. 12, 1994) (unpublished) (on file with author).

621. Roy Gyles, *Technological Options for Improving the Nutritional Value of Poultry*

ploded. First, would consumers have conferred so much effective demand on this seemingly cheap commodity had its price reflected the lifetime impairment of the value of the producers' labor power in the form of the physical and mental pain and suffering that the largely atomized worker-producers have been unable to project into their wages? And second, could society have achieved the same nutritional outcome by production methods less destructive of the physical and emotional health of the direct producers? Apart from the issue of whether alternative sources of amino acids such as legumes would have been and remain a superior nutritional component and would reduce the loss of usable energy by rendering unnecessary the addition of an animal trophic level to the food chain,⁶²² the answer might be that it would indeed have been impossible to achieve the same high level of output at the same low prices by any more humane production methods. "Ironically," as *The Wall Street Journal* recently noted, it is precisely

the public's growing concern for its own health and safety that has helped fuel growth of some of the nation's harshest jobs. Poultry workers, for instance . . . feed Americans' burgeoning appetite for lean and easy-to-cook meat by trimming away fat, bone and skin—and succumbing to rates of injury and illness that afflict almost one out of four workers annually.⁶²³

The chief cause of the extremely debilitating work in the poultry industry is the speed to which workers are driven to perform highly repetitive motions in order to keep pace with a partially automated production process.⁶²⁴ If a fully automated process is viewed as the end goal, in which physical stresses will be replaced by boredom—"[e]ven the lightening of labor becomes a means of torture inasmuch as the machine does not free the worker from work, but rather his work from content"⁶²⁵—it is not clear how this state of affairs could have been achieved in ways radically

Products, in DESIGNING FOODS: ANIMAL PRODUCT OPTIONS IN THE MARKETPLACE 297, 298-99 (1988).

622. FRANCES M. LAPPÉ, DIET FOR A SMALL PLANET 176-77 (20th anniv. ed. 1991); G. TYLER MILLER, JR., LIVING IN THE ENVIRONMENT: AN INTRODUCTION TO ENVIRONMENTAL SCIENCE 62-63, 259, 265 (6th ed. 1990).

623. Horwitz, *supra* note 23, at A1.

624. Saporito, *supra* note 485, at 74 ("Poultry processing is a mixed bag of machine and hand operations.").

625. 1 MARX, DAS KAPITAL, *supra* note 25, at 445-46.

different from those actually used. Even strong labor unions would have found it difficult to pressure (nonexistent) firms to delay the start-up of a broiler industry until automation technology was available. Even if this implausible scenario had been imaginable, how could any profit-seeking entity have justified such long-term investments designed to result in a one-time enormous explosion of output without having gradually built up a guaranteed demand for the product?

It is, in other words, possible that only the ruthlessly minute division of labor—B.C. Rogers Poultry, for example, boasts of “designated knife sharpeners whose sole task is to sharpen knives”⁶²⁶—and relentless driving of workers at ever faster speeds can deliver the enormous volume of throughput within such a relatively short period of time. If indeed the slaughtering and eviscerating processes could be automated, perhaps the industry should confine itself to mass producing the whole chickens that are the end-products of those operations. The further processing lines, which now constitute the central source of repetitive trauma disorders, produce the most profitable commodities at the greatest cost to deboners and other workers. Consumers buy deboned chicken because it is cheap—just as some hire others to do other kinds of dirty work such as “picking up dog shit” when they “d[o]n’t have the time do it”⁶²⁷ because that labor comes cheap. If house cleaners were expensive, few people could afford to slough off this work on to them. So, too, perhaps products such as boneless chicken breasts should be converted into luxuries by paying deboners as much as plumbers or lawyers, or by slowing down the line to a leisurely pace that enables workers to chat and take frequent breaks.

The mass production of deboned chicken breasts presents an interesting variation on Joseph Schumpeter’s view of “the capitalist engine [as] production for the masses, whereas climbing upward in the scale of individual incomes, we find that an increasing proportion is being spent on personal services.”⁶²⁸ To verify this claim, Schumpeter adduced the example of Louis XIV:

626. Letter from R. Jackson Rogers, General Counsel, B.C. Rogers Poultry, to Anthony Horwitz, *Wall Street Journal* (Nov. 15, 1994) (on file with author).

627. Susan Cheever, *The Nanny Track*, *NEW YORKER*, Mar. 6, 1995, at 84, 94.

628. JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 67 (2d ed. 1966).

[A] budget on that level had little that really mattered to gain from capitalist achievement. . . . Electric lighting is no great boon to anyone who has money enough to buy a sufficient number of candles and to pay servants to attend to them. It is the cheap cloth, the cheap cotton and rayon fabric, boots, motorcars and so on that are the typical achievements of capitalist production. . . . The capitalist achievement does not typically consist in providing more silk stockings for queens but in bringing them within the reach of factory girls in return for steadily decreasing amounts of effort.⁶²⁹

Boneless chicken breasts, however, represent neither a new product nor one—such as an automobile—that no normal consumer could produce and that even the mechanically-inclined could not create without heroic efforts. The ability to buy cheap boneless chicken breasts is merely tantamount to converting consumers into little Louis XIVs with enough money to pay remote servants to perform tasks that suddenly become beneath their dignity. Or, in the ideological reformulation favored by *The Wall Street Journal* in the mid-1950s, “[t]he men who process poultry” are engaged in an act of “chivalry” by “doing more and more of the housewife’s work for her.”⁶³⁰ The prevalence of such low-paid jobs in the United States, whether taking place in the home or externalized to factories, underscores how underdeveloped the welfare state is. For one major impact of advanced welfare states such as Sweden “is that people will increasingly have to provide common labor services for themselves: wages will have risen too high, because the level of minimum state provision is high, to permit a large servant class.”⁶³¹ The point is not to abolish the division of labor or to forgo its benefits, but to encourage all people to perform as much of the unpleasant but unskilled work that virtually all non-handicapped people are capable of doing, rather than using their financial power to induce those whose meager assets force them to accept low reservation wages to devote their whole lives to harmful and unchallenging tasks.

629. *Id.*

630. Winston Fournier, *Poultry Eating Gains with Pre-Cooked Pies and Oven-Ready Birds*, WALL ST. J., Feb. 17, 1954, at 1.

631. NATHAN GLAZER, *THE LIMITS OF SOCIAL POLICY* 127 (1988).

An example that illustrates the possibilities of organized worker-consumer cooperation involves the same union that organizes chicken processors. After UFCW members who work as checkers in St. Louis supermarkets complained about repetitive strain injuries, a NIOSH study found that reaching and unloading heavy items from carts caused extra strain. The local union then used those results to negotiate a change in working conditions so that customers now unload for themselves, as is the case in most supermarkets.⁶³² As a NIOSH official observed, "It's important for the public to realize that they're doing a real service to the cashiers. . . . Customer unloading takes a lot of stress off checkers."⁶³³

More than two centuries ago, Adam Smith, who considered the industrial division of labor one of the underpinnings of civilization,⁶³⁴ recognized some of the grave dangers to which a worker was exposed when his entire life was confined to the performance of one or two "very simple operations"; having

no occasion to exert his understanding, or to exercise his invention in finding out expedients for removing difficulties which never occur[. . .] he naturally loses . . . the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become. The torpor of his mind renders him . . . incapable of relishing or bearing a part in any rational conversation. . . . Of the great and extensive interests of his country he is altogether incapable of judging. . . . It even corrupts the activity of his body, and renders him incapable of exerting his strength with vigour and perseverance, in any other employment. . . . His dexterity at his own particular trade seems . . . to be acquired at the expence of his intellectual [and] social . . . values.⁶³⁵

Although socialists later agreed with Smith that the extreme division of labor characteristic of subordination to machines was "pure boredom" and an unsurpassed "method of stupidifica-

632. *Redesigned Checkstands Will Help Reduce Cashier Injuries*, UNITED FOOD & COM. WORKERS ACTION, Jan.-Feb. 1995, at 23.

633. *Id.*

634. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 3-21 (Edwin Cannan ed., 1937) (1776).

635. *Id.* at 734-35.

tion,"⁶³⁶ they also believed that such a crippling system suppressed a "world of productive instincts and capacities, as one in the states of La Plata butchers a whole animal in order to seize its hide or tallow."⁶³⁷ In turn, Smith agreed with his later critics that the workers' potential was being destroyed: "By nature a philosopher is not in genius and disposition half so different from a street porter, as a mastiff is from a greyhound, or a greyhound from a spaniel, or this last from a shepherd's dog."⁶³⁸

The absence of a working class movement in the United States has made workers more blind than elsewhere to the consequences of their consumption choices for other workers at their places of production and employment. This blindness is promoted by the anarchy of capitalist relations of production, the ideology of consumer sovereignty as a sacrosanct value of American civilization, and the strict but superficial separation of economics from politics. Where even the progressive consumer movement is detached from the labor movement, workers have access to little or no systematic flow of information or education and are therefore not accustomed to think about the physical and mental costs that other workers bear in producing the commodities that they want to consume—despite the fact that millions of consumers are individually conscious of the process as put-upon producers of other workers' commodities of choice. To the extent that workers remain atomized, they lend support to the extreme individualism that underlies the prevailing image of consumers as making decisions without regard to larger societal considerations.

Only in such a rigidly fissured capitalist society as the United States could the following dichotomous analysis, offered by Daniel Bell in the mid-1950s, have found such resonance:

[H]ere is a "value" problem for the human-relations engineers. Which "variable" should one seek to maximize, the satisfactions of the immediate work group or the productiv-

636. Friedrich Engels, *Die Lage der Arbeitenden Klasse in England*, in KARL MARX & FRIEDRICH ENGELS, 2 WERKE 225, 397-98 (1957) (1845); see also FRIEDRICH ENGELS, *Conditions of the Working Class in England*, in KARL MARX & FRIEDRICH ENGELS, 4 COLLECTED WORKS 466, 466 (1975).

637. 1 MARX, *DAS KAPITAL*, *supra* note 25, at 381. For insightful and evasive comparison respectively of Smith and Marx, see Nathan Rosenberg, *Adam Smith on the Division of Labor: Two Views or One?* *ECONOMICA*, May 1965, at 127, and E.G. West, *The Political Economy of Alienation: Karl Marx and Adam Smith*, *OXFORD ECON. PAPERS*, Mar. 1969, at 1.

638. SMITH, *supra* note 634, at 16.

ity of the company? . . . Should work be organized so as to increase output and decrease costs . . . so that there is a larger product for society? Or should work be organized so as to benefit the individuals on the job? . . . [W]ho shall bear the costs, the consumer or the worker?

Historically, the answer of the market society has been that the consumer should benefit. This underlies our concept of efficiency. In a competitive economy, how can any single company take on the burden of increased costs unless all competitors do likewise? . . . Short of pressure from the workers themselves, there is no action which would force modern enterprise to reorder the flow of work.⁶³⁹

An instructive counterpoint to this throughput über alles framework stems, unsurprisingly, from two self-consciously unorthodox capitalists. Because the novelties produced by Ben & Jerry's Homemade, Inc., such as super-fatted, high calorie ice cream—which, as one of ten foods that the Center for Science in the Public Interest suggests “you should never eat,”⁶⁴⁰ may, to be sure, be less healthful than mass-produced chicken—involve many hand operations, its workers incurred repetitive strain wrist injuries. After redesigning machinery and processes and partial automation failed to eliminate the problem,⁶⁴¹ the firm “closed down the Brownie Bar line . . . due in part to concerns about ergonomic stresses inherent in the manufacturing process.”⁶⁴² Although customers protested “about the disappearance of the ‘brownie ice cream sandwich,’ . . . according to Mr. Cohen, until there is a machine to replace the repetitive motion that threatens to injure operators’ arms, continuing production is ‘not an option.’”⁶⁴³

639. DANIEL BELL, *Work and Its Discontents: The Cult of Efficiency in America, in THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* 222, 254-55 (1960).

640. BEN & JERRY'S HOMEMADE, INC., 1993 ANNUAL REPORT 25 (1994).

641. Edward Felsenthal, *An Epidemic or a Fad? The Debates Heats Up Over Repetitive Stress*, WALL ST. J., July 14, 1994, at A1; Robert Manor, *Ben & Jerry's Puts a Cherry on Top of Profit-Making*, ST. LOUIS POST-DISPATCH, June 30, 1994, at 13B, available in Westlaw, St. Louis Post-Dispatch database; Paul Rogers, *Breaking All the Rules*, DAILY FOODS MAG., Sept. 1992, at 59, available in LEXIS, News Library, Mags File.

642. BEN & JERRY'S HOMEMADE, INC., *supra* note 640, at 20.

643. Roger Trapp, *Peace, Love and Ice Cream*, THE INDEPENDENT, Apr. 3, 1994, at 15, available in Westlaw, United Kingdom database.

Lest it be thought that Ben Cohen and Jerry Greenfield are socialists in disguise, it is noteworthy that their version of "Caring Capitalism" has been joined with threats to summon the police when the left-wing United Electrical Workers tried to leaflet one of their plants.⁶⁴⁴ Moreover, not only did Cohen, according to one insider's account, demand "that the ice cream be packed in a way that was brutally tiring and repetitive for his early employees, while accusing Big Business of exploiting workers,"⁶⁴⁵ but his employees continue to be exposed to a high injury rate in general⁶⁴⁶—in part because "the Company's need to manufacture more product through existing lines has pushed aside a long-term commitment to a risk management program."⁶⁴⁷ By the same token, however, the very fact that even an extraordinary exemplar of capital with a semi-human face had to enforce its decision in the teeth of consumer resistance suggests how unlikely voluntary emulation by a self-professed "customer-driven business" such as Perdue⁶⁴⁸ would be.

If those responsible for requesting and designing conveyor-belt machinery were also required to work under its command for longer periods of time, working conditions would presumably improve significantly.⁶⁴⁹ A more direct approach, based on self-direction rather than Schadenfreude, would enable the workers themselves to initiate the request for the design and implementation of production engineering and process decisions. A reduction in the length of the working day of poultry processors is even more urgently needed than for the working class as a whole. Nevertheless, a redistribution of labor, which would modify if not abolish the caste-like relegation of millions of workers to a lifelong attachment to a single operation, devoid of possibilities for individual self-development,⁶⁵⁰ though even further removed from public debate in the

644. Robert Sullivan, Jr., *Just Desserts: Can Ben and Jerry Make a Company as Good as Their Ice Cream?*, ROLLING STONE, July 9-23, 1992, at 77.

645. Diana B. Henriques, *The Emperors of Ice Cream: The Unlikely Success Story of the Hippie Capitalists Ben and Jerry*, N.Y. TIMES, June 19, 1994, § 7, at 12 (reviewing FRED LAGER, *BEN & JERRY'S: THE INSIDE SCOOP* (1994)).

646. Claudia Dreifus, *Passing the Scoop: Ben & Jerry*, N.Y. TIMES, Dec. 18, 1994, § 6 (Magazine), at 38.

647. BEN & JERRY'S HOMEMADE, INC., *supra* note 640, at 20.

648. PERDUE & CHICKEN, *supra* note 62, at 27.

649. RUDOLF BAHRO, *DIE ALTERNATIVE: ZUR KRITIK DES REAL EXISTIERENDEN SOZIALISMUS* 332 (1977).

650. I MARX, *DAS KAPITAL*, *supra* note 25, at 359-60.

United States, is as necessary as a redistribution of income, wealth, and power. Although partial and symbolic sharing of dirty work may suffice to break the link between it and the disrespect associated with it,⁶⁵¹ a thoroughgoing transformation of social relations would require more.

It is a telling commentary on the power of capitalism to colonize the mind and efface the imagination of a different world that the mainstream public policy universe is exhausted by the dual notions that ever greater throughput in the service of lower prices is the supreme goal of economic life and that the best fate for a poultry worker is the destruction of her job and livelihood by automation and her consignment to some similarly debilitating and mentally unchallenging labor.⁶⁵² Only by demanding an end to a mode of production that ruthlessly subordinates all human development to the sole criterion of profitability can workers begin creating an alternative future in which the division of labor will cease to enslave the many and enrich the few.

651. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 174-75 (1983).

652. See Wireback, *supra* note 473 (discussing the problems inherent in the automation of the chicken industry).